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Business and Human Rights in Occupied Territory

Guidance for Upholding Human Rights



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EXECUTIVE SUMMARY

The United Nations Guiding Principles on Business and Human Rights (UNGPs) underscore the heightened risk of gross human rights abuses in conflict-affected areas. Given this risk, as well as the risk of the host State being involved in or unable to prevent human rights abuses, businesses are mandated to conduct “enhanced” human rights due diligence (HRDD). Home States of transnational business enterprises are also encouraged to support businesses in their responsibility to respect human rights, including through implementing domestic measures, such as legislation, as well as by cooperating in multilateral initiatives.

While guidance on HRDD in conflict-affected areas is broadly available, situations of occupation in particular continue to be met with inconsistent approaches by both businesses and States. Such incoherence is exacerbated by the already challenging legal and administrative environment present in occupied territories, where businesses must not only consider international human rights law (IHRL) but also international humanitarian law (IHL), alongside other frameworks, when assessing their business activities and relationships. Central to this assessment is the manner in which an Occupying Power administers the occupied territory, where IHL regulates the Occupying Power’s use and exploitation of natural resources, including land, and prohibits measures aimed at the permanent retention of the occupied territory, including the transfer of populations, amongst other principles.

Accordingly, businesses must be able to assess and account for how they cause, contribute, or are directly linked to adverse human rights impacts, and how their activities and relationships may support or benefit from an unjust administration of the territory. These issues include in part: incentives received by the Occupying Power to locate in the occupied territory; the legality and validity of contracts, licensing, and other transactional relations with the occupy power’s administrative and other authorities; and activities that uphold systemic discrimination.

The report closely examines three situations of occupation - Crimea, Western Sahara, and the Occupied Palestinian Territory (OPT) - and the activities of the businesses of the occupying State as well as foreign companies in such territories with a view to drawing lessons and recommendations for both businesses and States.

Indeed, while each situation of occupation is unique and requires a differentiated approach, business practices and their public responses examined in this report broadly highlighted an absence of enhanced human rights due diligence. This was often coupled with an apparent misunderstanding or misrepresentation of international law by the business. Alongside the actual and potential adverse human rights impacts, the case studies included in this report highlight the legal, financial, reputational, and commercial risks that businesses may face when operating in occupied territory.

Home States have also taken inconsistent approaches towards the three situations of occupation that were examined; these varying approaches range from failing to provide businesses with consistent guidance to taking decisive political action via the use of sanctions. Such incoherent policies have served to create conflicting messages to businesses, which may inadvertently serve to blanketly condone business activities in occupied territory and accompanying human rights abuses.

In light of this environment of *ad hoc* application of the UNGPs in situations of occupation, both States and businesses should take measures to ensure fulfillment of their respective obligations and responsibilities under international law. Driven by commitments to uphold the “Protect, Respect, and Remedy” framework, States should examine the coherence of policies related to contexts of occupation, ensure their consistency with international law, and take all necessary measures to fulfill their obligations. States should also ensure that businesses domiciled in their territory respect human rights throughout their areas of operation, including extraterritorially. In doing so, States can demonstrate to businesses that respect for human rights is not subject to politicization.

Likewise, businesses should conduct human rights due diligence for all operations and activities, and tailor an enhanced HRDD process to situations of occupation in order to consider the specific context present as well as actual and potential impacts on the protected population in the occupied territory. Given the heightened risks of abuse in conflict-affected areas in general, alongside the prevalence of unlawfully administered and prolonged situations of occupation, businesses may be unable to mitigate adverse human rights impacts in a specific setting.

I INTRODUCTION

The United Nations Guiding Principles on Business and Human Rights (UNGPs) outline State duties to protect against human rights abuses by third parties, including businesses, the business responsibility to respect human rights, and the right of individuals to access to remedy. Following their unanimous adoption by the United Nations Human Rights Council in 2011, many States, multilateral institutions, and businesses have demonstrated their commitment to upholding the UNGPs and the “Protect, Respect, and Remedy” framework laid out within them.

The practical implementation of the UNGPs has been extensively explored by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (hereafter “Working Group”), as well as by intergovernmental and non-governmental organizations, amongst others. While broad and sector-specific guidance is readily available, human rights abuses by businesses nonetheless occur, perhaps most starkly in conflict-affected areas where the risk of gross human rights abuse is heightened. In particular, situations of occupation have been met with inconsistent approaches by businesses as well as by home States, leading to persistent adverse impacts. This may be due to the failure of businesses to conduct enhanced human rights due diligence (HRDD), to fully respect the UNGPs by taking into account international humanitarian law and other applicable bodies of law when considering business operations and relationships in conflict-affected areas, or due to a lack of understanding of how these processes and standards should be implemented in practice.¹

Indeed, situations of occupation present “complex operating environments”² where businesses must closely examine how an activity or relationship falls within the broader administration of the territory by the Occupying Power. In doing so, businesses must not only assess the nature of the adverse impacts they themselves may directly cause or contribute to, but also evaluate how they

¹ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Principle 12 Commentary, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter U.N. Guiding Principles].

² Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory*, (June 6, 2014), 9 [hereinafter Working Group Statement].

may become linked with an economic structure which may serve to prolong an occupation, pursue or entrench a territory’s annexation, or uphold systemic discrimination and other serious human rights abuses. When such risks are high and immitigable, a business may need to conclude that operating within a certain context would be incompatible with its responsibilities under the UNGPs.

Given the complexity and gravity of issues present, States have a primary role in assisting businesses in ensuring respect for human rights, alongside upholding their obligations under international law. Instead, while States have issued guidance and other measures in relation to certain situations of occupation, coherent enforcement and accountability across situations is often lacking. What results is an *ad hoc* application of the UNGPs by States and businesses, and continuing violations of human rights in cases of occupation.

Purpose of the Report

This report seeks to contribute to the development of a more precise understanding of the types of business activities that take place in occupied territories, how such activities may contribute to human rights abuses and other violations of international law, and what steps businesses should take in their due diligence processes to mitigate and prevent such abuses. Accordingly, Section II will briefly address the international legal framework applicable to situations of occupation, the UNGPs and the administration of an occupation, and the relationship between the UNGPs and sanctions. In Section III, case studies drawn from three ongoing situations of occupation - Western Sahara, Crimea, and the Occupied Palestinian Territory (OPT) - will then be examined. The case studies identify certain activities of business sectors representative of those found in occupied territories, and use specific company examples to draw attention to potential and actual adverse human rights impacts. The case studies were developed based on extensive desk research, interviews with experts and practitioners in each of the contexts, and outreach to the concerned companies.³ Further consultations with lawyers, legal academics, non-governmental organizations, and others with experience working in related fields were also held.

³ Companies that were the primary focus of the case studies received notification, and were provided with an opportunity to respond.

In light of the legal framework and case studies, Section IV of the report will then examine what steps businesses may take while conducting enhanced due diligence to ensure respect for human rights. In doing so, the report aims to highlight the “specific impacts on specific people”⁴ present in situations of occupation. Risks to businesses, including legal, financial, reputational, and commercial risks, when operating in occupied territory will also be presented. In Section V, the role of home States in ensuring business respect for human rights will be considered. While each conflict and occupation is unique, concrete recommendations can nonetheless be derived as to how home States and businesses can meet their respective responsibilities and obligations under international law.

II FRAMEWORK OF OCCUPATION

The presence of an armed conflict should raise a red flag for businesses: risks of causing, contributing to, or having direct links to adverse human rights impacts are heightened. Given the extent to which businesses may be seen as complicit in these human rights violations,⁵ it is imperative for a business to understand the type of conflict in which it is involved in or linked to. This includes distinguishing between an international armed conflict, which involves two or more states, including situations of occupation, and a non-international armed conflict, where one or more non-State armed groups are involved in hostilities between each other or government forces.⁶ Businesses must further be aware of the applicable international legal framework in all contexts of armed conflict.

Situations of occupation may in particular present risks for businesses due to unfamiliarity with the law of occupation, including as related to the administration of occupied territory, alongside possible uncertainty as to how the UNGPs apply to the context. Moreover, certain cases of occupation, such as prolonged situations, may present further challenges to businesses and require heightened precautions before engaging in activities or operations in an occupied territory or with an Occupying Power.

A. Legal Framework

In international law, a situation of occupation occurs when all or part of the territory of one State comes under the effective control and authority of the military forces of a foreign State.⁷ A territory is considered occupied even if the foreign army has not met with armed resistance or active hostilities have ended; the occupation ceases when the Occupying Power withdraws or is driven out, and

⁵ As noted in the Commentary to Principle 17 of the U.N. Guiding Principles, this may include “non-legal and legal meanings.” Principle 2 of the Global Compact notes complicity where legal liability is incurred, or in cases of ‘beneficial’ or ‘silent’ complicity. See Global Compact, *The Ten Principles of the Global Compact*, <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

⁶ Non-international armed conflicts are more prevalent than international armed conflicts today. See: International Committee for the Red Cross (ICRC), Non-international armed conflict, <https://casebook.icrc.org/glossary/non-international-armed-conflict>.

⁷ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, [hereinafter Hague Regulations].

⁴ U.N. Guiding Principles, supra note 1, principle 18 (commentary).

a local government exercises “full and free” sovereignty.⁸ During the period of occupation, international humanitarian law (IHL) applies and binds all parties to the conflict, including both State and non-State actors. The relevant IHL rules that apply to situations of occupation include: the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex (hereafter Hague Regulations), 1907; the Fourth Geneva Convention, 1949 (hereafter GCIV); and Additional Protocol (I) to the Geneva Conventions, 1977. International human rights law (IHRL) also applies and is complementary to IHL, with a State’s obligations under IHRL extending to the territories it exercises its jurisdiction.⁹ Businesses must respect both IHRL and IHL standards and ensure that their operations do not contribute to or benefit from such violations.

Situations of occupation are intended to be temporary; sovereignty is not transferred to the Occupying Power. Instead, “protected persons,”¹⁰ who are the local population of the occupied territory retain the right to self-determination, even in cases of annexation when “all or part of the occupied territory” is incorporated into the territory of the Occupying Power.¹¹ Given the absolute prohibition against the acquisition of territory by threat or use of force,¹² annexation is illegal and the Occupying Power does not acquire sovereignty. Accordingly, the protected population maintains and cannot be deprived of their rights and guarantees under IHL.¹³

⁸ ICRC, Occupation and International Humanitarian Law: Questions and Answers, Aug. 4, 2004, available at <https://www.icrc.org/eng/resources/documents/misc/634kfc.htm>.

⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. ¶¶ 106-113, (July 9).

¹⁰ “Protected persons” under the Fourth Geneva Convention include civilians of the local population who “find themselves...in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” See Convention (IV) Relative to the Protection of Civilian Persons in Times of War, Geneva, art. 4, Aug. 12, 1949, 75 UNTS 287 [hereinafter GCIV].

¹¹ Commentary of 1958, Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Pictet ed. 1958), art. 47 [hereinafter Pictet Commentary IV].

It should be noted that the UN Declaration on the Granting of Independence to Colonial Countries and Peoples also provides for the protection of the territorial integrity of Non-Self Governing Territories. G.A. Res. 1514 (XV), para. 5 (Dec. 14, 1960).

¹² U.N. Charter, art. 2, para. 4.

¹³ GCIV, *supra* note 10, art. 47.

The Right to Self-Determination

- Fundamental principle of international law, which all States are expected to promote.
- Found in the UN Charter and common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁴
- Includes: the right of peoples to “freely determine their political status and freely pursue their economic, social and cultural development” and to “freely dispose of their natural wealth and resources” (common Art. 1, ICCPR & ICESCR); and the “right of peoples and nations to permanent sovereignty over their natural wealth and resources,”¹⁵ which remains vested in the peoples of colonial, non-self-governing, and occupied territories.¹⁶
- Prohibits the deprivation of a people to “its own means of subsistence” (common Art. 1, ICCPR & ICESCR).

The obstruction of economic development, including through the prevention of peoples to “dispose of their natural wealth and resources,” may adversely impact other rights, such as the right to an adequate standard of living and the right to work (Arts. 6 and 11, ICESCR).

The Occupying Power must seek to ensure the welfare of the protected population¹⁷ throughout its administration of the occupied territory. In doing so, the local laws in force in the occupied territory may only be suspended or changed by the Occupying Power if they are incompatible with the laws of occupation, represent a threat to its security, or prevent it from providing for the minimum guarantees under the Fourth Geneva Convention.¹⁸ The extension of legislation and the

¹⁴ International Covenant on Civil and Political Rights, March 23, 1976, 2 U.S.T. 999, 30 U.N.T.S. 23 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

¹⁵ G.A. Res. 1803 (XVII), ¶ 1, (Dec. 14, 1962).

¹⁶ See: G.A. Res. 50/33, para. 1, U.N. Doc. A/RES/50/33 (Feb. 9, 1996); G.A. Res. 37/135, para. 2, U.N. Doc. A/RES/37/135 (Dec. 17, 1982).

¹⁷ Hague Regulations, *supra* note 7, art. 43; GCIV, *supra* note 10, art. 47.

¹⁸ Id. Hague Regulations at art. 43 and GCIV at art. 64. See also: Occupation and International Humanitarian Law: Questions and Answers, *supra* note 8.

jurisdiction of administrative bodies of the Occupying Power to the occupied territory, and other policies aimed at transforming the occupied territory which go beyond the norms of temporary occupation are considered unlawful.¹⁹ The UN Security Council has affirmed that annexation creates a situation that has “no legal validity” and is “null and void”.²⁰ Accordingly, third States are prohibited from recognizing such an unlawful situation or engaging in “acts which would imply such recognition,” and are required to cooperate to bring such unlawful situations to an end.²¹

IHL further provides special guarantees to the protected population, including prohibitions against: individual and mass forcible transfer; forced labor; and collective punishment,²² and prohibits the transfer of the Occupying Power’s civilian population into the occupied territory.²³ Such population transfer by the occupying State is often enabled by the Occupying Power’s unlawful appropriation of property, and inexorably linked to the exploitation of the natural resources of the occupied territory.

19 See the section on “Transformative Occupation” in: Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory, ICRC, March 2012, p.67-72, https://shop.icrc.org/occupation-and-other-forms-of-administration-of-foreign-territory-expert-meeting.html?__store=default [hereinafter Expert Meeting].

20 Resolution 662 of 1990 held that Iraq’s annexation of Kuwait “under any form and whatever pretext has no legal validity, and is considered null and void.” See also: S.C. Res. 2334, U.N. Doc. S/RES/2334 (Dec. 23, 2016)

21 Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, Article 41 and Commentary.

22 See GCIV, *supra* note 10, arts 49, 51, and 33.

23 *Id.* at art 49.

Property and Natural Resources in Occupied Territory

IHL imposes prohibitions on:

- the confiscation of private property (Art.46, Hague Regulations).
- the destruction of real or personal property belonging to private individuals, the State, and other public authorities, amongst others, unless required for military necessity (Art. 53, GCIV).
- the unlawful and wanton extensive destruction and appropriation of property not justified by military necessity (Art. 147, GCIV).
- pillage (Art. 47, Hague Regulations; Art 44, GCIV).

Further, the Occupying Power is “*usufructuary*”²⁴ or administrator of the natural resources in the occupied territory. Accordingly:

- immovable public property, such as quarried resources, can only be used in a manner that ensures that the capital of such property is safeguarded (Art. 55, Hague Regulations);²⁵
- the opening of new mines and wells after the start of the occupation by the Occupying Power is prohibited.²⁶
- the exploitation of natural resources should be used to offset the costs of the occupation.²⁷

The Universal Declaration of Human Rights also affirms the right to own property and prohibits the arbitrary deprivation of property (Art. 17).

24 Under the rules of *usufruct*, the Occupying Power has a limited right to use immovable public property and must safeguard the capital for the returning sovereign. Hague Regulations, *supra* note 7, art. 55. See also: Rule 51. Public and Private Property in Occupied Territory. ICRC Database of Customary IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule51.

25 Immoveable public property is subject to the rules of *usufruct*, and can only be seized or destroyed if required by imperative military necessity. *Id.* at Rule 51. Public and Private Property in Occupied Territory. ICRC Database of Customary IHL, ICRC.

26 First report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur, 30 April 2018, A/CN.4/720, paras. 31-32, http://digitallibrary.un.org/record/1626541/files/A_CN-4_720-EN.pdf.

27 This is narrowly interpreted to include the humanitarian needs of the protected population. Corporate War Crimes: Prosecuting the Pillage of Natural Resources, James G. Steward, Open Society Foundations, 2011, para. 97.

Alongside these and other principles of IHL and IHRL, States and business enterprises must also consider obligations and potential liability under international criminal law.²⁸ The UNGPs note that individual liability may be incurred by corporate officers and employees, and call on business enterprises to treat the risk of gross human rights abuses “as a legal compliance issue”.²⁹ Businesses, as legal persons, may also be prosecuted for direct participation or complicity in international crimes,³⁰ or held liable under civil law.³¹ The claim brought against the business entity or individual may vary depending upon the jurisdiction in which the case is brought.³²

B. The UNGPs and the Administration of Occupation

Although the UNGPs recognize the heightened risk of gross human rights abuse in conflict-affected areas,³³ situations of occupation and the unique challenges they present are not explicitly addressed. The UN Working Group’s 2014 Statement on the UNGPs application to the Occupied Palestinian Territory (hereafter “Working Group Statement”), however, provides an authoritative baseline for such contexts.³⁴ In the statement, the Working Group affirmed that in situations of occupation, the Occupying Power, i.e. the State exercising effective control and with *de facto* jurisdiction over the occupied territory, holds “obligations equivalent to those of a ‘host State’, as described in the Guiding Principles on Business and Human Rights”.³⁵ An Occupying Power thus acts as both home and host State to companies domiciled within its sovereign territory, but with operations in occupied territory.

28 U.N. Guiding Principles, *supra* note 1, principles 7 (commentary), 23 (commentary).

29 U.N. Guiding Principles, *supra* note 1, principle 23 (commentary).

30 See: Anita Ramasastry and Robert C. Thompson, Commerce, Crime and Conflict, Legal Remedies for Private Sector Liability for Grave Breaches of International Law, A Survey of Sixteen Countries, Executive Summary, 2006, p. 27. The survey of sixteen national legal systems confirms the view that it is possible to hold business entities liable for the commission of international crimes.

31 Red Flags, Liability Risks for Companies Operating in High-Risk Zones, http://www.redflags.info/index.php?page_id=14&style_id=0.

32 Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations, and other Business Enterprises, John Ruggie, A/HRC/4/35, para. 27.

33 U.N. Guiding Principles, *supra* note 1, principles 7, 23 (commentary).

34 Working Group Statement, *supra* note 2.

35 Working Group Statement, *supra* note 2, at footnote 21.

As noted, situations of occupation are temporary; an Occupying Power should create conditions that lead to the exercise of the right to self-determination by the protected population, including those related to economic development.³⁶ When an occupation is administered in good faith,³⁷ and where IHL and IHRL are “interpreted in a way that is consistent with the right to development, regardless of the length of occupation,”³⁸ business activities and relationships can play a critical role in the development of the territory, and in supporting the welfare of the protected population.³⁹

However, the Occupying Power may be “unable or unwilling” to effectively protect against human rights abuse, or may be engaged in violations itself.⁴⁰ In certain cases, abuse may be tied to the practices by which the occupying state pursues annexation and the unlawful acquisition of territory, and the legal and administrative regimes established by the Occupying Power that necessitate and perpetuate systematic violations of international law, including the right to self-determination. An Occupying Power may, for example, institute policies and measures that: aim at permanent transformations or prolonging the occupation; serve to de-develop the economy of the occupied territory, including through the collection and misuse of taxes and other fees;⁴¹ and establish distortions or dependency through skewed integration, or create a captive market, amongst other issues.⁴² The UN Conference on Trade and Development (UNCTAD) has

36 The elimination of the state of occupation is necessary to fully achieving the right to development. See: Declaration on the Right to Development, G.A. Res. 41/128, Article 1 & 5, U.N. Doc. A/RES/41/128, (Dec. 4, 1986).

37 Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, 23 October 2017, U.N. Doc. A/72/43106, paras. 35-37.

38 In situations of occupation, international human rights law and international humanitarian law should “be interpreted in a way that is consistent with the right to development, regardless of the length of occupation.” Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, 19 October 2016, A/71/554, para. 39, available at https://www.ohchr.org/Documents/Countries/PS/A_71_554_en.pdf

39 An ICRC expert meeting emphasized the difference between projects that entail the disruption of sovereignty and those “aimed at getting the basic infrastructure of the occupied society to work.” Expert Meeting, *supra* note 19, at 68.

40 U.N. Guiding Principles, *supra* note 1, principle 7 (commentary); Working Group Statement, *supra* note 2, at 4.

41 Article 48 of the Hague Regulations requires that an Occupying Power use “taxes, dues, and tolls” to “defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.”

42 See for example: Expert Meeting, *supra*, note 19; The Palestinian Economy: Macroeconomic and Trade Policymaking under Occupation, UNCTAD, 2012, https://unctad.org/en/PublicationsLibrary/gdsapp2011d1_en.pdf.

highlighted such policies, noting that:

“[I]n almost all types of occupation...acts and measures taken by the occupier...often deprive the people under colonial rule of the internationally recognized human right to development by confiscating their national resources, preventing them from accessing and utilizing those resources, depriving them of the ability to produce and thus forcing them to consume products produced by the occupier”.⁴³

Central to facilitating these processes are economic relationships and structures that businesses inevitably feed into.

A business must therefore be aware of how they may cause, contribute, or be directly linked to violations of IHRL and IHL, including those rooted in the unjust administration of the territory. These three tiers of responsibility, as laid out in the UNGPs, broadly include acts and omissions within a business’s activities, and extend to relationships with partners, and State and non-state entities in its value chain or those linked to its operations, products, or services.⁴⁴

Some issues for businesses to consider include:

- Relationships with administrative and other authorities of the Occupying Power, where such authorities serve to further annexation or entrench the Occupying Power’s unlawful exercise of sovereignty. This may include the provision of fees to such authorities in relation to their activity;⁴⁵
- Use of natural resources within the occupied territory, including land and water, and the extraction of non-renewable resources where title may be invalid or unlawfully acquired, and/or be administered in a manner which serves to deprive the protected population of “its own means of

subsistence;”⁴⁶

- Receiving incentives from the Occupying Power to relocate to the occupied territory, including operating in special economic zones therein, which may reinforce illicit activities, such as the transfer of its civilian population into occupied territory or further the absorption and integration of the occupied territory into that of the occupier; and
- Activities that contribute to or uphold systemic discrimination.

C. Sanctions

Business enterprises should also be aware of the presence of sanctions or measures taken by third States in relation to occupied territories. For example, the European Union, the United States, Japan, Australia, and other States adopted countermeasures that include sanctions in response to Russia’s annexation of Crimea. These measures were aimed at coercing Russia’s compliance with international law and ensuring the non-recognition of Russia’s unlawful activities in Crimea.

The implementation of sanctions and countermeasures by states are a critical structural difference between the case of Crimea and other situations of occupation and annexation, and as will be highlighted, serve as a main driver for companies’ decisions not to undertake or terminate dealings related to that territory. In cases where business activities or services are prohibited, legal compliance with sanctions may thus take precedence over a company’s human rights due diligence process. The presence or absence of sanctions for a particular service or business activity may not, however, immediately implicate all potential risks of adverse human rights impacts.

⁴³ According to UNCTAD, acts and measures taken by the Occupying Power include the appropriation of “assets, natural resources and economic benefits that rightfully belong to the colonized people.” Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, Annex, Economic costs of the Israeli occupation for the Palestinian people, para.6, A/70/35, <https://undocs.org/A/70/35>.

⁴⁴ U.N. Guiding Principles, *supra* note 1, principle 13 and commentary.

⁴⁵ See: Heidelberg Cement’s response to Human Rights Watch regarding the provision of fees to Israeli authorities used “for the benefit of the residents of Area C.” Israeli settlements are notably located in Area C, where the Israeli settler population is larger than the Palestinian population. Annex VIII: Letter from Heidelberg Cement to Human Rights Watch, Occupation, Inc., How Settlement Businesses Contribute to Israel’s Violations of Palestinian Rights, Human Rights Watch, 19 January 2016, <https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian> [hereinafter Occupation, Inc.].

⁴⁶ Common Article 1, ICCPR & ICESCR; See for example: Concluding observations on the fourth periodic report of Israel, Committee on Economic, Social and Cultural Rights, 12 November 2019, E/C.12/ISR/CO/4, paras. 14-15.

III SECTOR AND CASE STUDIES

Just as the daily lives of the protected population continue while under occupation, so too do economic activities. As a result, all sectors of economy and industry are often found operating in situations of occupation. At the same time, the Occupying Power plays a central role, via its administration of the territory, in shaping how economic activities and structures develop during the course of the occupation. Underlying this is the consideration that the Occupying Power is often not “a neutral entity acting only in the interests of the occupied territory”.⁴⁷ With these varying interests at play, businesses must carefully consider their operations or relationships in occupied territory in light of IHRL, IHL, and other legal frameworks, and conduct enhanced HRDD to prevent or mitigate adverse human rights impacts. What is often found instead is a lack of consistent application of the UNGPs by businesses and States resulting in continued adverse impacts on the human rights of the protected population in the occupied territory.

The following section identifies select sectors and case studies in Crimea, Western Sahara, and the Occupied Palestinian Territory that are emblematic of the legal and human rights risks present in such territories, as well as the varying approaches taken by home States towards each context. Key sectors not identified in the report, but nonetheless active in occupied territories, include banking and finance, construction, and solar energy, amongst others.⁴⁸ Each section begins with a brief background on the specific context of occupation, and aims to provide a general indication of the rule of law and human rights situation present. Each case study includes a potential issue related to the company’s adherence to applicable legal frameworks and the UNGPs. This is not meant to be an exhaustive identification of risks, but instead seeks to highlight some possible issues. The final case studies examine multi-national companies that operate in more than one situation of occupation. Relevant actions taken by the Occupying Power, and home and third States in relation to business operations and relationships are also identified.

⁴⁷ Expert Meeting, *supra* note 19, at 68.

⁴⁸ See for example: Powering the Plunder, Western Sahara Resource Watch, November 2016; Financing Land Grab: The Direct Involvement of Israeli Banks in the Israeli Settlement Enterprise, Who Profits, February 2017; Occupation, Inc., *supra* note 45.

A. Crimea

The Autonomous Republic of Crimea and the city of Sevastopol are components of Ukraine’s administrative and territorial structure under the Ukrainian constitution.⁴⁹ On 22 February 2014, following months of protest in Kiev, Ukraine that began in November 2013 in Maidan Nezalezhnosti or Independence Square (“Maidan” protests), then-President Viktor Yanukovich was impeached.⁵⁰ Within days, armed groups supported by troops of the Russian Federation controlled strategic facilities in Crimea while armed men seized the Parliament of Crimea.⁵¹

A referendum was held on 16 March 2014 under Russian control, where voters in Crimea supported the territory’s incorporation into the Russian Federation. The Ukraine asserted that many Crimean Tatars and ethnic Ukrainians boycotted the referendum, that there were many irregularities and violations during the vote,⁵² and that the referendum itself went against the Ukrainian constitution and relevant legislation.⁵³ A UN General Assembly resolution subsequently deemed the vote invalid and called on States to not recognize the attempted changes to the status of Crimea.⁵⁴ Irrespective of these condemnations, a “treaty of accession” was signed on 18 March 2014 between Russia and the “Republic of Crimea,” marking the annexation of Crimea and Sevastopol.⁵⁵ On 11 April 2014, a new constitution for Crimea and Sevastopol was adopted, establishing Crimea as a “democratic

⁴⁹ Article 133 and Chapter X of the Constitution of Ukraine, Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996.

⁵⁰ Ukrainian MPs vote to oust President Yanukovich, BBC News, 22 February 2014, <https://www.bbc.com/news/world-europe-26304842>.

⁵¹ Id. See also Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), Human Rights Council, 25 September 2017, A/HRC/36/CRP.3, para. 3 [hereinafter Situation in Crimea, 25 September 2017].

⁵² See statement by Yuriy Sergeyev, Permanent Representative of Ukraine to the United Nations, United Nations Human Rights Monitoring Mission Deployed to Crimea amid Crisis between Russian Federation, Ukraine, Security Council Told, United Nations, 19 March 2014, <https://www.un.org/press/en/2014/sc11328.doc.htm>

⁵³ Press release: Regarding the referendum in Crimea Autonomous Republic scheduled for March 16, 2014, Ministry of Foreign Affairs of Ukraine.

⁵⁴ Backing Ukraine’s territorial integrity, UN Assembly declares Crimea referendum invalid, UN News, 27 March 2014, <https://news.un.org/en/story/2014/03/464812-backing-ukraines-territorial-integrity-un-assembly-declares-crimea-referendum>.

⁵⁵ Situation in Crimea, 25 September 2017, *supra* note 51, para. 5.

state within the Russian Federation”.⁵⁶ Russia holds that the decision of Crimeans to “reunite with Russia” was an exercise of their right to self-determination.⁵⁷

Following the annexation, Crimea and Sevastopol became subject to Russia’s domestic laws and administrative bodies. Russia nationalized key enterprises and assets,⁵⁸ and established a free economic zone in Crimea and Sevastopol for a period of 25 years, offering exemptions from: land tax for three years; property tax for 10 years; and, import duties and taxes payment, amongst other incentives for businesses and investors.⁵⁹ Since the start of the occupation, the UN has documented “[l]arge scale expropriation of public and private property... without compensation or regard for international humanitarian law provisions protecting property from seizures or destruction”.⁶⁰ Ukrainian companies have filed investment arbitrations against the Russian Federation for their appropriated property under the Russia-Ukraine Bilateral Investment Treaty.⁶¹ As a result of the annexation, a host of States including the United States, Japan, and Australia, and the European Union adopted countermeasures and sanctions against Russia.

⁵⁶ An Introduction to the Constitution of the Autonomous Republic of Crimea, Oxford Constitutional Law, <http://oxcon.oup.com/page/crimea-constitution/an-introduction-to-the-constitution-of-the-autonomous-republic-of-crimea>

⁵⁷ Comment by Foreign Ministry Spokesperson Maria Zakharova on the occasion of the three-year anniversary of Crimea’s unification with Russia, The Ministry of Foreign Affairs of the Russian Federation, 16 March 2017.

⁵⁸ “In July 2014, the Crimean parliament adopted a regional law on takeovers of strategic facilities in Crimea, thus effectively legalizing forced expropriation.” Imitating Chavez: A Year of Nationalization in Crimea, Carnegie Moscow Center, 19 March 2015, <https://carnegie.ru/commentary/59421>.

⁵⁹ Law establishing a free economic zone in Crimea and Sevastopol, President of Russia, 1 December 2014, <http://en.kremlin.ru/events/president/news/47116>; Investment Portal of the Republic of Crimea, <https://invest-in-crimea.ru/en/homepage#p1>.

⁶⁰ Situation in Crimea, 25 September 2017, *supra* note 51, para. 16

⁶¹ Ongoing Territorial Challenges in Crimea Cases: Putting *Everest v. Russia* in Context, Kluwer Arbitration Blog, 5 November 2018, <http://arbitrationblog.kluwerarbitration.com/2018/11/05/territorial-challenges-expected-in-crimea-cases-putting-everest-v-russia-in-context/>; Ukraine’s Naftogaz Seeks \$5.2 Billion In Damages From Russia Over Seized Crimea Assets, 1 August 2019, Radio Free Europe, <https://www.rferl.org/a/ukraine-s-naftogaz-seeks-5-2-billion-in-damages-from-russia-over-seized-crimea-assets/30086374.html>.

Human Rights Situation

Perceived political opponents and those expressing dissenting views, especially Crimean Tatars and ethnic Ukrainians, have reportedly been harassed, detained, and subject to torture and ill-treatment.⁶² Raids including on “businesses, cafes, bars, restaurants, [and] markets” have been conducted since March 2014, in part to instill fear, and disproportionately target the Crimean Tatar community.⁶³

The UN has stated that residents of Crimea were coerced into taking Russian Federation citizenship, where individuals without it were discriminated against.⁶⁴ This includes prohibitions on the employment of Ukrainian citizens that do not hold Crimean residency registration; as a result, in 2016, individuals that were found during raids against businesses risked deportation, while their employers faced fines or the closure of their business.⁶⁵ In some cases Ukrainian citizens have also been “forcibly transferred to the Russian Federation or deported to mainland Ukraine”.⁶⁶ Alongside transfers and deportations, Russia has also sought to alter the demography of the region, with 108,224 individuals from the Russian Federation having changed their residency to Crimea or Sevastopol.⁶⁷

In April 2014, the Office of the Prosecutor of the International Criminal Court (ICC) announced a preliminary examination, initially focusing on crimes against humanity, in the context of the “Maidan” protests beginning in November 2013. The temporal period was later extended to any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards.⁶⁸ The examination is ongoing.

⁶² Ukraine: Escalating Pressure on Crimean Tatars, Human Rights Watch, 2 April 2019, <https://www.hrw.org/news/2019/04/02/ukraine-escalating-pressure-crimean-tatars>; Situation in Crimea, 25 September 2017, *supra* note 51, paras. 15, 90-92.

⁶³ *Id.* at ‘Situation in Crimea’ at paras. 69 and 105.

⁶⁴ *Id.* at paras. 6 and 62.

⁶⁵ *Id.* at para. 68-69.

⁶⁶ Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine 13 September 2017 to 30 June 2018, Office of the High Commissioner for Human Rights, para. 10, https://www.ohchr.org/Documents/Countries/UA/CrimeaThematicReport10Sept2018_EN.pdf.

⁶⁷ *Id.* at para. 79.

⁶⁸ Preliminary examination Ukraine, International Criminal Court, <https://www.icc-cpi.int/ukraine>

i. Energy

Following the annexation, Ukraine continued to supply Crimea with the majority of its energy needs. In November 2015, four pylons, located in the Ukraine, that transmitted electricity between the Ukraine and Crimea were blown-up by unidentified individuals “believed to be supporting the blockade of Crimea”.⁶⁹ The UN Office of the High Commissioner for Human Rights (OHCHR) highlighted the impacts of the disruption of energy on the protected population of Crimea, including its effect on the right to adequate housing and an adequate standard of living, and underscored Russia’s obligation, as Occupying Power, to provide for the humanitarian needs of the protected population; it further noted Ukraine’s obligations under the ICESCR.⁷⁰

Infrastructure projects, including an ‘energy bridge’ between Russia and Crimea, were planned and constructed in order for Crimea to shift its dependence from the Ukraine to Russia.⁷¹ Russia also had early plans to build two power stations in Crimea. In March 2016, while plans for the power stations and a second ‘energy bridge’ were underway, Russian-imposed authorities in Crimea announced it would no longer receive electricity from Ukraine.⁷² This followed the expiration of the contract on 1 January 2016 between the Ukrainian energy company and Crimean authorities.⁷³ EU sanctions, implemented in 2014, included prohibitions on the export of “certain goods and technologies to Crimean companies or for use in Crimea” including those for use in the energy sector.⁷⁴

Siemens

Siemens is composed of Siemens AG, the parent company headquartered in Munich, Germany, and its subsidiaries. Siemens focuses on “electrification,

automation and digitalization” in sectors including energy management, power and gas, and mobility.⁷⁵ The company has been operating in Russia for 170 years.⁷⁶

The provision of turbines by Siemens to a Russian partner following Crimea’s annexation placed it at risk of liability for violations of sanctions as well as potential violations of IHL, including as related to attempted changes to the status quo of the occupied territory.

In 2015, Siemens sold four gas turbines to OAO VO TechnoPromExport (TPE), a subsidiary of Russia State-owned Rostec, for use at a power station in the Taman Peninsula, Russia. The turbines were allegedly delivered by the company’s joint venture Siemens Gas Turbines Technologies (SGTT), based in St. Petersburg, during the summer of 2016.⁷⁷ OAO VO TPE then transferred the turbines to OOO VO TechnoPromExport, which were modified and moved to Crimea for installation.⁷⁸

Prior to the delivery, on 30 June 2015, a Russian newspaper reportedly gave details of the imminent supply of turbines to Crimea by Siemens that used a “new power station in Taman as a smokescreen”.⁷⁹ Siemens immediately denied the allegations, and affirmed that their business operations respected sanctions and “all political and legal frameworks”.⁸⁰ The statement did not, however, reference the UNGPs, human rights due diligence, or other potential IHL issues that were present due to Russia’s annexation of Crimea, and the business relationship (i.e. with a State-owned company) in which Siemens was involved. Siemens later stated that the turbines were delivered in June 2016 to a warehouse in St. Petersburg.⁸¹ Rumors of the turbines intended use in Crimea continued, however, and by September 2016, Siemens reportedly doubted whether the turbines were

⁷⁵ Annual Report 2017, Siemens, p.2. https://www.siemens.com/investor/pool/en/investor_relations/Siemens_AR2017.pdf.

⁷⁶ Our history in Russia, Siemens, available at: <https://www.siemens.com/global/en/home/company/about/history/countries/russia.html>.

⁷⁷ Siemens Annual Report 2017, Siemens, p.87.

⁷⁸ Id. Note that OOO denotes a limited liability company and OAO is a joint stock company.

⁷⁹ Siemens: Villain or victim in Crimean turbines scandal? Kyiv Post, 29 September 2017, <https://www.kyivpost.com/business/siemens-villain-victim-crimean-turbines-scandal.html>

⁸⁰ Official statement regarding media allegations of a breach by Siemens of sanctions against Russia, Siemens, 1 July 2015. The statement has since been removed from the Siemens website.

⁸¹ Germany Questions Siemens on Equipment that Made it to Crimea, Fox News, 13 July 2017, <https://www.foxbusiness.com/features/germany-questions-siemens-on-equipment-that-made-it-to-crimea>.

⁶⁹ Situation in Crimea, 25 September 2017, *supra* note 51, para. 217.

⁷⁰ Id. at paras. 218-219.

⁷¹ Explainer: Why Ukraine Supplies Electricity to Crimea, and why it stopped, Radio Free Europe / Radio Liberty, 24 November 2015, <https://www.rferl.org/a/ukraine-crimea-power-supply-electricity-explainer/27384812.html>.

⁷² Crimea to end electricity supplies from Ukraine, RT News, 31 March 2016, <https://www.rt.com/business/337891-crimea-russia-energy-ukraine/>.

⁷³ Situation in Crimea, 25 September 2017, *supra* note 51, para. 217.

⁷⁴ Joint Staff Working Document, Information Note to EU business on operating and/or investing in Crimea/Sevastopol, European Commission, June 10, 2015, p.3, <http://data.consilium.europa.eu/doc/document/ST-12078-2014-REV-2/en/pdf>.

delivered to Taman.⁸²

In July 2017, the German government inquired to Siemens as to how the turbines ended up in Crimea,⁸³ and also expressed to Russia that violations of sanctions would impact the relationship between the States.⁸⁴ Siemens underscored that contract provisions, which prohibited the delivery of turbines to third parties, were aimed at ensuring respect for sanctions.⁸⁵ However, aside from these contract provisions, it is unclear as to whether Siemens assessed the sale of the turbines or the relationship with OAO VO TPE under the UNGPs or conducted further due diligence in 2015, prior to the sale.

Importantly, the US government noted that the turbines would establish an “independent power supply to Crimea and Sevastopol” and “if successfully installed...will further Russia’s annexation.”⁸⁶

On 4 August 2017, the Council of the European Union published Implementing Regulation 2017/1417, subjecting additional individuals (the Vice-Minister for Energy of the Russian Federation, the Head of Department in the Energy Ministry of the Russian Federation, and the Director General of OOO VO TPE), and entities (OAO VO TPE, OOO VO TPE, and ZAO Interautomatika) to restrictive measures.⁸⁷ The Regulation affirmed that gas turbines were “supplied from Russia in breach of the contractual provisions for the original sale of the turbines from a company established in the Union to Russia.”⁸⁸ The Regulation also noted that the action undermines the EU’s policy of non-recognition of

⁸² Id.

⁸³ Id.

⁸⁴ Germany says Crimean turbine scandal souring relations with Russia, Reuters, 22 July 2017, <https://www.reuters.com/article/us-ukraine-crisis-crimea-siemens-idUSKBN1A70U1>

⁸⁵ Germany Questions Siemens on Equipment that Made it to Crimea, Fox News, 13 July 2017, <https://www.foxbusiness.com/features/germany-questions-siemens-on-equipment-that-made-it-to-crimea>

⁸⁶ Treasury Sanctions Additional Individuals and Entities in Connection with the Conflict in Ukraine and Russia’s Occupation of Crimea, U.S. Department of Treasury, 26 January 2016, <https://home.treasury.gov/news/press-releases/sm0266>

⁸⁷ Council Implementing Regulation (EU) 2017/1417 of August 2017 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1417&from=EN>

⁸⁸ Id. at para. 3.

“the illegal annexation of Crimea and Sevastopol”.⁸⁹

Siemens and SGTT filed a lawsuit against TechnoPromExport, who transferred the turbines, in July 2017.⁹⁰ Notably, ZAO Interautomatika, a company that Siemens had a 46 percent equity interest in 2017,⁹¹ was rumored to have been hired to turn on the turbines.⁹² In October 2018, the Supreme Court of Russia declined reviewing an Appeal Court ruling that dismissed the lawsuit filed by Siemens and SGTT against TechnoPromExport.⁹³ Siemens’ CEO later called the incident “an ‘individual’ error,” and planned increased investments in Russia.⁹⁴

ii. Tourism

Tourism was a key sector of Crimea’s economy, but has been in decline since the territory’s annexation. Ukrainians, who used to make up 70 percent of the tourists visiting the area, have largely disappeared.⁹⁵ Because international airlines and other multinational businesses within the tourism sector have largely abided by sanctions, the number of foreign tourists has also decreased significantly. Restrictive measures imposed by the Council of Europe beginning in March 2014 in response to the annexation of Crimea include prohibitions on “tourism services in Crimea or Sevastopol, in particular, European cruise ships cannot call at ports in the Crimean peninsula, except in case of emergency”.⁹⁶ U.S. sanctions included the prohibition of the export, sale, or supply by a U.S.

⁸⁹ Id. at para. 4.

⁹⁰ SGTT is a joint-venture, in which Siemens holds a majority share. Siemens says Crimea Turbines Claims Only Against TPE, Reuters, 11 July 2017, <https://uk.reuters.com/article/us-ukraine-crisis-crimea-siemens-court/siemens-says-crimea-turbines-claims-only-against-tpe-idUKKBN19W1EW>.

⁹¹ Siemens Annual Report 2017, p.122.

⁹² Russia will struggle to turn on Siemens turbines in sanctions- bound Crimea, Reuters, 19 July 2017, <https://www.reuters.com/article/us-ukraine-crisis-crimea-siemens-turbine/russia-will-struggle-to-turn-on-siemens-turbines-in-sanctions-bound-crimea-idUSKBN1A41RM>

⁹³ Russian Supreme Court dismisses Siemens subsidiary’s appeal in turbines case, Russian Legal Information Service, 16 October 2018, http://rapsinews.com/judicial_news/20181016/289557892.html

⁹⁴ Siemens to hike Russia investment despite Crimea scandal, DW, 16 February 2019, <https://www.dw.com/en/siemens-to-hike-russia-investment-despite-crimea-scandal/a-47548791>.

⁹⁵ The Unprofitable Business of Crimean Annexation, 12.3.2015, Center for International Private Enterprise, <https://www.cipe.org/blog/2015/12/03/the-unprofitable-business-of-crimean-annexation/>

⁹⁶ Illegal annexation of Crimea and Sevastopol: EU extends sanctions by one year, European Council, 18 June 2018, <https://www.consilium.europa.eu/en/press/press-releases/2018/06/18/illegal-annexation-of-crimea-and-sevastopol-eu-extends-sanctions-by-one-year/>

person of any goods, services, or technology to Crimea.⁹⁷ As a result, U.S.-headquartered travel companies Expedia, Priceline, and Airbnb stopped offering services related to Crimea, including flights and accommodations.⁹⁸ Russia attempted to bolster the sector, including by providing discounted holidays for employees of State companies.⁹⁹ Ukraine also adopted legal provisions that require foreigners to seek permission to enter into Crimea, and require both foreigners and Ukrainians to enter the territory through checkpoints.¹⁰⁰

Nationalization by Russian authorities beginning in 2014 also targeted properties related to tourism, including “hotels, private apartments, non-residential premises”¹⁰¹ and health resorts. In June 2017, Crimean authorities announced the demolition of 6,000 waterfront properties that were allegedly built without permits.¹⁰² In May 2018, the Permanent Court of Arbitration ruled that Russia must compensate Ukrainian investors \$159 million for nationalized properties, which included hotels, and residential and commercial properties.¹⁰³

Booking.com

Booking Holdings, formerly Priceline Group, owns Booking.com and companies Priceline, Agoda, KAYAK, Rentalcars.com, and OpenTable.¹⁰⁴ Booking.com offers

⁹⁷ Executive Order 13685 of December 19, 2014, Blocking Property of Certain Persons and Prohibiting Certain Transactions with Respect to the Crimea Region of Ukraine, Section 1(a), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_eo4.pdf

⁹⁸ Airbnb and Priceline join Expedia in halting Crimea travel bookings, but others don't, tnooz, 18 March 2015, available at <https://www.tnooz.com/article/crimea-sanctions-online-travel-companies-compliance/>; The cited article states that Priceline continued to offer flights. It should be noted that a search conducted on 3 October 2018 did not provide results for accommodation or flights.

⁹⁹ Russia's Pitch to Vacationers: Crimea is for Patriots, New York Times, 19 August 2015, <https://www.nytimes.com/2015/08/20/world/europe/russias-pitch-to-vacationers-crimea-is-for-patriots.html>

¹⁰⁰ Rules on entry into and exit from Crimea, Embassy of Ukraine to the Republic of South Africa, 30 June 2016, <https://rsa.mfa.gov.ua/en/news/5935-poryadok-vjizdu-na-timchasovo-okupovanu-teritoriju-ukrajini-ta-vijizdu-z-neji>; Four years after Russia annexed Crimea, the peninsula remains in limbo, 28 January 2019, Lost Angeles Times, <https://www.latimes.com/world/la-fg-crimea-20190128-story.html>

¹⁰¹ Situation in Crimea, 25 September 2017, *supra* note 51, para. 173.

¹⁰² Crimean business owners caught up in pro-Russia officials' crackdown, Los Angeles Times, 12 January 2017, <http://www.latimes.com/world/europe/la-fg-crimea-yalta-2017-story.html>.

¹⁰³ Hague court rules Russia must compensate Ukrainian investors \$159 mn for Crimea losses, Euromaiden Press, 10 May 2018, <http://euromaidenpress.com/2018/05/10/first-ever-ruling-of-hague-court-on-crimean-losses-russia-must-pay-ukrainian-companies-us159-mln/>

¹⁰⁴ About- Factsheet, Booking Holdings, <https://www.bookingholdings.com/about/factsheet/>

hotels, apartments, and other properties for travelers in the 229 countries and territories in which it operates,¹⁰⁵ including Crimea and Sevastopol. While Booking Holdings is headquartered in the United States, Booking.com is headquartered in the Netherlands.¹⁰⁶ Its Crimean properties are reportedly managed by Booking.com's Ukrainian representative office.¹⁰⁷

Booking.com's provision of accommodations in Crimea and Sevastopol places it at risk of violating sanctions related to tourism services, as well as being involved in adverse human rights impacts due to Russia's nationalization of private and state property related to tourism and travel.

EU sanctions specified the banning of “tourism services in Crimea or Sevastopol,” which as already noted, quickly led to companies like Expedia, Priceline, and Airbnb to halt services to the area in 2015. While Booking.com did not appear to follow suit, in 2014, it investigated ties between individuals sanctioned by the EU and their links to Ukrainian and Crimean hotels.¹⁰⁸

In December 2016, the Prosecutor's Office of the Autonomous Republic of Crimea, which relocated to Kiev in 2014, launched a criminal investigation into Booking.com.¹⁰⁹ The investigation was initiated after a Ukrainian parliament member filed a complaint, which called for access to the website to be blocked in the Ukraine, due to alleged violations of Ukrainian and international law.¹¹⁰ Partly in response, Booking.com reportedly corrected the locations of Crimea properties as “in the territory of Ukraine” in 2017.¹¹¹ In July 2018, Booking.com made further headlines

¹⁰⁵ The company provides properties in “more than 155,000 destinations in 226 countries and territories worldwide.” <https://www.bookingholdings.com/brands/booking/>

¹⁰⁶ Contact & Locations, Booking Holdings, <https://www.bookingholdings.com/contact-and-locations/>

¹⁰⁷ Entry on Booking.com in Crimea, Business in Occupied Lands, EIRIS Foundation, available at <http://www.businessinoccupiedlands.org/search/?search=235&country=223>

¹⁰⁸ Booking.com Investigates Hotels for Links to Sanctioned Ukrainians, The Moscow Times, 21 March 2014, <https://themoscowtimes.com/articles/bookingcom-investigates-hotels-for-links-to-sanctioned-ukrainians-33174>

¹⁰⁹ Ukraine investigates Booking.com for doing business in Crimea, Kyiv Post, 24 December 2016, <https://www.kyivpost.com/ukraine-politics/ukraine-investigates-booking-com-business-crimea.html>

¹¹⁰ Id. See also: Ukrainian authorities have opened a case against Booking.com for ‘aiding and abetting the occupiers in Crimea,’ UAWIRE, 21 December 2016, <http://uawire.org/news/the-ukrainian-authorities-have-opened-a-case-against-booking-com-for-aiding-and-abetting-the-occupiers-in-the-crimea>

¹¹¹ Booking.com has corrected its data on which country Crimea belongs to, 2 May 2017, UAWIRE, <http://uawire.org/news/booking-com-has-corrected-its-data-on-which-country-crimea-belongs-to>

with a reported change to the site to exclude tourist reservations for Crimea.¹¹² The company, however, reportedly began differentiating between leisure and business travel years earlier,¹¹³ blocking reservations for tourists while allowing customers to indicate “I’m traveling for work” to generate hotel listings.¹¹⁴ Documentation demonstrating that a trip is indeed for business is not required before reserving. A 2018 media report alleged that the website had previously offered reviews from tourists that had visited in the four years prior, but that the company eventually removed and disabled comments for the location.¹¹⁵

In response to an inquiry sent to Booking.com for this report, the company wrote:

*“The EU sanctions prohibit EU persons and EU based companies from rendering tourism services in Crimea and Sevastopol. In our opinion and as we do or may not know the purpose of travel, rendering accommodation reservation service does not fall into the scope of the sanctions. But to avoid any misunderstanding about our position, we have decided to make our service only available to travelers who travel to or in Crimea for business purposes. We have organized this through self-certification by the booker within the booking process. Only if the customer selects business as purpose of travel, the reservation can be completed. If the customer chooses leisure, then the reservation cannot be processed”.*¹¹⁶

Notably, the statement did not reference consideration of the UNGPs or relevant provisions of international law that may more broadly impact their provision of services. Given Russia’s nationalization of property, which included tourism sites and accommodations, alongside other potential adverse impacts, it is important for Booking.com to clarify what HRDD process, if any, has been carried out.

¹¹² US and EU Russia Sanctions Update- Overview and Energy Sector Focus (and the New Russian Countersanctions), Morgan Lewis, 30 July 2018, p.58, https://www.morganlewis.com/-/media/files/publication/presentation/webinar/2018/ukrainerussia_sanctionsupdate_30july18.ashx

¹¹³ Booking.com introduces special mode for hotel booking in Crimea, 20 December 2016, <https://en.interfax.com.ua/news/economic/391973.html>

¹¹⁴ Search performed on Booking.com on 11 January 2020.

¹¹⁵ Despite EU sanctions, hotel rooms available in Crimea, DW, 19 July 2018, <https://www.dw.com/en/despite-eu-sanctions-hotel-rooms-available-in-crimea/a-44751747>

¹¹⁶ Email communication from Peter Lochbihler, Director of Public Affairs, Booking.com International B.V., 11 March 2019.

B. Western Sahara

In 1963 and while under Spanish control, Western Sahara (then-Spanish Sahara) was placed on the UN list of non-self-governing territories, as a territory “whose peoples have not yet attained a full measure of self-government”.¹¹⁷ The UN General Assembly also adopted Resolution 2072 (XX) urging Spain to “take all measures for the liberation of the Territories of Ifni and Spanish Sahara from colonial domination”.¹¹⁸ Following competing claims to Western Sahara by Morocco and Mauritania, the UN General Assembly requested an advisory opinion from the International Court of Justice (ICJ). The Court found that no “legal ties of such a nature as might affect the application of ... the Declaration on the Granting of Independence to Colonial Countries and Peoples — in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory”.¹¹⁹

Shortly after the issuance of the advisory opinion in 1975, Morocco militarily invaded and occupied Western Sahara during the “Green March”. Thousands of Sahrawis fled their homes in Western Sahara between 1975-1976 as a result of fighting and became refugees. Morocco then proceeded to construct sand walls (‘berm’), with a heavy concentration of landmines, between 1980-1989,¹²⁰ to divide the territory controlled by Morocco and the Polisario Front (hereafter “Polisario”), the Sahrawi liberation movement. Morocco progressively annexed Western Sahara, now controlling 85 percent of the territory,¹²¹ and placed it under its domestic jurisdiction. The Polisario declared the territory under its control as the Saharan Arab Democratic Republic (SADR).

While the ICJ advisory opinion affirmed that Morocco did not have sovereignty

¹¹⁷ See UN Charter, Chapter XI, Article 73. The United Nations and Decolonization, Non-Self-Governing Territories, <https://www.un.org/dppa/decolonization/en/nsgt>

¹¹⁸ This resolution notably recalled the UN Declaration on the Granting of Independence to Colonial Countries and Peoples. UN General Assembly Resolution 2072 (XX) Question of Ifni and Spanish Sahara, 16 December 1965, para. 2.

¹¹⁹ The Advisory Opinion delivered on 16 October 1975. Western Sahara- Overview of the Case, International Court of Justice, <https://www.icj-cij.org/en/case/61>

¹²⁰ Keeping It Secret, The United Nations Operation in the Western Sahara, Human Rights Watch, October 1995, <https://www.hrw.org/reports/1995/Wsahara.htm>

¹²¹ Western Sahara, Freedom in the World 2014, Freedom House.

over the territory,¹²² the UN,¹²³ the African Union,¹²⁴ and the Court of Justice of the European Union,¹²⁵ amongst others, have also held that Morocco is the Occupying Power in Western Sahara. While the positions of most EU Member States are reserved on the question of occupation, they consider Western Sahara a non-self-governing territory, and Morocco to have non-sovereign status there.¹²⁶ Morocco argues that the region is part of its territory and “has been returned to its mother land”.¹²⁷

In violation of its duties as Occupying Power, Morocco has also implemented policies to alter the demography of the region, including offering “financial incentives for Moroccans to move to Western Sahara and for Sahrawis to move to Morocco”.¹²⁸ This has resulted in Sahrawis becoming a minority in Western

Sahara. The Moroccan government also incentivizes businesses to move to Western Sahara.¹²⁹

Human Rights Situation

In 2018, the US State Department noted that the Moroccan government was “sensitive to any reporting not in line with the state’s official position on the territory’s status, and they continued to expel, harass, or detain persons who wrote critically on the issue”.¹³⁰ Moroccan authorities also systematically obstructed gatherings in support of Sahrawi self-determination in Western Sahara.¹³¹ Sahrawi NGOs were prohibited from officially registering until 2015; such groups still face limitations on their activities by the government.¹³²

The UN further reported that the Sahrawi minority in Moroccan controlled-Western Sahara faced “alleged discrimination in the practice of their economic, social and cultural rights,”¹³³ including as a result of Moroccan authorities “not taking all necessary measures to consult the people of Western Sahara about the development of the natural resources of the Western Sahara”.¹³⁴ Moroccan labor laws apply in the territory, but unions are not active.¹³⁵

¹²² The Advisory Opinion delivered on 16 October 1975. Western Sahara- Overview of the Case, International Court of Justice, <https://www.icj-cij.org/en/case/61>

¹²³ The last time a UN resolution referred to Western Sahara as occupied was in 1980. See: UNGA resolution 35/19 Question of Western Sahara, 11 November 1980, para. 3, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/35/19; UNGA resolution 34/37, Question of Western Sahara, 21 November 1979, para. 5, <http://www.un.org/documents/ga/res/34/a34res37.pdf>; It should be noted that when former UN Secretary General Ban-Ki Moon referred to Morocco’s “occupation” of Western Sahara, Morocco reacted strongly, ordering dozens of UN staff to leave. UN Chief Regrets Morocco ‘misunderstanding’ over Western Sahara remark, Reuters, 28 March 2016, <https://www.reuters.com/article/us-morocco-westernsahara-un/u-n-chief-regrets-morocco-misunderstanding-over-western-sahara-remark-idUSKCN0WU1N9>

¹²⁴ Legal Opinion on the Legality in the Context of International Law including the Relevant United Nations Resolutions and OAU/AU Decisions, of Actions Allegedly Taken by the Moroccan Authorities or Any Other State, Group of States, Foreign Companies or Any Other Entity in the Exploration and/or Exploitation of Renewable and Non-Renewable Natural Resources or Any Other Economic Activity in Western Sahara, Office of the Legal Counsel and Directorate for Legal Affairs of the African Union Commission, 2015, https://au.int/sites/default/files/newsevents/workingdocuments/13174-wd-legal_opinionof-the-auc-legal-counsel-on-the-legality-of-the-exploitation-and-exploration-by-foreign-entities-of-the-natural-resources-of-western-sahara.pdf

¹²⁵ Fisheries Agreement concluded between the EU and Morocco is valid in so far as it is not applicable to Western Sahara and to its adjacent waters, Press Release No 21/18, Court of Justice of the European Union, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/cp180021en.pdf>

¹²⁶ The EU, Morocco, and the Western Sahara: a chance for justice, European Council on Foreign Relations, 10 June 2016, https://www.ecfr.eu/article/commentary_the_eu_morocco_and_the_western_sahara_a_chance_for_justice_7041

¹²⁷ Statement by Morocco, Pacific Regional Seminar on the implementation of the Second International Decade for the Eradication of Colonialism: priorities for action, 28 to 30 November 2006, PRS/2006/CRP.14.

¹²⁸ Western Sahara, Freedom in the World 2016, Freedom House. This is in addition to the Sahrawi refugees living in Algeria. In December 2017, the UNHCR estimated that 173,600 refugee lived in refugee camps in Tindouf, Algeria. Sahrawi Refugees in Tindouf, Algeria: Total In-Camp Population, UNHCR, March 2018, http://www.usc.es/export9/sites/webinstitucional/gl/institutos/ceso/descargas/UNHCR_Tindouf-Total-In-Camp-Population_March-2018.pdf

¹²⁹ See for example: Morocco pushes development in disputed Western Sahara, Euractiv, Nov. 8, 2018, <https://www.euractiv.com/section/global-europe/news/morocco-pushes-development-in-disputed-western-sahara/>

¹³⁰ Western Sahara 2018 Human Rights Report, US State Department, <https://www.state.gov/wp-content/uploads/2019/03/WESTERN-SAHARA-2018.pdf>;

The UN similarly has reported cases of torture and cruel, inhuman or degrading treatment by Moroccan agents against individuals suspected of “posing a threat to ‘the territorial integrity of the State,’ which Morocco defines as including Western Sahara.” Report of the Secretary-General on the situation concerning Western Sahara, United Nations Security Council, 10 April 2017, S/2017/307, para. 69.

¹³¹ Morocco/Western Sahara Events of 2017, Human Rights Watch, <https://www.hrw.org/world-report/2018/country-chapters/morocco/western-sahara>

¹³² Western Sahara, Freedom in the World 2016, Freedom House. See also: Western Sahara, Freedom in the World 2018, Freedom House.

¹³³ Report of the Secretary-General on the situation concerning Western Sahara, United Nations Security Council, 10 April 2017, S/2017/307, para. 75

¹³⁴ Concluding observations on the sixth periodic report of Morocco, Human Rights Committee, 1 December 2016, CCPR/C/MAR/CO/6, para. 9, <http://undocs.org/CCPR/C/MAR/CO/6>

¹³⁵ Western Sahara, Freedom in the World 2018, Freedom House.

i. Agriculture

Agriculture contributes approximately 19 percent to the Moroccan GDP, and employs 4 million people.¹³⁶ In 2008, Morocco launched the ‘Green Morocco Plan’ (Plan Maroc Vert), in which it “aimed to double the agricultural sector’s value-added” between 2008-2020.¹³⁷ The plan included Dakhla, a fertile coastal area in Western Sahara, and aims to have 2,000 hectares of land used for agricultural activity there by 2020.¹³⁸ Western Sahara Resource Watch (WSRW) has noted that many of the lands marketed and used for the agricultural industry in the Dakhla area belong to Saharawi people that are now in refugee camps in Algeria; the industry also facilitates the transfer of Moroccan settlers through employment.¹³⁹ Notably, Morocco’s King Mohammed VI owns some of the agribusinesses in Dakhla, alongside Moroccan conglomerates and French multinational firms.¹⁴⁰

In 2015, the UN Special Rapporteur on the right to food visited Morocco and Dakhla, including agricultural and fishing projects therein, and noted that while many are benefiting from economic growth, “More effort needs to be made to ensure that benefits of projects are disseminated equally. Projects being developed must be inclusive and fully participative ensuring that the most vulnerable are targeted”.¹⁴¹

¹³⁶ Presentation of the sector, Invest in Morocco, <http://www.invest.gov.ma/?Id=25&lang=en&RefCat=5&Ref=148>

¹³⁷ Implementation Completion and Results Report on a Series of Programmatic Loans in the Amount of Euro 219.7 Million and US \$300 Million to the Kingdom of Morocco for a Inclusive Green Growth Development Policy Loans (1 and 2), World Bank, 30 April 2018, Report No: ICR00004088, p.3-4.

¹³⁸ Label and Liability: How the EU Turns a blind eye to falsely stamped agricultural products made by Morocco in occupied Western Sahara, Western Sahara Resource Watch (WSRW), 18 June 2012, p.13.

¹³⁹ Conflict Tomatoes, WSRW, 2012, https://www.wsrw.org/files/dated/2012-02-13/conflict_tomatoes_14.02.2012.pdf.

¹⁴⁰ Label and Liability, *supra* 138, 4.

¹⁴¹ Statement by the United Nations Special Rapporteur on the right to food, Hilal Elver, at the end of her visit to Morocco* (5 - 12 October 2015), 12 October 2015, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16597&LangID=E>

Azura Group

The French-Moroccan family-owned Azura Group (Azura) has been in business for over 25 years, and describes itself as “one of the largest private producers of tomatoes in the world” with 46 tomato farms.¹⁴² The company also produces and sells fruits and herbs.¹⁴³ Azura’s presence in Western Sahara includes farms, and a two-acre aquaculture facility in the Dakhla region.¹⁴⁴ In 2011, WSRW stated that Azura and Idyl, another agricultural company, employed up to 10,000 people in Western Sahara, the majority of which were Moroccan.¹⁴⁵

Azura includes the company Maraissa, which carries out production and packaging in Morocco and Western Sahara, and Disma International, a logistics and sales company based in Perpignan, France.¹⁴⁶ Other companies with activities in Western Sahara have created subsidiary companies for the purpose of exporting to Europe.¹⁴⁷

Azura, alongside other brands operating in Western Sahara, have faced calls by civil society and social movements that they and their products should be boycotted.¹⁴⁸ In regards to public criticism of Swiss grocery chains sourcing and allegedly mislabeling tomatoes from Western Sahara, one grocer reported that they would switch their suppliers, while another said that the consumers “can choose themselves the countries from which they want to buy products,” suggesting that HRDD was not a consideration during purchase processes.¹⁴⁹

¹⁴² The Group, Azura, <https://www.azura-group.com/en/the-azura-group/the-key-numbers>; <https://www.azura-group.com/en/the-azura-group/a-family-group-and-ambitious>; The group has been reported to be operating in Western Sahara since 2006. Azura among the bidders for Dakhla aquaculture contract, Africa Intelligence, 15 September 2016, <https://www.africaintelligence.com/mce/business-circles/2016/09/15/azura-among-the-bidders-for-dakhla-aquaculture-contract,108181242-gra>

¹⁴³ Products, Azura, <http://www.azura-group.com/produits/>

¹⁴⁴ Morocco aims to double value of seafood exports by 2020, SeafoodSource, 13 February 2018, <https://www.seafoodsource.com/features/morocco-aims-to-double-value-of-seafood-exports-by-2020>.

¹⁴⁵ Agriculture, WSRW, 21 January 2011, <https://www.wsrw.org/a201x1837>

¹⁴⁶ Disma International, ZipMec Database, https://www.zipmec.eu/en/disma-international_45403.html

¹⁴⁷ Handbook of Land and Water Grabs in Africa, Foreign Direct Investment and Food and Water Security, Routledge International Handbooks, Ed. Tony Allan, Martin Keulertz, Suvi Sojamo, and Jeroen Warner, 2013, p.196.

¹⁴⁸ Western Sahara: Action to Boycott Azura Brand Tomatoes Launched at Auchan Stores in Bagnolet, All Africa, 7 July 2004, <https://allafrica.com/stories/201407080702.html>.

¹⁴⁹ Swiss criticized on Saharan tomatoes, Eurofruit, 15 February 2016, <http://www.fruitnet.com/eurofruit/article/167886/swiss-criticised-on-saharan-tomatoes>.

Azura's operations provide employment opportunities for Moroccans, which may facilitate the transfer of civilians of the Occupying Power into Western Sahara, in violation of international law. Companies that import from Azura may also contribute to violations of IHL, such as the extension of Morocco's domestic legislation into the territory including through the issuance of certificates of origin.

As part of challenging Moroccan agricultural exports from Western Sahara, on 19 November 2012, the Polisario brought an action against the Council of the European Union in regards to an agreement, which further developed the European Union - Morocco Association Agreement¹⁵⁰ to include “reciprocal liberalization measures on agricultural products, fish and fishery products”.¹⁵¹ The action alleged, in part, that the agreement breached “the right of self-determination of the Sahrawi people,” encouraged “the policy of annexation followed by the Kingdom of Morocco,” and infringed on other norms of international law.¹⁵² The Polisario later submitted information regarding how agricultural holdings in Western Sahara were “exclusively oriented toward export,” used Saharan water resources, and were “controlled by foreign non-native persons”.¹⁵³ In 2015, the Court of Justice of the European Union (CJEU) found that the “contested decision must be annulled in so far as it approves the application of the agreement referred to by it to Western Sahara”.¹⁵⁴ In its decision, the Court noted that the Council did not consider how the exploitation of natural resources in Western Sahara impacted the local population.¹⁵⁵

Following an appeal by the Council, the CJEU ruled in 2016 that the Polisario

¹⁵⁰ The Agreement “constitutes the framework for EU-Morocco political, economic, social, scientific and cultural cooperation within the Euro-Mediterranean Partnership.” EU-Morocco Association Agreement, EU Neighbours Library, <https://library.euneighbours.eu/content/eu-morocco-association-agreement>;

The action was brought on 19 November 2012. *Front Polisario v. Council*, (Case T-512/12), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:055:0014:0015:EN:PDF>.

¹⁵¹ 2012/496/EU: Council Decision of 2 December 2010 on the signature of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012D0496>. The agreement entered into force in October 2012.

¹⁵² The Polisario raised five pleas. *Front Polisario v. Council*, (Case T-512/12), at para. 1-5.

¹⁵³ Judgment of the General Court (Eighth Chamber), *Front populaire pour la libération de la sagaia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, 10 December 2015, Para. 243, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=172870&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=164110>.

¹⁵⁴ *Id.* at para. 247.

¹⁵⁵ *Id.* at paras. 244-246.

Front did not have standing “to seek annulment of the decision at issue”.¹⁵⁶ It nevertheless held that Western Sahara did not come within the scope of the Association Agreement between Morocco and the European Union.¹⁵⁷ The EU Commission proceeded to issue guidance to customs authorities on the import of goods from Western Sahara into the EU, asserting that the origin of Western Sahara must be “declared so...tariff preferences cannot be claimed in the customs declaration and shall not be granted”.¹⁵⁸ The guidance also affirmed that where there was a doubt as to the accuracy and authenticity of proofs of origin, verification from Moroccan authorities was necessary.¹⁵⁹

Despite the CJEU judgments, on 11 June 2018, the EU Commission adopted two proposals recommending the granting of preferences to products originating in Western Sahara and under the control of Moroccan customs authorities.¹⁶⁰ The Commission issued an accompanying report on consultations conducted in Western Sahara, which claimed general support for the agreement and that “all parts of the population, regardless of background” would benefit from increased exports to the EU.¹⁶¹ The Polisario, civil society, and even members of the EU Parliament and a subsequent fact-finding mission by the European Parliament’s Committee on International Trade, heavily criticized the proposals. However, on 16 January 2019, the EU Parliament adopted the EU-Morocco Agricultural Agreement that extends to Western Sahara. The Polisario has challenged the agreement.

ii. Phosphate Mining

Phosphate, a non-renewable resource, is essential for the production of synthetic fertilizer, and has crucially allowed for an increase in land appropriate for

¹⁵⁶ Judgment of the Court (Grand Chamber), *Council of the European Union v. Front Polisario*, 21 December 2016, para. 133, <https://tinyurl.com/rygh7k6>

¹⁵⁷ *Id.* paras. 92-97.

¹⁵⁸ Customs implications of ECJ judgment in case C-104/16P (Western Sahara), https://ec.europa.eu/taxation_customs/sites/taxation/files/guidance-2017-03-15.pdf

¹⁵⁹ *Id.*

¹⁶⁰ Commission adopts proposals amending the association agreement with the Kingdom of Morocco to grant preferences to products from Western Sahara, in line with ECJ ruling, European Commission, 11 June 2018, https://ec.europa.eu/neighbourhood-enlargement/news_corner/news/commission-adopts-proposals-amending-association-agreement-kingdom-morocco-grant_en.

¹⁶¹ Commission Staff Working Document, Report on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara, 15 June 2018, paras. 3-5, https://ec.europa.eu/taxation_customs/sites/taxation/files/11062018_morocco_association_agreement_report_en.pdf.

agriculture.¹⁶² With 72 percent of the world’s phosphate rock reserves found in Morocco and Western Sahara,¹⁶³ the Office Cherifien de Phosphate (OCP), a Moroccan state-owned company, is the “world’s leading phosphate exporter”.¹⁶⁴

Morocco’s National Office of Hydrocarbons and Mines issues licenses for the sector.¹⁶⁵ Although the SADR government established the SADR Petroleum and Mining Authority (PMA), “to responsibly manage natural resource development within Western Sahara for the benefit of the Saharawi people,”¹⁶⁶ licenses issued by the PMA are unenforceable by SADR in Moroccan-controlled areas of Western Sahara.

OCP’s subsidiary, Phosphates de Boucraa S.A. (Phosboucraa), operates the Bou Craa mine in Western Sahara, and transports and prepares the phosphate for export in El Aaiun (Laayoune), also in Western Sahara.¹⁶⁷ The Bou Craa mine reportedly contributes “around 25 [percent] of... total sales of phosphate rock” for OCP.¹⁶⁸ Although the Bou Craa mine is one of the largest providers of phosphate,¹⁶⁹ the amount currently present in reserves globally does not necessitate reliance on Western Sahara sources.¹⁷⁰ In 2016, some Sahrawis conducted a hunger strike to highlight alleged discriminatory hiring practices by OCP.¹⁷¹

¹⁶² The Desert Rock That Feeds the World, The Atlantic, 29 November 2016, <https://www.theatlantic.com/science/archive/2016/11/the-desert-rock-that-feeds-the-world/508853/>.

¹⁶³ Phosphate Rock, United States Geological Survey, p.125, https://minerals.usgs.gov/minerals/pubs/commodity/phosphate_rock/mcs-2016-phosp.pdf.

¹⁶⁴ OCP profile, Mining Atlas, <https://mining-atlas.com/company/OCP.php>.

¹⁶⁵ Morocco and Western Sahara, 2014 Minerals Yearbook, US Geological Survey, p. 59.2, <https://minerals.usgs.gov/minerals/pubs/country/2014/myb3-2014-mo-wi.pdf>.

¹⁶⁶ Sahrawi Arab Democratic Republic Petroleum & Mining Authority, <http://www.sadrpma.com>

¹⁶⁷ Existing value chain, Phosboucraa, <http://www.phosboucraa.ma/industry/existing-value-chain>.

¹⁶⁸ P is for Plunder, Morocco’s exports of phosphates from occupied Western Sahara, Western Sahara Resource Watch, 2016, p.10, <https://www.jornaltornado.pt/wp-content/uploads/2017/04/Relatorio-P-for-Plunder-2016.pdf>.

¹⁶⁹ The mine produced 14% of the world’s phosphate consumption in 2011. Bou Craa Phosphate Mine, Western Sahara, NASA Earth Observatory, 16 June 2018, <https://earthobservatory.nasa.gov/images/92794/bou-craa-phosphate-mine-western-sahara>.

¹⁷⁰ The Desert Rock That Feeds the World, The Atlantic, 29 November 2016, <https://www.theatlantic.com/science/archive/2016/11/the-desert-rock-that-feeds-the-world/508853/>.

¹⁷¹ Hunger striking against OCP discriminatory employment, WSRW, 12 January 2016, <https://www.wsrw.org/a105x3346>; In 2010, Saharawi employees of OCP protested against reduced wages. Saharawi phosphate workers demand embargo, WSRW, 2 March 2010, <https://www.wsrw.org/a105x1354>.

Ballance Agri-Nutrients (Ballance)

Two New Zealand companies, Ballance Agri-Nutrients (Ballance) and Ravensdown, are major importers of phosphate rock from Western Sahara.¹⁷² Ballance and Ravensdown are both farmer cooperatives that offer products and services related to farming and livestock,¹⁷³ and have issued statements in defense of their sourcing of phosphate from Western Sahara.¹⁷⁴ In 2014, for example, Ballance issued a response to WSRW stating that the company “relies on the ruling from the New Zealand Government that: The United Nations does not prohibit trade in resources from Western Sahara. Nor does such trade contravene a United Nations legal opinion”.¹⁷⁵ The statement did not indicate that Ballance conducted a human rights due diligence process in line with the UNGPs.

The mining of phosphate by OCP from Western Sahara and its subsequent sale to Ballance may violate the right of the protected population to permanent sovereignty over their natural resources and prohibitions against pillage.

On 1 May 2017, the MV ‘NM Cherry Blossom’ was en route to New Zealand, when it stopped near Port Elizabeth, South Africa.¹⁷⁶ The ship was carrying phosphate from the Bou Craa mine that was destined for Ballance.¹⁷⁷ The SADR and the Polisario brought a complaint in South Africa that the ship was carrying unlawfully appropriated phosphate resources that belonged to the people of Western Sahara.¹⁷⁸ The respondents, OCP and Phosboucraa, claimed that the mining and

¹⁷² Sales of Western Sahara “Conflict Minerals” Rise but Trade is Getting Harder for Morocco to Maintain, Forbes, 8 April 2019, <https://www.forbes.com/sites/dominicdudley/2019/04/08/sales-of-western-sahara-conflict-minerals-rise-but-trade-is-getting-harder-for-morocco-to-maintain/#284985d554f8>.

¹⁷³ Our Business, Ballance, <https://ballance.co.nz/Our-Business-and-History>; Ravensdown, <https://www.ravensdown.co.nz/services/planning-advice>.

¹⁷⁴ Ravensdown has stated that they are “not convinced that the actions of two farmer-owned co-operatives on the other side of the world will change a 40 year-old political stalemate that the UN has so far failed to resolve.” Ravensdown’s position on Western Sahara, Ravensdown, <https://www.ravensdown.co.nz/services/product-availability/phosphate-rock-supply>.

¹⁷⁵ Letter to Western Sahara Resource Watch from CEO of Ballance, 6 May 2014, https://www.wsrw.org/files/dated/2014-05-06/ballance-wsrw_06.05.2014.pdf.

¹⁷⁶ *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV ‘NM Cherry Blossom’ and Others* (15/6/2017), High Court of South Africa, Easter Cape Local Division, Port Elizabeth, Judgment, para. 1, <http://www.saflii.org/za/cases/ZAECPEHC/2017/31.html>.

¹⁷⁷ Id. at para. 1.

¹⁷⁸ Id. at paras. 2 & 13.

sale of the phosphate was in line with international law and Moroccan law.¹⁷⁹ On 15 June 2017, the case was referred to trial, where the decision to refer noted that OCP and Phosboucraa did “not claim to have mined the phosphate... with the consent of the people” of Western Sahara.¹⁸⁰ In February 2018, the High Court of South Africa ruled in favor of the applicants stating, “Ownership in the phosphate has never vested” in OCP and Phosboucraa, and they “were not entitled to sell the phosphate”.¹⁸¹ The materials contained in the shipment were set to be auctioned with proceeds going to the SADR PMA for use in future cases.¹⁸² In the end, the shipping carrier Furness Withy reportedly bought the shipment and sold it to OCP for a nominal sum.¹⁸³

Following the judgment and the release of the cargo, Ballance asserted that the United Nations was “the correct place to address the underlying issues around self-determination and sovereignty for Western Sahara, which are very complex and long-running,” and noted the various community and other initiatives OCP Group had in Western Sahara.¹⁸⁴ The company’s CEO went on to note the importance of the relationship as approximately “70 [percent] of all phosphate used by New Zealand farmers and growers” comes from OCP Group.¹⁸⁵ Following the initial referral to hear the case, OCP issued a statement denouncing the decision, and claimed that the entire process was political.¹⁸⁶ Similar cases brought by the Polisario in Panama and Uruguay have been dismissed.¹⁸⁷

¹⁷⁹ Id at para. 15.

¹⁸⁰ Id. at para. 48.

¹⁸¹ Saharawi Arab Democratic Republic, Polisario Front and NM Shipping SA, et al, High Court of South Africa, 23 February 2018, para. 3.2, https://wsrw.org/files/dated/2018-02-23/20180223_south_africa_ruling.pdf.

¹⁸² Auction starts for seized Western Sahara phosphate cargo S. Africa, Reuters, 19 March 2018, <https://af.reuters.com/article/africaTech/idAFKBN1GV1FS-OZATP>.

¹⁸³ Stalled NZ phosphate shipment sets sail after a year, RNZ, 10 May 2018, <https://www.radionz.co.nz/news/national/357054/stalled-nz-phosphate-shipment-sets-sail-after-a-year>.

¹⁸⁴ Ballance welcomes resolution of cargo dispute, Balance, 10 May 2018, <https://ballance.co.nz/News/NewsPage/Ballance-welcomes-resolution-of-cargo-dispute>.

¹⁸⁵ Id.

¹⁸⁶ OCP Group disputes the decision of the South African court to hear the case on its merits, OCP, 15 June 2018, <http://newsroom.phosboucraa.ma/news/ocp-group-disputes-decision-south-african-court-hear-case-its-merits>

¹⁸⁷ Panama court dismisses Western Sahara phosphate claim: Morocco’s OCP, Reuters, 8 June 2017, <https://www.reuters.com/article/us-westernsahara-morocco-panama/panama-court-dismisses-western-sahara-phosphate-claim-moroccos-ocp-idUSKBN18Z2SC>; After Panama, Uruguay dismisses Polisario’s complaint about Moroccan Phosphates, North Africa Post, 6 August 2017, <http://northafricapost.com/19193-panama-uruguay-dismisses-polisarios-complaint-moroccan-phosphates.html>.

C. Occupied Palestinian Territory

In June 1967, Israel occupied the Palestinian territory, composed of the West Bank, including East Jerusalem, and the Gaza Strip, and also occupied the Syrian Golan.¹⁸⁸ Israel immediately annexed East Jerusalem, where it applies its domestic legislation, and in the decades that followed, began establishing settlements throughout the OPT.¹⁸⁹ Israel’s administration of the OPT has been described as a dual or two-tiered legal system, where Palestinians are subject to a system of Israeli military orders, and Jordanian and Ottoman laws, while Israeli settlers fall under Israel’s civilian domestic laws.¹⁹⁰ Following the Oslo Accords, the West Bank, excluding East Jerusalem, was divided into Areas A, B, and C, with Area A under full Palestinian control, Area B under Palestinian civil authority and joint Palestinian and Israeli security control, and Area C under full Israeli control. In practice, the Israeli military conducts raids in all parts of the West Bank, and has sole security control over Area B.¹⁹¹

Israeli settlements in Jerusalem and Area C of the West Bank include: residential housing, in which approximately 600,000¹⁹² Israeli settlers reside; industrial zones, including quarries; agricultural farms; and tourism sites. Israel’s domestic laws and regulations, alongside government incentives, induce Israeli citizens, and Israeli and international businesses to relocate to settlements.¹⁹³ Israeli banks also

¹⁸⁸ While this report focuses on Israel’s occupation of the OPT, the context of the occupied Syrian Golan raises similar concerns for businesses operating therein.

¹⁸⁹ Israel disengaged from its settlements in the Gaza Strip in 2005.

¹⁹⁰ One Rule, Two Legal Systems: Israel’s Regime of Laws in the West Bank, Association for Civil Rights in Israel, <https://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>; Separate and Unequal, Israel’s Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories, Human Rights Watch, https://www.hrw.org/sites/default/files/reports/iopt1210webwcover_0.pdf.

¹⁹¹ “For all practical purposes, since September 2000, Area B has functionally ceased to exist and has been under full Israeli control.” Palestinian Movement Restrictions Highlight Israeli Apartheid, Negotiation Affairs Department, State of Palestine, available at <https://www.nad.ps/en/publication-resources/factsheets/palestinian-movement-restrictions-highlight-israeli-apartheid>.

¹⁹² Settlements, B’Tselem, <https://www.btselem.org/topic/settlements>.

¹⁹³ Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, 26 January 2018, A/HRC/37/39, paras. 43- 45.

provide an array of services that “support, maintain, and expand” settlements.¹⁹⁴

Israel largely rejects that it is legally bound by the Fourth Geneva Convention, and argues that it is not an Occupying Power, that the territory is “disputed,” and that the human rights treaties it has ratified do not extend beyond its own territory.¹⁹⁵ However, the International Court of Justice,¹⁹⁶ the UN Security Council (UNSC) and General Assembly (UNGA),¹⁹⁷ and the International Committee of the Red Cross,¹⁹⁸ amongst others, have all affirmed Israel’s obligations as Occupying Power under IHL, including the Fourth Geneva Convention, and the application of its obligations under human rights treaties to the OPT. Limited control of the Gaza Strip and areas of the West Bank by Palestinian authorities does not alter Israel’s status as Occupying Power.¹⁹⁹ The UN and most States maintain the position that Israeli settlements in the West Bank, including East Jerusalem, are illegal under international law. Following UN Human Rights Council Resolution 31/36 of 2016, UN OHCHR began work on establishing a database of all business enterprises involved in specified activities related to Israeli settlements and the Wall built by Israel in the West Bank.²⁰⁰ In February 2020, close to four years after

194 Israeli Banks Profit From Settlements, Human Rights Watch, 28 May 2018, <https://www.hrw.org/news/2018/05/28/israeli-banks-profit-settlements>, See also, Financing Land Grab, The Direct Involvement of Israeli Banks in the Israeli Settlement Enterprise, Who Profits, February 2017, <https://whoprofits.org/report/financing-land-grab-the-direct-involvement-of-israeli-banks-in-the-israeli-settlement-enterprise/>.

195 See for example: Committee on the Elimination of Discrimination against Women, Concluding observations on the sixth periodic report of Israel, 17 November 2017, CEDAW/C/ISR/CO/6, para. 14; Israel, the Conflict and Peace: Answers to frequently asked questions, Israeli Ministry of Foreign Affairs, 30 December 2009, https://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx

196 Legal Consequences, *supra* note 10, ¶¶ 90-113.

197 See for example: UNSC Resolution 2334 (2016), UNSC Resolution 478 (1980), and UNGA Resolution 58/292 (2004).

198 The International Committee of the Red Cross (ICRC) has affirmed the de jure applicability of the Fourth Geneva Convention. See Annex 2, December 2001, para. 2, available at: <https://www.icrc.org/eng/resources/documents/article/other/5fldpj.htm>.

199 “Full control over the whole territory, or part of the territory, of the occupied State is not required at all times provided that the occupying State has established its authority and retains the capacity to exercise such authority.” First report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur, 30 April 2018, A/CN.4/720, para. 22.

200 Israel claimed that the Wall was built to address security concerns, while the former UN expert on the OPT, John Dugard, called it an “act of territorial annexation under the guise of security.” 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.

the resolution’s passing, and despite significant political pressure opposing its release, UN OHCHR published the information in a report (hereafter “database report”) that lists over 100 Israeli and international businesses.²⁰¹

The State of Palestine became a member of the International Criminal Court (ICC), acceding to the Rome Statute of the ICC in January 2015. Following the lodgment of an article 12(3) declaration by the State of Palestine on 1 January 2015, the Office of the Prosecutor automatically opened a preliminary examination into the Situation in Palestine. On 15 May 2018, the State of Palestine made a further referral to the Court, specific to Israel’s ongoing settlement activity.²⁰² Experts and human rights organizations in Palestine have submitted evidence of pillage including the unlawful exploitation of natural resources, unlawful appropriation and destruction of property, willful killing, forcible transfer, apartheid and persecution by Israeli state authorities and private actors.²⁰³ In December 2019, the Prosecutor of the ICC concluded the preliminary examination into the Situation in Palestine, deciding that there was “a reasonable basis to proceed with an investigation,”²⁰⁴ but also requesting that the Pre-Trial Chamber rule on the scope of the Court’s territorial jurisdiction.

201 Database of all business enterprises involved in the activities detailed in paragraph 96 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, Advanced Unedited Version, 12 February 2020, A/HRC/43/71.

While the release of the report was largely welcomed by Palestinian and international civil society actors, its limitations and content, including well-documented but overlooked companies and a narrow time frame, were also raised by organizations.

202 Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018, https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf.

Notably, in its 2016 *Policy Paper on Case Selection and Prioritisation*, the Office of the Prosecutor stated that it would seek to cooperate and provide assistance to States in regards to conduct such as the illegal exploitation of natural resources and land grabbing, amongst other serious crimes. See *Policy Paper on Case Selection and Prioritisation*, Office of the Prosecutor, 15 September 2016, para. 7, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

203 Palestinian Human Rights Organisations Submit File to ICC Prosecutor: Investigate and Prosecute Pillage, Appropriation and Destruction of Palestinian Natural Resources, Al-Haq, 26 October 2018, <http://www.alhaq.org/advocacy/targets/international-criminal-court-icc/1314-palestinian-human-rights-organisations-submit-file-to-icc-prosecutor-investigate-and-prosecute-pillage-appropriation-and-destruction-of-palestinian-natural-resources>.

204 Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction, International Criminal Court, 20 December 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>.

Human Rights Situation

The human rights context in the OPT has been extensively documented by the UN and international, Israeli, and Palestinian organizations. Freedom of movement of the Palestinian population is severely constrained due to physical barriers, including the Wall and checkpoints, and Israel's permit system. According to the UN, lack of access and obstructed movement impacts an array of civil, political, economic, social and cultural rights, including the right to work, health and education for Palestinians.²⁰⁵

Human rights and international humanitarian law violations often connected with the presence and expansion of Israeli settlements include the demolition of Palestinian property, settler violence, the transfer of Palestinians, land appropriation, and the exploitation of Palestinian natural resources.²⁰⁶ These and other violations occur within the context of continued threats of annexation of the West Bank, and the Jordan Valley in particular, by Israeli officials.

i. Agriculture

The OPT has fertile land and rich water resources, making it a prime location for the agricultural sector. Eighty-seven percent of the Jordan Valley and Dead Sea area, known as Palestine's "breadbasket", is under full Israeli control and largely inaccessible to Palestinians.²⁰⁷ As a result of this control, and incentives provided by Israeli authorities, Israeli agricultural settlements, growing "dates, field crops (falha), and greenhouse crops" flourish.²⁰⁸ Israeli NGO Kerem Navot has found that the area taken over by settler agriculture throughout the West Bank is 1.5 times larger than the constructed area of settlements.²⁰⁹ Over 40 percent of the

²⁰⁵ Freedom of Movement, Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem, Report of the Secretary-General to the United Nations Human Rights Council, February 2016, p.2, https://www.ohchr.org/Documents/Countries/PS/SG_Report_FoM_Feb2016.pdf.

²⁰⁶ Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Report of the Secretary-General, 16 March 2017, A/HRC/34/39, paras 11, 18-20, 47-49.

²⁰⁷ Humanitarian Fact Sheet on the Jordan Valley and Dead Sea Area, February 2012, UN OCHA, https://www.ochaopt.org/sites/default/files/ocha_opt_jordan_valley_factSheet_february_2012_english.pdf.

²⁰⁸ It should be noted that in other areas of the West Bank, Israeli settlements also grow "vineyards, olives groves, and deciduous fruit orchards." See: Israeli Settlers' Agriculture as a Means of Land Takeover in the West Bank, Kerem Navot, p.7, http://docs.wixstatic.com/ugd/cdb1a7_370bb4f21ceb47adb3ac7556c02b8972.pdf.

²⁰⁹ Naboth's Vineyard, Main Findings, Kerem Navot, October 2013, <http://www.keremnavot.org/naboths-vineyard>.

land used for settler agriculture is on private Palestinian land.²¹⁰

Restrictions placed on Palestinians by Israel, including access to land, water resources, and fertilizers, and limitations on building infrastructure, have a significant impact on development. In 2013, the World Bank estimated that granting Palestinians access to land and water for irrigation in the OPT could add an additional \$704 million USD in value added to the Palestinian economy from the agricultural sector.²¹¹

Although Israeli labor laws apply to Palestinians working in Israeli settlements,²¹² a 2012 Israeli State Comptroller report, and continued documentation by Israeli and other organizations, found that lack of oversight and enforcement by Israeli authorities of these standards has allowed for continued labor abuse at both industrial and agricultural settlements.²¹³ This includes: the denial of minimum wage and social rights; dangerous work conditions, including exposure to pesticides and other chemical materials without proper safety equipment; and preventing unionization.²¹⁴ Human Rights Watch also documented the use of child labor in agricultural settlements in the Jordan Valley, and the hazardous environment "due to pesticides, dangerous equipment, and extreme heat" in which they work.²¹⁵

Zorganika

Zorganika is a privately owned Israeli company established in 1992 in the

²¹⁰ Id.

²¹¹ Area C and the Future of the Palestinian Economy, World Bank, 2 October 2013, para. 23, <http://documents.worldbank.org/curated/en/137111468329419171/pdf/AUS29220REPLAC0EVISSION0January02014.pdf>.

²¹² The Israeli High Court of Justice held in 2007 that Israeli employers must comply with Israeli labor laws in the West Bank, and a 1982 military order required Israeli employers to pay minimum wage to settlement workers. See: Employment of Palestinians in Israel and the Settlements: Restrictive Policies and Abuse of Rights, Kav LaOved, August 2012, p.37-39, <http://www.kavlaoved.org.il/en/wp-content/uploads/sites/3/2013/06/KLO-Palestinian-Report-Aug-2012.pdf>

²¹³ Id. See also Occupation, Inc., *supra* note 45.

²¹⁴ Employment of Palestinians in Israel and the Settlements: Restrictive Policies and Abuse of Rights, Kav LaOved, August 2012, p.39- 48.

²¹⁵ Ripe for Abuse: Palestinian Child Labor in Israeli Agricultural Settlements in the West Bank, Human Rights Watch, 13 April 2015, <https://www.hrw.org/report/2015/04/13/ripe-abuse/palestinian-child-labor-israeli-agricultural-settlements-west-bank>

settlements of Hamra and Zarzir enclave in the occupied Jordan Valley.²¹⁶ The Zarzir enclave, where Zorganika's farms are located, is designated by Israel as a nature reserve and closed military zone.²¹⁷ The company owns and operates organic date farms, a packinghouse, and a visitor center,²¹⁸ and holds tours for tourists²¹⁹ and other delegations.²²⁰

In a 2012 interview, the Israeli owner of Zorganika stated that 90 percent of its Medjool dates are exported.²²¹ Hadiklaim, an Israeli cooperative of date farmers located in Israel and the OPT, was reported to export Zorganika products globally.²²² Hadiklaim sells date products under various brand names, and also supplies dates to stores and distributors to market under their own brands.²²³

The owner of Zorganika previously stated that Marks & Spencer ended their relationship due to allegations regarding their presence on appropriated Palestinian land, and that they have a "huge problem with the customs duty on exports to Europe".²²⁴ Campaigns against date products from Israeli settlements,

including those from Zorganika, have been launched globally.²²⁵

Zorganika's operations implicate possible violations of IHL, including prohibitions on the confiscation of personal property, and adverse impacts on freedom of movement and access of the protected population due to the designation of the land by the Occupying Power as a 'closed military zone.'

In a promotional video, Zorganika owner Kevin Smith stated that they began the company when they "got an opportunity to re-establish a neglected plantation".²²⁶ The history of this "neglect" was brought to light in a 2013 case. Palestinian landowners and their heirs petitioned the Israeli High Court of Justice (HCJ) seeking to have their land in the Jordan Valley, allegedly under Zorganika's possession, returned to them. The Palestinian landowners had been prohibited from entering their land since 1969 and had assumed that the property was not in use due to minefields and that it was a closed military area.²²⁷ The landowners filed the petition upon learning that settlers were cultivating their land. Documents from the Israeli Civil Administration confirmed the transfer of private Palestinian land to the settler owners of Zorganika.²²⁸

In an attempt to preclude ruling on the petition, in July 2017, the Court tried to reach an agreement between the parties in order to compensate the Palestinian landowners.²²⁹ Following the landowners' refusal to accept compensation and insistence that their land should be returned to them, the Israeli HCJ denied the

²¹⁶ The company name may also spelled as 'Zorganica.'

²¹⁷ Zorganika Profile, WhoProfits, <https://whoprofits.org/company/zorganika>; Farming in the West Bank: Organic Paradise, Thorny Reality, Haaretz, 24 April 2012, <https://www.haaretz.com/1.5216745>.

²¹⁸ Zorganika Profile, WhoProfits, <https://whoprofits.org/company/zorganika>.

²¹⁹ Israeli Settlers' Agriculture as a Means of Land Takeover in the West Bank, Kerem Navot, p.58, http://docs.wixstatic.com/ugd/cdb1a7_370bb4f21ceb47adb3ac7556c02b8972.pdf

²²⁰ For example, the Israeli Civil Administration took a delegation from the Euro-Mediterranean Parliamentary Assembly to Zorganika. Interim Report of the *Ad Hoc* Committee on Energy, Environment and Water, Euro-Mediterranean Parliamentary Assembly, 29 January to 1 February 2010, <http://www.parlamento.it/documenti/repository/affari%20europei/APEM/InterimReportGirodano.pdf>.

²²¹ Farming in the West Bank: Organic Paradise, Thorny Reality, Haaretz, 24 April 2012, available at <https://www.haaretz.com/1.5216745>; Zorganika dates are also available through online purchases for markets in Europe. See: <https://www.israel-spezialitaeten.de/shop/datteln-und-dattelprodukte/29/5kg.-bio-medjoul-datteln-groesse-jumbo-von-medjool-plus>

²²² Hadiklaim- Israel Date Growers Cooperative Profile, Who Profits, <https://www.whoprofits.org/company/hadiklaim-israel-date-growers-cooperative>

²²³ Hadiklaim sells Medjool dates primarily under the brand King Solomon, and other date products under the brands Jordan River and Jordan River Bio-Top.

Hadiklaim, About Us, <http://www.hadiklaim.com/about-us>

²²⁴ Farming in the West Bank: Organic Paradise, Thorny Reality, Haaretz, 24 April 2012, available at <https://www.haaretz.com/1.5216745>

²²⁵ In UK, supermarkets the frontline to check out BDS, Times of Israel, 20 August 2014, <https://www.timesofisrael.com/in-uk-supermarkets-the-frontline-to-check-out-bds/>; Jordan River Medjool DattelIn, Schweiz Palastina, <https://palaestina.ch/index.php/de/israelische-produkte/328-jordan-river-medjool-datteln-de>

²²⁶ zorganikadiklahim.WMV, published on 23 November 2008 by Nestor Czerwacki on YouTube, available at <https://www.youtube.com/watch?v=pGETtUI-PF8>

²²⁷ Palestinians Petition High Court to Reclaim Jordan Valley Land, Haaretz, 1 October 2013, <https://www.haaretz.com/.premium-palestinians-petition-for-land-1.5342748>;

Israel's High Court Blasts State for Giving Palestinian-owned Land to Settlers, Haaretz, 21 April 2015, <https://www.haaretz.com/.premium-court-blasts-state-for-land-transfer-1.5353425>

²²⁸ Document Confirms World Zionist Organization Allocates Land to Settlers in Jordan Valley, Haaretz, 9 September 2013, <https://www.haaretz.com/document-settlers-got-palestinian-land-1.5331372>; Israel's High Court Blasts State for Giving Palestinian-owned Land to Settlers, Haaretz, 21 April 2015, <https://www.haaretz.com/.premium-court-blasts-state-for-land-transfer-1.5353425>;

²²⁹ Palestinians Can Seek Compensation From Settlers in Confiscated Land Case, Court Says, Haaretz, 18 July 2017, available at <https://www.haaretz.com/israel-news/.premium-palestinians-can-seek-compensation-from-settlers-in-confiscated-land-case-court-says-1.5494863>

petition in November 2017.²³⁰ The Court concluded that the relief sought by the petition could not be granted as long as the military closure order was in force.²³¹

Both Zorganika and Hadiklaim were listed in the recently released UN database report.²³²

ii. Security

Israel's security sector is a major contributor to its domestic economy, and intertwined with its occupation of Palestinian territory. Israel's Ministry of Economy and Industry, alongside Israeli companies, highlight their "field-proven" equipment,²³³ while officials and agencies from the U.S. and Europe visit Israel for training and information on security issues.²³⁴ While Israel's import of weapons drastically increased between 2013-2017, it is also one of the largest exporters of weapons in the world.²³⁵ This is in addition to exporting USD \$6.5 billion in cyber-security products in 2016 alone.²³⁶ With Israel increasingly privatizing security services in the OPT, coupled with the continued use of equipment to implement its policies there, multinational companies have also found opportunities for profit.²³⁷

²³⁰ Israeli High Court Denies Palestinians' Petition to Recover Lands Being Farmed by Settlers, Haaretz, 24 November 2017, <https://www.haaretz.com/israel-news/premium-court-denies-palestinians-petition-to-recover-lands-being-farmed-by-settlers-1.5626817>.

²³¹ Id.

²³² See: Database of all business enterprises involved in the activities detailed in paragraph 96 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, 12 February 2020, A/HRC/43/71, p.8-9

²³³ Israel's Homeland Security Industry: Utilizing Innovation to Keep Us Safe, Israel Ministry of Economy and Industry, <https://itrade.gov.il/thailand/israels-homeland-security-industry-utilizing-innovation-keep-us-safe/>; 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>

²³⁴ Durham, North Carolina Becomes First U.S. City to Bar Police From Training in Israel, Haaretz, 19 April 2018, <https://www.haaretz.com/us-news/durham-becomes-first-u-s-city-to-bar-police-from-training-in-israel-1.6011720>; IPS officers visit Israel to learn best policing practices, The Economic Times, 13 July 2018, <https://economictimes.indiatimes.com/news/defence/ips-officers-visit-israel-to-learn-best-policing-practices/articleshow/48541981.cms>

²³⁵ "Israel's arms imports increased by 125 per cent between 2008–12 and 2013–17." SIPRI Fact Sheet, March 2018, p.12, Stockholm International Peace Research Institute, p. 2, 12, https://www.sipri.org/sites/default/files/2018-03/fssipri_at2017_0.pdf

²³⁶ 6 Reasons Israel Became A Cybersecurity Powerhouse Leading The \$82 Billion Industry, Forbes, 18 July 2017, <https://www.forbes.com/sites/gilpress/2017/07/18/6-reasons-israel-became-a-cybersecurity-powerhouse-leading-the-82-billion-industry/#61a32170420a>

²³⁷ Private Security Companies and the Israeli Occupation, Who Profits Research Center, January 2016, https://whoprofits.org/wp-content/uploads/2018/06/old/private_security_companies_final_for_web.pdf

G4S

G4S is a multi-national company that provides security services and products. G4S formed in 2004 when Group 4 Falck (Denmark) merged with Securicor (United Kingdom).²³⁸ Prior to the merger, in 2002, Group 4 Falck acquired a 50 percent holding in Israeli security company, Hasmira; G4S increased its shares to hold 90 percent of Hasmira in 2007.²³⁹ In December 2016, G4S reached an agreement to sell G4S Israel (formerly Hasmira) to the Israeli private equity fund, FIMI Opportunity Funds (FIMI), but retained partial ownership in a police training facility in Israel.²⁴⁰

G4S was at risk for being linked to adverse human rights impacts, where its equipment and services were reportedly used in facilities where detainees, including children, were ill-treated, and used in barriers throughout the West Bank that obstruct freedom of movement.

Group 4 Falck came under scrutiny immediately after acquiring Hasmira in 2002, due to Hasmira's employment of armed guards in Israeli residential settlements in the West Bank. In response, in October 2002, the company's CEO stated that the guarding services were not in contravention to any law, but affirmed that it would remove the guards from the West Bank.²⁴¹ Other activities in the West Bank and Israel persisted, however, as did criticism from international and local civil society. Allegations regarding G4S activities included: installing and maintaining security systems in Israeli Prison Services (IPS) facilities both in the OPT and Israel, as well as for Israeli checkpoints along the Wall; supplying equipment to the Israeli police headquarters in the West Bank; supplying full body scanners for the Erez checkpoint in Gaza;²⁴² and operating in settlements, including by providing

²³⁸ Our History, G4S, <https://www.g4s.com/who-we-are/our-history>

²³⁹ Lawyers for Palestinian Human Rights (LPHR) & G4S PLC: Final Statement After Examination of Complaint, UK National Contact Point for the OECD Guidelines for Multinational Enterprises, March 2015, para. 6.

²⁴⁰ Agreement Reached on Sale of G4S Israel, G4S, 2 December 2016, <http://www.g4s.com/en/investors/news-and-presentations/regulatory-announcements/2016/12/02/agreement-reached-on-sale-of-g4s-israel>

²⁴¹ Group 4 security firm pulls guards out of West Bank, 8 October 2002, The Guardian, <https://www.theguardian.com/world/2002/oct/09/israel>; G4S response regarding allegations of complicity with international humanitarian law violations by Israel, Business and Human Rights Resource Centre, 21 December 2010, <https://www.business-humanrights.org/en/doc-g4s-response-regarding-allegations-of-complicity-with-international-humanitarian-law-violations-by-israel>.

²⁴² The Case of G4S: Private Security Companies and the Israeli Occupation, WhoProfits, March 2011, p.7, 11, 17, <https://whoprofits.org/wp-content/uploads/2018/06/old/WhoProfits-PrivateSecurity-G4S.pdf>

security equipment and services, and providing security officers for commercial clients, such as supermarkets.²⁴³ Each of these facilities and locations was linked to international human rights law and international humanitarian law violations.

In September 2012, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 identified G4S as one of many companies that profit from operations related to Israeli settlements.²⁴⁴ This was followed by a 2013 UN fact-finding mission report that noted the role of companies in facilitating and profiting from Israeli settlements, including companies that provided security equipment and services.²⁴⁵ Within this backdrop, churches, unions, and others divested from or ended contracts with G4S due to its ties with Israel's occupation.²⁴⁶

In November 2013, Lawyers for Palestinian Human Rights (LPHR) a legal charity based in the United Kingdom (UK) brought a complaint against G4S before the UK National Contact Point (NCP) for the OECD's Guidelines for Multinational Enterprises.²⁴⁷ The complaint alleged that the company provided services and equipment for the Wall in the West Bank, the Erez Crossing, between the Gaza Strip and Israel, and at IPS facilities.²⁴⁸

²⁴³ G4S response regarding allegations of complicity with international humanitarian law violations by Israel, Business and Human Rights Resource Centre, 21 December 2010, <https://www.business-humanrights.org/en/doc-g4s-response-regarding-allegations-of-complicity-with-international-humanitarian-law-violations-by-israel>

²⁴⁴ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, 19 September 2012, A/67/379, paras 47-51, <https://unispal.un.org/dpa/dpr/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/4b2de5243ebce35685257aa200487927?OpenDocument>

²⁴⁵ G4S, however, was not specifically named in the report; the report only cited general activities of concern. 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, 7 February 2013, para. 96, A/HRC/22/63.

²⁴⁶ See for example: United Methodist Church Divests from G4S, United Methodist for Kairos Response, 12 June 2014, https://www.kairosresponse.org/pressrel_umc_divests_g4s.html; Dutch union dumps G4S for aiding Israel's human rights abuses, Electronic Intifada, 16 December 2013, <https://electronicintifada.net/blogs/adri-nieuwhof/dutch-union-dumps-g4s-aiding-israels-human-rights-abuses>

²⁴⁷ The complaint argued that the issue should come before the UK NCP rather than the Israeli NCP; the latter did not object. Final Review, p.7

²⁴⁸ Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from Lawyers for Palestinian Human Rights (LPHR) Against G4S, May 2014, para. 22, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315104/bis-14-854-palestinian-lawyers-complaint-against-g4s-ncp-initial-assessment.pdf

In its 2015 Final Statement, the NCP examined guidance from the UK's Foreign and Commonwealth Office (FCO) in looking at the three areas covering the complaint, and noted that although the UK government did not support business links to settlements in the OPT, it did not provide specific advice on the other facilities, locations, and Israeli agencies that were the subject of the complaint.²⁴⁹ The NCP further stressed that no information was provided to demonstrate G4S staff or equipment had a direct part in the aforementioned human rights impacts.²⁵⁰ The NCP, however, considered that G4S's actions were inconsistent with its obligation under Chapter IV, paragraph 3 (enterprises should seek ways to prevent or mitigate human rights impacts) of the Guidelines for Multinational Enterprises, as it was unclear as to what, if any, actions were taken by G4S to address impacts.²⁵¹ The NCP also noted that G4S's public response following the Final Statement was misleading, and a missed early opportunity for G4S "to signal the seriousness of its intention" to address the NCP's recommendations.²⁵²

Both before and during the OECD complaint process, G4S issued statements asserting compliance with international law and its commitments under the UN Global Compact, and that it conducted human rights due diligence in line with the OECD Guidelines and the UNGPs.²⁵³ These positions were reemphasized in a 19 March 2019 response letter in regards to this report. G4S further noted "the decision to sell G4S Israel was made on strategic and commercial grounds" and that all operations had been transferred to FIMI in June 2017.²⁵⁴ It further noted that it had no operational role in the police training center, and that it was a "minor financial investment".²⁵⁵

²⁴⁹ Lawyers for Palestinian Human Rights (LPHR) & G4S PLC: Final Statement after Examination of Complaint, UK National Contact Point for the OECD Guidelines for Multinational Enterprises, March 2015, para. 49, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431972/bis-15-306-lawyers-for-palestinian-human-rights-final-statement-after-examination-of-complaint-uk-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises-r1.pdf

²⁵⁰ Id. at para. 41.

²⁵¹ Id. at para. 67 & 76.

²⁵² Follow up Statement after recommendations in complaint from LPHR against G4S, UK National Contact Point for the OECD Guidelines for Multinational Enterprises, July 2016, para. 23, 24

²⁵³ See for example: Human Rights Review of G4S, Human Rights Report and Legal Opinion, Summary of Independent Review, 2 June 2004; G4S Update- April 2002, G4S, https://www.business-humanrights.org/sites/default/files/media/documents/company_responses/g4s-israel-apr-24-2012.pdf

²⁵⁴ Letter dated 19 March 2019, Nigel Lockwood, Head of Government Affairs & CSR, G4S plc.

²⁵⁵ Id.

D. Companies with Operations in Multiple Contexts of Occupation

Reflective of the global economy, many companies have established business operations or relationships in multiple situations of conflict, including occupied territories. Even in such instances, business enterprises often fail to implement a comprehensive and coherent HRDD process for situations of occupation. In doing so, business enterprises not only expose themselves to heightened risks of adverse impacts across contexts, but also to greater scrutiny in regards to the consistency and legality of their actions.

i. Extractives: Heidelberg Cement

Numerous initiatives and guidance have been developed and implemented in relation to the extractive sector and conflict-affected areas in order to identify, address, and prevent human rights impacts, and provide avenues for remedy. Situations of occupation, however, present additional challenges and limitations on the use of natural resources in line with international law. As mentioned in Section II, this includes prohibitions on the expansion of sites or rate of exploitation of a given natural resource by opening new mines and wells after the start of the occupation by the Occupying Power,²⁵⁶ and prohibitions against pillage,²⁵⁷ amongst other issues.

HeidelbergCement (Heidelberg) is based in Germany; the company operates in 60 countries and has approximately 59,000 employees.²⁵⁸ Following its acquisition of Italcementi in 2016, the company became “number 1 in aggregates production, number 2 in cement, and number 3 in ready-mixed concrete”.²⁵⁹

☞ *Western Sahara*. Through its purchase of Italcementi, Heidelberg expanded its presence to include Western Sahara and Morocco.²⁶⁰ It

²⁵⁶ First report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur, 30 April 2018, A/CN.4/720, paras. 31-32, http://digitallibrary.un.org/record/1626541/files/A_CN-4_720-EN.pdf

²⁵⁷ Courts have found pillage, the appropriation of private property, to have occurred when assets were acquired by force and without the consent of the owner, as well as “when the agreement was based on threats, intimidation, pressure, or a position of power derived from the surrounding armed conflict.” Business and International Humanitarian Law, An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law, ICRC, p.22

²⁵⁸ Company, HeidelbergCement Group, <https://www.heidelbergcement.com/en/company>

²⁵⁹ Id.

²⁶⁰ Morocco, HeidelbergCement Group, <https://www.heidelbergcement.com/en/morocco>

currently operates a grinding and cement bagging center near El Aaiun (Laayoune) in Western Sahara via Ciments du Maroc.²⁶¹ Ciments du Maroc also established a wind farm in Western Sahara in 2011.²⁶² The company has been criticized for its presence in Western Sahara, and also subject to divestment by the Norwegian pension fund KLP.²⁶³

In response to an inquiry for this report, Heidelberg stated that more than two-thirds of its employees at the center are Sahrawi, that representatives of the Saharawi population “hold a minority stake of 9 percent in the grinding mill” and that it sells 70 percent of the cement to Saharawi customers.²⁶⁴ The company further noted its use of renewable energy, as “the wind farm produces electricity to cover the demand of the grinding mill,” as well as its social projects in Western Sahara.²⁶⁵

☞ *Occupied Palestinian Territory*. Heidelberg established its presence in Israel and Israeli settlements²⁶⁶ in 2007, following its acquisition of Hanson.²⁶⁷ The company acquired four sites in Israeli settlements, including 2 concrete plants, an asphalt plant, and an aggregates quarry.²⁶⁸

Following the acquisition, the company came under scrutiny due to

²⁶¹ Centre de broyage de Laâyoune, Ciments du Maroc, <https://www.cimentsdumaroc.com/fr/centre-de-broyage-de-laayoune>

²⁶² Renewable energies: Ciments du Maroc financed wind farm inaugurated in Laâyoune, Invest in Morocco, 21 October 2011, <http://www.invest.gov.ma/?Id=39&lang=en&RefCat=5&Ref=175>

²⁶³ What is HeidelbergCement doing in occupied Western Sahara?, Western Sahara Resource Watch, 2 March 2018, <<https://www.wsrw.org/a105x4124>>; Decision to exclude from investments, KLP, 1 June 2015, http://english.klp.no/polopoly_fs/1.31195.1434009511!/menu/standard/file/Heidelberg%20og%20CEMEX%20beslutning%20om%20utelukkelse%20ENG.pdf

²⁶⁴ Email communication from Andreas Schaller, Director of Group Communication & IR, HeidelbergCement AG, 29 March 2019.

²⁶⁵ Id.

²⁶⁶ See: Occupation, Inc., *supra* note 45; The Israeli Exploitation of Palestinian Natural Resources: Part II Heidelberg Cement, Who Profits, November 2016, <https://whoprofits.org/updates/the-israeli-exploitation-of-palestinian-natural-resources-part-ii-heidelberg-cement/>

²⁶⁷ Israel, HeidelbergCement Group, <https://www.heidelbergcement.com/en/israel>

²⁶⁸ Hanson Israel, Who Profits, <https://whoprofits.org/company/hanson-israel-formerly-pioneer-concrete-israel/>

its presence in settlements, and became a subject of divestment.²⁶⁹ Heidelberg had responded to criticism of its presence in Israeli settlements by asserting that it is “committed to global values and standards” including the OECD guidelines, and that its subsidiary Hanson Israel carried out “an intensive legal assessment” finding that its operations were compatible with international law.²⁷⁰

In a communication in regards to this report, the company noted that both of its ready-mixed plants in settlements were closed by mid-2018, and that the “aggregates quarry with the asphalt plant is located... on public land”.²⁷¹ Heidelberg went on to note that it was “committed to sell the operations in the OPT and has started a disposal process”.²⁷²

In December 2015, Heidelberg established a subsidiary “HeidelbergCement Palestine” in Ramallah, OPT.²⁷³ According to the company, HeidelbergCement Palestine’s activities depend “on specific demands,” but that it “has been active in imports to Gaza and the West Bank in 2018”.²⁷⁴ It is unclear as to whether Heidelberg conducted HRDD in relation to its presence in Ramallah.

☞ *Ukraine and EU Sanctions.* In 2014, Heidelberg abandoned a plant in the Ukrainian border area of Donetsk. Its operations there came to a halt after pro-Russian separatists allegedly began making demands to the company, which went unfulfilled by Heidelberg in order to “abide

by EU sanctions”.²⁷⁵ In its 2017 Annual Report, Heidelberg noted “As a result of the conflict in eastern Ukraine, we have lost control of one of our cement plants. We have now written off the cement plant in our balance sheet”.²⁷⁶ The company noted that it “signed the divestment of the Ukrainian business” in January 2019.²⁷⁷

Heidelberg’s 2018 Annual Report affirmed that it was committed to upholding the UNGPs and OECD Guidelines, and stated that it developed a human rights risk analysis, which “explicitly examines the risk of violating the rights of indigenous peoples”.²⁷⁸ The report, however, did not mention a framework for evaluating situations of occupation, and referred to these contexts as the “political crisis between Ukraine and Russia, the political and religious conflicts in the Middle East”.²⁷⁹

ii. Tourism: Airbnb

The tourism sector’s impact on human rights in occupied territories may be less apparent to the general public than extractives and other industries, but nonetheless severe. Control of tourism sites, including natural and historical sites, and relevant institutions, by an Occupying Power may serve to obstruct the social, economic and cultural development of the protected population. Excavations and the removal of cultural property, and as previously noted, the use of natural resources, including land, are also subject to restriction under international humanitarian law. As highlighted in the Booking.com case study, tourism may also implicate issues related to property rights.

Airbnb is headquartered in the United States, and provides a platform for individuals in 191 countries to rent their apartments and homes to “become hospitality entrepreneurs”.²⁸⁰ In November 2018, Airbnb announced that they had developed a framework for their operations in “disputed” territories, where it would: examine each context on a case-by-case basis; consult with experts

²⁷⁵ HeidelbergCement halts production at Ukraine factory, CemNet.com, 18 November 2014, <https://www.cemnet.com/News/story/155715/heidelbergcement-halts-production-at-ukraine-factory.html>

²⁷⁶ Annual Report 2017, HeidelbergCement, p.79.

²⁷⁷ Email communication from Andreas Schaller, Director of Group Communication & IR, HeidelbergCement AG, 29 March 2019.

²⁷⁸ Annual Report 2018, HeidelbergCement, p.65.

²⁷⁹ Id. at p.67.

²⁸⁰ About Us, Airbnb, <https://press.airbnb.com/about-us/>

²⁶⁹ Pension Fund blacklists four companies after Danwatch investigation, 10 October 2017, <https://danwatch.dk/en/pension-fund-blacklists-four-companies-after-danwatch-investigation/>; Decision to exclude from investments, KLP, 1 June 2015, <<https://www.klp.no/en/english-pdf/Heidelberg%20og%20CEMEX%20beslutning%20om%20utelukkelse%20ENG.pdf>>

²⁷⁰ Occupation, Inc., *supra* note 45; Response to the article of Electronic Intifada, HeidelbergCement, 2 October 2017, https://www.business-humanrights.org/sites/default/files/documents/Response_HC_20171002.pdf

²⁷¹ Email communication from Andreas Schaller, Director of Group Communication & IR, HeidelbergCement AG, 29 March 2019 [hereinafter Schaller email].

It should be noted that in a previous communication with the company, Palestinian NGO Al-Haq alleged that the company’s location on public remained in violation of IHL and that Heidelberg held “unlawfully acquired leases” on the public property. See: Al-Haq Response to HeidelbergCement, Business and Human Rights Resource Center, 10 October 2017, <https://www.business-humanrights.org/sites/default/files/documents/Al-Haq%20Response%20Heidelberg.pdf>

²⁷² Schaller email, *supra* note 271.

²⁷³ Palestine, HeidelbergCement Group, <https://www.heidelbergcement.com/en/palestine>

²⁷⁴ Email communication from Andreas Schaller, Director of Group Communication & IR, HeidelbergCement AG, 25 August 2019.

and stakeholders; assess safety risks; determine whether listings contributed to “existing human suffering” and had “a direct connection to the larger dispute in the region”.²⁸¹ The statement notably did not refer to the UNGPs or adverse human rights impacts potentially tied to operations.

In applying this framework, Airbnb decided to remove “approximately 200” listings in Israeli settlements in the occupied West Bank, excluding East Jerusalem. Airbnb affirmed in the statement that its policy did not apply to settlements in Jerusalem or the occupied Syrian Golan, both of which are annexed and occupied territory. It instead referred to these areas as “in Israel”,²⁸² and did not provide a reason for the exception. Airbnb’s statement also noted that it removed listings in Crimea following the implementation of sanctions. In January 2019, the company announced that it would remove listings in South Ossetia and Abkhazia in light of its new framework, and noted that it was continuing to look at other areas subject to “disputes”.²⁸³

Irrespective of this, the focus on the company’s decision by NGOs, the media, and others, however, remained on Israeli settlements. While numerous human rights organizations welcomed Airbnb’s decision, it was condemned by Israel. One Israeli minister stated that as long as the policy was not reversed, the State would “continue to promote steps against the company, both in the regulatory and legal spheres here in Israel and vis-à-vis our friends in the US and around the world”.²⁸⁴ Indeed, lawsuits against Airbnb were filed in Israel and the US by Israeli settlers.²⁸⁵ Important to refocusing the issue on international law and adverse human rights impacts, two Palestinian villages and a Palestinian-American filed counterclaims in the US against the settlers who listed properties on confiscated lands on Airbnb; counterclaims included “war crimes, crimes against humanity... discrimination on

the basis of religion and national origin... trespass and unjust enrichment”.²⁸⁶

In a final development, Airbnb issued a statement on 9 April 2019 stating that it would “not move forward with implementing the removal of listings in the West Bank”.²⁸⁷ It went on to state that the framework would not be implemented in any “disputed” territory, and that any profits from Airbnb activities in such areas would be donated to humanitarian aid organizations. The reversal of the company’s decision was met with condemnation by a variety of groups.²⁸⁸

Airbnb, as well as other online travel platforms Booking.com (and Booking Holdings Inc.), Expedia, and TripAdvisor are included in the UN database report.

281 Listings in Disputed Territories, Airbnb, 19 November 2018 <https://press.airbnb.com/listings-in-disputed-regions/>

282 The statement asserted in part “To be clear, our announcement does not apply to more than 20,000 listings in Israel — including in Jerusalem and Golan Heights — and hosts continue to share their places with travelers.”

283 Framework for Evaluating Listings in Disputed Areas, Airbnb, 17 January 2019, <https://press.airbnb.com/framework-for-evaluating-listings-in-disputed-areas/>

284 Israel will Seek Legal Steps Against Airbnb, Says Minister, The Jerusalem Post, 9 January 2019, <https://www.jpost.com/Israel-News/Israel-will-seek-legal-steps-against-Airbnb-says-minister-576811>

285 Airbnb Facing Lawsuit in the U.S. Over Israeli Settlements Ban, CTECH, 29 November 2018, <https://www.calcalistech.com/ctech/articles/0,7340,L-3750986,00.html>

286 Palestinians Intervene to Sue Settlers in Airbnb Lawsuit, Center for Constitutional Rights, 18 March 2019, <https://ccrjustice.org/home/press-center/press-releases/palestinians-intervene-sue-settlers-airbnb-lawsuit>

287 Update on Listings in Disputed Regions, Airbnb, 9 April 2019, <https://press.airbnb.com/update-listings-disputed-regions/>

288 See for example: Palestinian Non-Governmental Organizations Network call on International and Local NGOs to Reject Donations from Airbnb, 13 May 2019, <http://www.alhaq.org/advocacy/6055.html>; Israel/OPT: Reversal of Airbnb on illegal settlement listings deeply shameful, Amnesty International, 10 April 2019, <https://www.amnesty.org/en/latest/news/2019/04/israel-opt-reversal-of-airbnb-ban-on-illegal-settlement-listings-deeply-shameful/>

IV BUSINESS RESPECT FOR HUMAN RIGHTS & SITUATIONS OF OCCUPATION

The case studies in the previous section demonstrate that companies operating in or having relationships with occupied territories often have unclear, if any, enhanced human rights due diligence procedures. Where HRDD or other processes are undertaken, the outcome and framework used often remain subject to scrutiny by NGOs and others. Overall, the case studies illustrate the need for businesses to ground their decisions concerning their operations and relationships, and the human rights risks they may face as a matter of international law, including the UNGPs, via a rigorous HRDD process. The lack of guidance cited for consideration by companies also suggests the need for home States to take stronger action in order to guide and regulate multinational businesses domiciled in their territory.

The following section explores how businesses can assess the situation of human rights and the rule of law in occupied territories as part of an enhanced due diligence process, including by evaluating actual and potential adverse impacts that their operations or activities may cause or contribute to. Businesses may also use an HRDD process to determine whether and how they may be able to positively contribute to the development of the occupied territory in a manner that accords with the right to self-determination, amongst other rules of international law.²⁸⁹ This section also identifies legal, financial and other risks businesses may face as a result of activities in or relationships linked to occupied territory.

A. Enhanced Due Diligence

Given the nature of the international law violations that have come to be associated with many ongoing situations of occupation, and the complex operating environments in conflict areas more broadly, business enterprises should adopt enhanced and ongoing due diligence measures to identify actual and potential adverse human rights impacts.²⁹⁰ In doing so, businesses may also avoid reputational, legal, and commercial risks by developing a deeper understanding of the framework of occupation.

²⁸⁹ The Working Group has called on businesses to use human rights due diligence as a tool for understanding impacts and contributing to sustainable development. The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 15 July 2018, A/73/163, para. 59.

²⁹⁰ Working Group Statement, *supra* note 2, p.9-10.

As laid out in the UNGPs, the process of human rights due diligence should include:

1. an assessment of actual and potential human rights impacts;
2. integration of the findings into internal functions and processes, in conjunction with relevant action;
3. tracking the effectiveness of their response; and
4. communicating how the business enterprise is addressing human rights impacts.²⁹¹

Both the UN Working Group and the OECD have issued guidance on how the due diligence process can be practically implemented by businesses.²⁹² The Working Group has further underscored the need for enhanced due diligence, or “heightened care” in the due diligence process, in complex operating environments, such as situations of occupation.²⁹³

The initial step of HRDD can be carried out through understanding “the specific impacts on specific people, given a specific context of operations,”²⁹⁴ where enhanced due diligence would entail understanding the details of these elements. Accordingly, key information related to the ‘specific context’ of occupation, such as the legal and administrative environment, and the ‘specific people,’ i.e. the protected population, can provide initial indicators of potential human rights risks surrounding the operational context. These elements may also highlight gross human rights abuses, including war crimes and systematic discrimination, and may also entail possible violations of peremptory norms (fundamental principles)

²⁹¹ U.N. Guiding Principles, *supra* note 1, principles 17-21.

²⁹² See: OECD Due Diligence Guidance for Responsible Business Conduct, OECD, 2018, <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>; The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Working Group, 16 July 2018, A/73/163, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement>;

The Working Group has noted that six elements of due diligence detailed by the OECD fully align with the UNGPs. Companion note I to the Working Group’s 2018 report to the General Assembly (A/73/163), Working Group on Business and Human Rights, p.7.

²⁹³ Working Group Statement, *supra* note 2, at 9-10.

²⁹⁴ U.N. Guiding Principles, *supra* note 1, principle 18 (commentary).

of international law, which should be prioritized in the due diligence process.²⁹⁵

As previously noted, while legal compliance with sanctions may take precedence over a HRDD process and prohibit business activities or relationships, compliance with sanctions does not equate to compliance with the UNGPs. Businesses nonetheless can integrate HRDD into “broader enterprise risk-management systems” which include compliance with sanctions.²⁹⁶

i. “Specific Context”

A business may begin its due diligence by examining the legal and administrative regime in light of an Occupying Power’s international obligations under IHL, IHRL, and other frameworks. Once having a broad overview of the state of the rule of law, businesses should more narrowly consider the laws and policies related to the sector in which they operate or have relationships with. Although not exhaustive, key issues related to the specific context of occupation are addressed below.

Identifying the Occupying Power

As aforementioned, the positions of Russia, Morocco, and Israel towards the territory that they occupy all contravene international law. Accordingly, businesses should not rely solely on the positions of and statements made by the Occupying Power, and should assess the status and administration of the territory to ensure its compliance with international law. In conducting due diligence, businesses can evaluate submissions from Occupying Powers made to international and regional courts, UN treaty bodies, and other mechanisms, to evaluate how the practices of the Occupying Power align with the findings of those institutions and bodies. Even when operating in areas of self-rule by the protected population, businesses must consider that the Occupying Power is the primary duty bearer, and conduct HRDD accordingly.

Annexation / Extension of Domestic Laws to Occupied Territory

An Occupying Power that seeks the permanent retention of the occupied territory through its annexation or implements its domestic laws in that territory is acting

²⁹⁵ The UNGP 24 notes that it may be necessary to prioritize actions, and seek to prevent and mitigate impacts that are the most severe. Peremptory norms of international law include the right to self-determination and the prohibition against threat or use of force to acquire territory. See also: The Corporate Responsibility to Respect Human Rights, An Interpretive Guide, United Nations Office of the High Commissioner for Human Rights, 2012.

²⁹⁶ U.N. Guiding Principles, *supra* note 1, principle 17(commentary).

in violation of international law.²⁹⁷ Businesses should thereby recognize how their business activities or relationships contribute to or are directly linked to adverse human rights impacts, including as related to the right to self-determination. In such instances, businesses should further consider the legality and validity of contracts, licensing, and other transactional relations with the Occupying Power’s administrative and other authorities and with entities operating under its jurisdiction, and how these economic relationships reinforce the occupation or serve to further integrate the occupied territory into that of the occupier.

Businesses should also consider risks related to business relationships within the territory of the Occupying Power and/or State-owned companies, which may be extended to activities in the occupied territory by virtue of the fact that the occupying State treats the territory as part of its domestic jurisdiction. Even though Siemens reportedly included contract provisions that sought to adhere to sanctions, the red flags present- namely the environment of annexation and the warning on energy infrastructure projects specifically, contained in the EU’s restrictive measures- should have alerted Siemens to use extreme caution and consider the heightened risks related to its distribution channels. In conducting due diligence, businesses should examine if restrictions that limit or specify where a product can be used or distributed can be effective when the occupied territory is viewed and treated by the occupying State as an intrinsic part of its territory, and what steps it can take to effectively mitigate or prevent human rights abuses if it cannot control the distribution of its goods.

Sector-specific context

Each industry or sector has risks in its operations and relationships that may be unique to it. Guidance has been developed by the OECD, amongst others, to examine and provide recommendations for businesses in various industries, including agriculture, finance, and extractives, amongst others. While HRDD should be ongoing, businesses can develop and implement consistent and clear baseline policies by assessing risks common to their sector in situations of occupation in light of international law standards.²⁹⁸

²⁹⁷ GCIV, *supra* note 10, art 47.

²⁹⁸ The OECD urges companies to establish “the factual circumstances of its activities and relationships and evaluating those facts against relevant standards provided under national and international law.” OECD Due Diligence Guidance for Responsible Supply Chains, p.13,

As part of a due diligence process, the OECD Guidelines encourage companies to “adopt, and clearly communicate to suppliers and the public, a company policy for the supply chain of minerals originating from conflict-affected and high risks areas”.²⁹⁹ The Working Group Statement also suggests businesses “exercise extreme caution in all business activities and relationships involving acquisition of assets in conflict zones”.³⁰⁰ This issue was evident when OCP and Phosboucraa argued that they had title to the phosphate cargo, and that the mining operations were lawful under Moroccan law, while the South African Court held that “ownership in the phosphate... never lawfully vested” with either company.³⁰¹

Businesses should also assess the heightened risks of adverse impacts that have already been established as related to a specific occupied territory that relates to their sector of operation. For example, Airbnb’s initial decision to delist properties in Israeli settlements was limited to those in the West Bank, exclusive of East Jerusalem. Given the broad consensus on the illegality of settlements and the property regime associated with it, the policy should have covered the West Bank in its entirety, with other operators implementing similar measures.³⁰²

Access to Remedy

When assessing the context of a specific occupation, businesses should also consider whether individuals that have had their human rights impacted by a business activity or relationship have access to domestic remedies. The UN has noted Russia’s nationalization of property in Crimea was “done in disregard of ownership rights and without compensation,” and that amendments to regulatory acts on legislation have “undermined legal certainty and guarantees against

²⁹⁹ Annex I Five-Step Framework for Risk-Based Due Diligence in the Mineral Supply Chain, OECD Due Diligence Guidance for Responsible supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Third Edition, 2016, p.17, <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>

³⁰⁰ Working Group Statement, *supra* note 2, at 10.

³⁰¹ *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV ‘NM Cherry Blossom’ and Others* (15/6/2017), High Court of South Africa, Easter Cape Local Division, Port Elizabeth, Judgment, para. 97, <<http://www.saflii.org/za/cases/ZAECPEHC/2017/31.html>>, *Saharawi Arab Democratic Republic, Polisario Front and NM Shipping SA, et al, High Court of South Africa*, 23 February 2018, para. 3.2, https://wsrw.org/files/dated/2018-02-23/20180223_south_africa_ruling.pdf

³⁰² Israel: Airbnb to End Settlement Rentals, Booking.com, Other Global Tourism Companies Should Follow Suit, Human Rights Watch, 20 November 2018, <https://www.hrw.org/news/2018/11/20/israel-airbnb-end-settlement-rentals>

arbitrariness”.³⁰³ As aforementioned, some property owners have sought remedy through international arbitration.

In other contexts, while a case may move forward, either within the occupied territory itself or as part of the judicial authority of the Occupying Power, the impartiality of the system itself may be a barrier to effective remedy. While this was highlighted in the Zorganika case, such an outcome is not unique. In 2009, for example, Israeli NGO Yesh Din submitted a petition to the Israeli High Court of Justice seeking to put to an end all mining activities in settlements in the West Bank, alleging violations of international law. The Court rejected the petition, in a decision that was widely condemned by human rights NGOs and seen as contrary to IHL,³⁰⁴ since that time Yesh Din has documented an expansion in quarrying activities.³⁰⁵ Notably, Heidelberg has cited the case when responding to criticism of its quarrying operations in the West Bank.³⁰⁶

ii. “Specific People”

As part of due diligence processes, business enterprises should carefully assess human rights impacts on “protected persons” in the occupied territory, including by having meaningful consultations with protected persons that are or may potentially be impacted by business activities and relationships.³⁰⁷ Many of the business enterprises identified in the case studies claimed that local populations were benefiting through the presence of their operations or business relationships, and appeared to not distinguish between the protected population and civilians of the Occupying Power that were unlawfully present in the territory. Such positions are often in line with that of an Occupying Power, and may also entail broad business presumptions regarding the legality of the operating environment and relevant legislation. An approach of including all possible stakeholders rather than the individuals and communities lawfully present that have their human rights impacted may, however, lead to businesses failing to respect human rights

³⁰³ Situation in Crimea, 25 September 2017, *supra* note 51, paras. 170 &173.

³⁰⁴ High Court sanctions looting: Israeli quarries in the West Bank, B’Tselem, 16 January 2012, https://www.btselem.org/settlements/20120116_hcj_ruling_on_quarries_in_wb

³⁰⁵ Great Drain: Israeli quarries in the West Bank: High Court Sanctioned Institutionalized Theft, Yesh Din, 14 September 2017, <https://www.yesh-din.org/en/great-drain-israeli-quarries-west-bank-high-court-sanctioned-institutionalized-theft/>

³⁰⁶ Occupation, Inc., *supra* note 45, Annex VIII: Letter from Heidelberg Cement to Human Rights Watch.

³⁰⁷ U.N. Guiding Principles, *supra* note 1, principle 18.

and IHL, or prevent adverse impacts.³⁰⁸

As previously noted, civilian settlers in the occupied territory are unlawfully present. In each of the contexts mentioned, the Occupying Power has incentivized its own civilian population to relocate to the occupied territory. The prohibition against such transfer was included in the Fourth Geneva Convention in order to prevent transfer for “political and racial reasons” and colonization, which worsened “the economic situation of the native population”.³⁰⁹ Accordingly, when conducting enhanced due diligence, businesses must distinguish between the occupied and settler populations. Businesses should consider whether their operations or relationships provide the necessary equipment, services, or financing which enable and facilitate the presence of settlers. Furthermore, activities that use the natural resources of an occupied or non-self-governing territory must be in line with the “interests and wishes of the people” of the territory, and must conform to provisions regarding the administration of natural resources in occupied territory under international humanitarian law.³¹⁰ These issues, as well as the “decisive nature of the requirement of consent, *over and above the question whether the agreement benefits the non-self-governing Saharawi people,*” were addressed in a pending complaint brought before Ireland’s OECD NCP on Irish multinational San Leon Energy plc for its hydrocarbon exploration activities in Western Sahara.³¹¹

308 OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2 February 2017, p.19-20.

309 Pictet Commentary IV, *supra* note 11, art. 49.

310 Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, 12 February 2002, S/2002/161 ; Paragraph 1 of UNGA Resolution 50/33 reaffirms the inalienable right of the peoples of colonial and Non-Self-Governing Territories to self-determination and independence and to the enjoyment of the natural resources of their Territories, as well as their right to dispose of those resources in their best interests.” General Assembly Resolution 50/33: Activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under colonial domination, 9 February 1996, available at <http://www.un.org/documents/ga/res/50/ares50-33.htm>

311 San Leon’s Energy Compliance with the OECD Guidelines for Multinational Enterprises in its Operations in Western Sahara, Global Legal Action Network (GLAN), 24 October 2018, p.19

Nestlé

Nestlé became the first multinational food and beverage company to invest in establishing a full operation in the Occupied Palestinian Territory, outside of Israeli settlements and in areas under Palestinian administration, in 1997.³¹² The company decided to open operations in the OPT after the Oslo Agreement, when they deemed conditions to be suitable.³¹³ Starting as a joint venture with a product distributor in Bethlehem, the company later established its headquarters there.³¹⁴ The company employs approximately 40 individuals, and has additional facilities in Nablus. Both Bethlehem and Nablus are considered “Area A” of the West Bank, and under the administration of the Palestinian Authority. Nestlé’s presence in these cities therefore does not support Israel’s settlement enterprise. However, given that these cities remain under Israeli occupation, according to a Nestlé representative, risks “differ from one city to another depending on the local situation”.³¹⁵

Because all Nestlé products are imported, and not manufactured within the OPT, Nestlé must abide by both Israeli and Palestinian laws for their operations.³¹⁶ The company stated that the import of products “are compliant with the Israeli Ministry of Health licensing requirements and regulations; compliant with the Palestinian Authorities regulation as it is sold in Palestine and follow Nestlé rules and guidelines in marketing and sales (do’s and don’ts)”.³¹⁷

Nestlé has experienced delays at ports of entry in Israel, and unlike companies based in Israel, it cannot provide a guarantee for the release of goods. The company faces further challenges when the ‘Container’ checkpoint is closed, due to the checkpoint’s location on a major road that connects the southern West Bank to the central and northern West Bank.³¹⁸ However, Nestlé also affirmed that given their 21-years of operations in the OPT, they can “plan accordingly to mitigate any delays or challenges experienced with the distribution of goods”.³¹⁹

312 Nestlé in Palestine Garners International Environmental, Health & Safety Certifications for its Warehouse and Offices Operations, 4 August 2015, Nestlé Press Release, available at <https://www.nestle-me.com/en/media/pressreleases/nestle-palestine-iso-certification>

313 Email response from Nestlé on 22 July 2018, conveying statements from Rainer Mueller, Communications Director at Nestlé Middle East.

314 Id.

315 Id.

316 Interview with Nestlé’s General Business Manager, Anton Hazboun, in Bethlehem, OPT on 1 August 2018 [hereinafter Hazboun interview].

317 Email communication, 18 March 2019, Anton Hazboun, General Business Manager of Nestlé in Palestine [hereinafter Hazboun email].

318 Hazboun interview, *supra* note 316.

319 Hazboun email, *supra* note 317..

In operating in Area A, and with the consent of local Palestinian authorities, Nestlé provides an important example of a transnational business whose presence does not benefit from nor contribute to discriminatory administrative practices of the Occupying Power. Nevertheless, a company located in the territory administered by the protected population must still conduct HRDD.

Vulnerable and Marginalized Groups

The UNGPs call on both States and businesses to pay particular attention to groups and populations that may be at a heightened risk of vulnerability or marginalization,³²⁰ including those at risk due to “entrenched patterns of severe discrimination”.³²¹ This is reaffirmed by the Working Group Statement in relation to “enhanced” due diligence.³²² While women, children, minorities, and other groups may face increased vulnerability and marginalization within the protected population, it is important to note that the law of occupation recognizes the “tense and vulnerable position”³²³ of the protected population in its entirety, and seeks to ensure the protection of their rights.³²⁴ As highlighted by the three situations of occupation addressed in the report, this position of vulnerability and marginalization may be exacerbated by the policies and measures imposed by the Occupying Power in its administration of the territory. Notably, the vulnerability of the protected population as a whole may increase in situations of prolonged occupation or annexation.³²⁵

³²⁰ See: UNGP General Principles, UNGP 18 Commentary, UNGP 27 Commentary

³²¹ The Corporate Responsibility to Respect Human Rights, An Interpretive Guide, United Nations Office of the High Commission for Human Rights, 2012.

³²² Working Group Statement, *supra* note 2, at 10.

³²³ The Law of Armed Conflict, Belligerent Occupation, p.10, available at https://www.icrc.org/eng/assets/files/other/law9_final.pdf

³²⁴ See for example, Article 8, 27 of the Fourth Geneva Convention, and Hague Regulations, *supra* note 7, art. 46.

³²⁵ The UN Country Team in the Occupied Palestinian Territory noted in 2016 “After nearly 50 years of occupation every Palestinian living in the...(OPT) is vulnerable to some degree.” United Nations Country Team Occupied Palestinian Territory, Common Country Analysis, p.11, available at https://eeas.europa.eu/sites/eeas/files/common_country_analysis.pdf

iii. “Specific Impacts”

Central to an HRDD process is an assessment of a business activity or relationship’s impact on human rights, including “all internationally recognized human rights as a reference point,”³²⁶ where priority should be given to addressing the most severe impacts on the protected population.³²⁷ While a business may have a broad idea of the type of potential human rights impacts its sectoral activities may implicate, such as land and water rights in the extractive industry, these impacts may be heightened in situations of occupation, including due to policies and practices instituted by the Occupying Power, as well as a result of a broader climate of impunity.

Special attention should also be paid to how an Occupying Power’s administration of a territory and the economic structures or relationships it creates may impact the individual and collective rights of the population in the occupied territory. In situations where an Occupying Power transfers its own civilian population into the occupied territory, business that facilitates such transfer through construction, services, or other means, or with relationships linked to it, may be contributing to an environment of systemic discrimination and to the displacement of the protected population. More broadly, and as highlighted in Section II, business activities and relationships linked to an unjustly administered occupation may have particular consequences on the right to self-determination and all other rights flowing from it. An internal report by the UN noted, for example, that the denial of “Sahrawis’ right to self-determination is the primary cause of all other human rights violations in the country”.³²⁸

Business should therefore fully and objectively assess their ‘specific impacts’ on human rights in an occupied territory, rather than seek to highlight the alleged ‘positive’ aspects of their presence or ties to occupied territories. The Working Group has noted the conflation of “negative and positive impacts” which “fail to stress the importance of first preventing and addressing adverse human rights impacts (‘do no harm’) before jumping to other efforts of ‘doing good’; these are two separate concepts and the latter does not absolve a failure to comply

³²⁶ U.N. Guiding Principles, *supra* note 1, principle 18 and commentary.

³²⁷ U.N. Guiding Principles, *supra* note 1, principle 24.

³²⁸ Occupied Country, Displaced People, Norwegian Refugee Council, 2014, p.15 <https://www.nrc.no/globalassets/pdf/reports/occupied-country---displaced-people.pdf>

with the former”.³²⁹ This ‘conflation’ was highlighted by Ballance in regards to the complaint put forth in South Africa, where they stated they have seen “first-hand the economic development, community support, and healthcare initiatives that OCP Group has in the area,”³³⁰ as well as in Heidelberg’s response on its operations in Western Sahara.

Occupying Powers have also made similar statements.³³¹ However, employment of the local protected population or other initiatives that may include or benefit them, do not countermand the adverse impacts created by a business’s operations in a broader, unlawful operating environment.³³²

iv. Addressing Human Rights Risks

Following an assessment, businesses should “seek ways to honour the principles of internationally recognized human rights,”³³³ including by taking the appropriate steps to prevent and mitigate actual and potential impacts dependent upon the manner in which they cause or contribute to abuses and the extent of their leverage over the actors perpetrating them.³³⁴ Leverage can be exercised and increased by: including relevant provisions in contracts; notifying partners early on of the possibility of termination should adverse impacts occur and go unaddressed; and through capacity-building.³³⁵ If a business is unable to prevent or mitigate adverse impacts and cannot increase its leverage to do so, it should assess the severity of the human rights risks and impacts, and consider terminating its operations or

³²⁹ Companion Note II to the Working Group’s 2018 Report to the General Assembly (A/73/163), Working Group on Business and Human Rights, Version 16 October 2018, p.6, <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf>

³³⁰ Balance welcomes resolution of cargo dispute, 10 May 2018, Balance, <https://ballance.co.nz/News/NewsPage/Ballance-welcomes-resolution-of-cargo-dispute>

³³¹ Israeli-Palestinian Economic Relations, Israel Ministry of Foreign Affairs, 22 November 1998, <<http://www.israel.org/mfa/foreignpolicy/peace/guide/pages/israeli-palestinian%20economic%20relations.aspx>>

³³² See for example Human Rights Watch discussion on Palestinian workers in Israeli settlements in: Occupation, Inc., *supra* note 45.

³³³ U.N. Guiding Principles, *supra* note 1, principle 23(b).

³³⁴ U.N. Guiding Principles, *supra* note 1, principle 19.

³³⁵ The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 16 July 2018, A/73/163, para. 54; Doing Business with Respect for Human Rights, A Guidance Tool for Companies, Shift, Global Compact Network Netherlands, & Oxfam, 2016, https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf

the business relationship where appropriate.³³⁶ Prioritizing the principle of “do no harm” raises important questions about the confines of mitigation of adverse impacts when operating in occupied territory.

Further, while transnational businesses may operate in occupied territory without adverse impacts, there may also be certain sectors or circumstances where businesses cannot avoid committing or contributing to severe human rights abuses. For example, because of the international consensus on the illegality of Israeli settlements, and the “immitigability” of the “systemic and pervasive nature of the negative human rights impact caused by them,” the UN OHCHR affirmed it would be “difficult to imagine a scenario” where businesses could engage in specified activities related to the establishment, maintenance, and growth of settlements “in a way that is consistent with the Guiding Principles and international law”.³³⁷ Beyond ceasing operations, businesses “should provide for or cooperate in” remediation in line with Pillar III of the UNGPs in cases of actual adverse impacts.

B. Risks to Businesses

In addition to the heightened risk of causing, contributing, and being directly linked to adverse human rights impacts, businesses operating in occupied territories can be exposed to a range of risks, including legal liability, financial and investor-related risks, reputational risks, and commercial risks, amongst others. Many of these risks are directly related to the human rights impacts of operations and activities in occupied territory, underlining the necessity of an enhanced HRDD process.

i. Legal Risks

Representatives and officials of business enterprises may be held individually criminally liable if they commit or assist in the commission of grave breaches of international humanitarian law.³³⁸ The Working Group has also noted the use of tort law, competition and consumer law (e.g. for misleading and deceptive conduct), and advertising law, amongst other avenues for remedy in cases

³³⁶ U.N. Guiding Principles, *supra* note 1, principle 19 (commentary); Working Group Statement, *supra* note 2, at 10.

³³⁷ Database Report, paras. 40-41

³³⁸ Business and International Humanitarian Law, ICRC, p.15

related to corporate violations of human rights.³³⁹ Advisories issued by EU states, for example, note the legal risks businesses may face as a result of “financial transactions, investments, purchases, acquisitions and other economic activities” in or benefiting Israeli settlements, including disputes over title.³⁴⁰

As in other situations of conflict, stakeholders and victims of human rights abuses that are prevented from having access to domestic remedies often seek recourse in third States, including home States, via universal jurisdiction laws and other relevant legislation. The Polisario’s case in South Africa demonstrated a successful challenge to the commercial activities of a company in occupied territory brought in the jurisdiction of a third state. Complaints related to business activities in the OPT have also been brought in the home States of companies, including in the United States and the Netherlands.³⁴¹

ii. Financial Risks, including Investor-related Risks

Financial risks may arise for businesses operating in conflict-affected areas due to political instability, competing claims over resources, and other uncertainties. Such risks may implicate a company’s entire supply chain. Following the South African court decision regarding ownership of the phosphate shipment, Ballance stated that because they did not own the cargo, the cost fell on OCP.³⁴² The company CEO noted that the cost of the impounded ship was covered by insurance at a rate of \$10,000 per day.³⁴³ Meanwhile, the detention of the ship for a year was estimated to have cost the chartering company, Furness Withy, \$3.5 million.³⁴⁴

³³⁹ Companion note I to the Working Group’s 2018 report to the General Assembly, (A/73/163), p.5, <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote1DiligenceReport.pdf>

³⁴⁰ EU member state business advisories on Israeli settlements, ECFR, 2 November 2016, https://www.ecfr.eu/article/eu_member_state_business_advisories_on_israel_settlements

³⁴¹ *Corrie et al. v. Caterpillar*, Center for Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/corrie-et-al-v-caterpillar>; Corporate Complicity, Access to Justice and the International Legal Framework for Corporate Accountability, International Commission of Jurists, 31 May, 2013, p.4, https://www.icj.org/wp-content/uploads/2013/10/Report-Corporate-Complicity-Legal-SeminarFinalsmallpdf.com_1.pdf

³⁴² Moroccan fertilizer agency gives up court case to win back NZ phosphate cargo, Stuff, 14 July 2017, <https://www.stuff.co.nz/business/farming/94737821/moroccan-fertiliser-agency-gives-up-court-case-to-win-back-nz-phosphate-cargo>

³⁴³ Ballance still in shipshape, Farmers Weekly, 24 July 2017, <<https://farmersweekly.co.nz/section/other-sectors/view/ballance-still-in-shipshape>>

³⁴⁴ Maersk drops transport of conflict rock from occupied Western Sahara, 23 June 2018, <https://www.wsrw.org/a105x4189>

Investment funds have increasingly demonstrated a willingness to recognize these and other challenges present in conflict-affected areas, and divest from or screen companies that are seen to be directly or indirectly complicit in human rights abuses.³⁴⁵ As a result, investors can play a key role in encouraging businesses to incorporate a robust human rights due diligence process that manages risks and increases investor confidence.³⁴⁶

A variety of investment institutions have recognized the risks involved with operating in occupied territories. For example, GES, an investment services company in Europe (and acquired by Sustainalytics in 2019) engaged with companies operating in Western Sahara for over a decade, and encouraged them to address human rights issues in the territory.³⁴⁷ As a result of GES’s work, some investors decided to not invest in businesses in the region, while companies ceased or reduced their involvement, and others stated their intention to review their policies.³⁴⁸ Religious institutions and other pension funds have also divested from companies linked to Western Sahara and Israeli settlements.³⁴⁹ Notably, the Friends Fiduciary updated their guidelines in 2018 to “avoid investing in companies that provide products or services that materially contribute to the maintenance and expansion of occupied territories and conflict zones”.³⁵⁰ This latter policy highlights that as the understanding of the business risks present in occupied

³⁴⁵ Clarifying the Concepts of “Sphere of Influence” and “Complicity,” Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, 15 May 2008, A/HRC/8/16, para. 63-67.

³⁴⁶ The Working Group has called on businesses to use human rights due diligence as a tool for understanding impacts and contributing to sustainable development. The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 15 July 2018, A/73/163, para. 86.

³⁴⁷ Responsible Business Advancing Peace: Examples from Companies, Investors, & Global Compact Local Networks, A Joint UN Global Compact-PRI Publication, p.93, <https://www.unpri.org/download?ac=4007>

³⁴⁸ Id. at p.94.

³⁴⁹ See for example: Norwegian sovereign fund divests companies over Western Sahara, IPE, 28 June 2016, <https://www.ipe.com/news/esg/norwegian-sovereign-fund-divests-companies-over-western-sahara/10013990.article>; United Methodist pension fund divestment of Israeli banks, 14 January 2016, Palestine Israel Ecumenical Forum, <https://pief.oikoumene.org/en/news-events/news/united-methodist-pension-fund-exclusion-and-divestment-of-israeli-banks>; Presbyterian Church votes to divest holdings to sanction Israel, The Guardian, 21 June 2014, <https://www.theguardian.com/world/2014/jun/21/presbyterian-church-votes-divest-holdings-to-sanction-israel>

³⁵⁰ Investment Guidelines, Friends Fiduciary, March 2018, p.2.

territories develops, so too should coordination and action by investors.³⁵¹

iii. Risk of Losing Public Contracts and Access to Public Support

As highlighted by the UNGPs, States can promote and ensure business respect for human rights by “denying access to public support and services” for businesses that refuse to cooperate in addressing a situation of gross human rights abuse, as well as through their public contracts for goods and services.³⁵²

While States have yet to comprehensively ensure the protection of human rights through their procurement,³⁵³ local governments have passed motions that exclude business enterprises that violate human rights from public contracts. Local councils, primarily in Europe, have also passed resolutions in regards to Israel’s occupation of Palestinian territory. For example, in 2018, Dublin’s City Council passed a motion to end contracts with Hewlett Packard due to its links to Israel’s occupation;³⁵⁴ in 2017, Sint-Jans-Molenbeek in Belgium adopted a motion that prohibits dealings with companies and Israeli institutions linked to the occupation.³⁵⁵

iv. Reputational Risks

Mere presence in a situation associated with widespread human rights abuses may lead to reputational risks for a company.³⁵⁶ Such risks are well-recognized in the context of the OPT, where some EU states, including the Czech Republic, Denmark, and France, have warned of reputational risks related to business

³⁵¹ See para. 90(e) on investor efforts more generally. The Working Group has called on businesses to use human rights due diligence as a tool for understanding impacts and contributing to sustainable development. The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 15 July 2018, A/73/163.

³⁵² U.N. Guiding Principles, *supra* note 1, principles 6, 7.

³⁵³ A 2016 study of 20 jurisdictions found that States are generally not fulfilling their duty. Public Procurement and Human Rights: A Survey of Twenty Jurisdictions, International Learning Lab on Public Procurement and Human Rights, July 2016, <https://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf>

³⁵⁴ Dublin City Council vote to support economic sanctions against Israel, Irish Examiner, 10 April 2018, <https://www.irishexaminer.com/breakingnews/ireland/dublin-city-council-vote-to-support-economic-sanctions-against-israel-836549.html>

³⁵⁵ Belgian municipality boycotts companies promoting Israeli occupation, PressTV, 29 April 2017, <https://www.presstv.com/Detail/2017/04/29/519852/Belgium-Molenbeek-Israeli-occupation-Palestinian-territories>

³⁵⁶ Clarifying the Concepts of “Sphere of Influence” and “Complicity,” Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, 15 May 2008, A/HRC/8/16, para. 70

dealings with Israeli settlements.³⁵⁷ Guidance issued by the British government, for example, warns “citizens and businesses... of the potential reputational implications of involvement in economic and financial activities in settlements, as well as possible abuses of the rights of individuals”.³⁵⁸

Lack of action and/or a failure to adopt corrective measures by businesses themselves or as a result of state inaction, coupled with a presumption of complicity in serious abuses, has resulted in civil society campaigns against certain companies. While G4S reported to take numerous steps as part of its due diligence process, including: commissioning legal reviews, conducting a senior management delegation to the region, seeking advice from socially responsible investment groups, alongside other independent sources, and engaging with media, NGOs, and customers, it also continued to affirm that its contracts related to the OPT were “not discriminatory or controversial”.³⁵⁹ Irrespective of its position, criticism of and international campaigns against the company continue.³⁶⁰

v. Commercial Risks

Business may face commercial risks, including those related to transparency in supply chains, when operating in occupied territory. The agricultural sector and in particular the exports of produce from occupied territories highlight these risks. As noted, Azura-controlled companies produce, package, and export products made in Western Sahara to France; this has led to the mislabeling of products in European grocery stores. These commercial risks were noted by European parliamentarians in 2012, where Azura’s use of France as a main transit point for its products and whether imports more generally met Europe’s food safety,

³⁵⁷ EU Member State Business Advisories on Israeli Settlements, European Council on Foreign Relations, 2 November 2016, https://www.ecfr.eu/article/eu_member_state_business_advisories_on_israel_settlements

³⁵⁸ Overseas Business Risk- The Occupied Palestinian Territory, Foreign & Commonwealth Office, 8 August 2018, <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories>

³⁵⁹ G4S Update - April 2012, G4S, https://www.business-humanrights.org/sites/default/files/media/documents/company_responses/g4s-israel-apr-24-2012.pdf

³⁶⁰ As a result of its past presence in the OPT and the company’s continued interest in a police training facility in Israel, UN Women became the fifth UN agency in Jordan to end its contract with the company in 2017. UN Women becomes 5th UN agency in Jordan to drop contracts with G4S, The Jordan Times, 3 October 2017, <http://www.jordantimes.com/news/local/un-women-becomes-5th-un-agency-jordan-drop-contracts-g4s>

health, and other standards was discussed.³⁶¹

Products originating from Israeli settlements in the OPT trigger similar risks, including but not limited to regulatory standards of the importing state and mislabeling of origin. Zorganika is listed in the United States Department of Agriculture (USDA) Organic Integrity Database. In the Database, Zorganika's certified products are fresh and dried dates, and its location is listed as "Moshav Hamra," Jordan Valley, Israel.³⁶² The certifier is listed as Control Union Certifications (CUC), headquartered in the Netherlands.³⁶³ According to the company's website, CUC does not have an office in Israel or Palestine.³⁶⁴ The USDA notes that the US recognition agreement with Israel provides "foreign certifying agents" authorization to certify products produced in Israel.³⁶⁵ Given this limitation, certification of Zorganika products may be considered invalid since the company is not directly subject to the jurisdiction of the certifying Israeli line ministry, since it is located in an illegal settlement in the West Bank where the application of Israeli domestic laws cannot be recognized as lawful by other states as a matter of international law.³⁶⁶ The validity of such certificates is a real concern for the authorities of third States who rely on Israel's practice to ensure that products placed on the market in their jurisdiction comply with the organic standard, and is thus a further risk faced by foreign companies in addition to the accurate origin labeling of such products. As will be discussed below, these risks to consumers were emphasized recently, in an opinion by the Court of Justice of the European Union.

³⁶¹ Debates, European Parliament, 14 February 2012, Strasbourg, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20120214+ITEM-013+DOC+XML+V0//EN>

³⁶² Zorganika, Operation Profile (1780803698) updated on 9 January 2020, USDA Organic Integrity Database, <https://organic.ams.usda.gov/Integrity/CP/OPP.aspx?cid=21&nopid=1780803698&ret=%252fIntegrity%252fDefault.aspx&retName=Home>

³⁶³ [CUC] Control Union Certifications Certifier Profile, USDA Organic Integrity Database, <<https://organic.ams.usda.gov/Integrity/CP/CertifierProfilePage.aspx?cid=21&ret=%252fIntegrity%252fCertifiers%252fCertifiersLocationsSearchPage.aspx&retName=Certifier%2bLocator>>

³⁶⁴ Find an Office, Control Union Certifications, <https://certifications.controlunion.com/en/contact-us/find-an-office?activity=Certifications&country=Palestine>

³⁶⁵ International Trade Policies: Israel, USDA, <https://www.ams.usda.gov/services/organic-certification/international-trade/Israel>

³⁶⁶ Notably, US Secretary of State Mike Pompeo affirmed in November 2019 "the United States Government is expressing no view on the legal status of any individual settlement." Full text of Pompeo's statement on settlements, Times of Israel 19 November 2019, <https://www.timesofisrael.com/full-text-of-pompeos-statement-on-settlements/>

Alongside measures taken by businesses themselves, actions taken by Occupying Powers may also undermine the transparency of supply chains and result in the application of incorrect tariff rates. For example, in regards to produce entering the EU that originates from Israeli settlements, notes taken during a 2017 meeting between Israel's Ministry of Economy and EU representatives indicated that it was nearly impossible for the EU to effectively differentiate between Israel and Israeli settlements due to Israeli domestic practices.³⁶⁷

Businesses with operations or relationships that extend to occupied territories should seek to increase transparency by conveying "internally and externally" the steps that they are taking to ensure the prevention and mitigation of human rights risks, including in their supply chains.³⁶⁸ Business enterprises should, for example, trace and disclose supplier lists. In doing so, businesses can gain a greater awareness of any links they may have to occupied territories, and develop appropriate monitoring and other mechanisms to ensure that their activities or relationships are not contributing to or benefiting from adverse human rights impacts.

³⁶⁷ Goods from Israel settlements granted preferential EU trade deals, Middle East Monitor, 28 September 2017, available at: <https://www.middleeastmonitor.com/20170928-goods-from-israel-settlements-granted-preferential-eu-trade-deals/>; See also 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, p.5.

³⁶⁸ Respecting Human Rights Through Global Supply Chains, Shift Workshop Report No. 2, October 2012, p.16-18, https://www.shiftproject.org/media/resources/docs/Shift_UNGPsupplychain2012.pdf

V ROLE OF STATES

As recognized by the UNGPs and highlighted in the case studies, the “host State” and in cases of occupation, an Occupying Power, may be unable or unwilling to protect human rights, or may be contributing to human rights violations in areas which they occupy or are under their *de facto* jurisdiction. An Occupying Power, alongside other interested parties, may falsely depict attempted compliance with the UNGPs and international standards as a political issue in order to dissuade challenges to its occupation, as demonstrated by the reaction following Airbnb’s initial delisting of settlement properties. In this environment of high-risks and political pressure, home States of transnational business enterprises have an important role to play in supporting and ensuring businesses domiciled in their territory respect human rights throughout their areas of operation, including in situations of occupation. A State’s obligation to ensure respect for IHRL comes in addition to the obligations of all High Contracting Parties to the Geneva Conventions, including third States, to respect and ensure respect for the Conventions in situations of armed conflict, including by acting with due diligence.³⁶⁹

As a baseline, States should ensure that their position on the status of a territory as occupied is in line with international law. This issue has been repeatedly highlighted as a result of shifts in United States policies, including recognition of Israeli sovereignty over the occupied Syrian Golan in March 2019 and reported negotiations between Israel and the US, which would see the US recognize Moroccan sovereignty over Western Sahara.³⁷⁰ Although largely condemned by other States, the US position may have implications on the likelihood of developing effective multilateral initiatives towards all occupied territories, including measures related to business and human rights.

Following the recognition of a territory as occupied, States should review and adopt the necessary internal policies and enforcement measures to ensure respect for their obligations under international law with a view to ensuring business respect for human rights in such contexts. The UNGPs detail steps home States can take to have early engagement with businesses on how to assess and address risks of business involvement in gross human rights abuses.³⁷¹ Measures taken by States in relation to areas of conflict should be “enhanced and context-specific”.³⁷² Given the prolonged nature of certain contexts of occupation, such as the Western Sahara and the OPT, and the constant, widespread and systematic nature of human rights abuses in each territory, States should consider the utility of broad guidance to businesses and instead move towards more proactive measures. This may include establishing civil, administrative or criminal liability, or taking action as a result of non-cooperation, such as by denying access to public contracts, support, and services.³⁷³

In view of the additional risks that extend to home State consumers, investors, and other stakeholders, home States should also “foster cooperation among” and build the capacity of government agencies, foreign and trade ministries, and their embassies, on issues related to IHL and other legal frameworks applicable to occupied territory.³⁷⁴ The UN Working Group has noted, for example, the use of export and import restrictions by States as a method to ensure corporate respect for human rights.³⁷⁵ Such measures have been especially prominent in relation to “trade in conflict minerals, illegal logging and conflict timber” and other areas “associated with higher risks of human rights abuses”.³⁷⁶ While the extension of such measures to occupied territories has generally been limited, a pending legislative initiative in Ireland seeks to use import restrictions to ensure State and business respect for human rights and international law.

³⁷¹ U.N. Guiding Principles, *supra* note 1, principles 2, 7.

³⁷² Guidance on National Action Plans on Business and Human Rights, UN Working Group on Business and Human Rights, p.26.

³⁷³ U.N. Guiding Principles, *supra* note 1, principles 6, 7, and commentaries.

³⁷⁴ U.N. Guiding Principles, *supra* note 1, principle 7 (commentary).

³⁷⁵ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 2 May 2018, A/HRC/38/48, para. 85

³⁷⁶ *Id.* at para. 90

³⁶⁹ Common Article 1, Geneva Conventions. *See also* Common Article 1 “establishes this standard with regard to private actors if the latter find themselves under the jurisdiction of a State, or with regard to breaches of IHL by States and non-State actors abroad whose conduct could be influenced by a third State.” Expert Opinion on Third States’ Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions, Dr. Théo Boutruche and Professor Marco Sassòli, p.14-15.

³⁷⁰ Israel pushes US to recognize Moroccan sovereignty in Western Sahara – report, Jerusalem Post, 5 February 2020, <https://www.jpost.com/Middle-East/Israel-pushes-US-to-recognize-Moroccan-sovereignty-in-Western-Sahara-report-616587>

The Control of Economic Activity (Occupied Territories) Bill seeks to uphold Ireland’s obligations under the Fourth Geneva Convention and customary international law, by making it an offense to import or sell settlement goods, provide services to settlements, or extract resources from an occupied territory in specific circumstances.³⁷⁷ Soon after passing detailed scrutiny in the Select Committee on Foreign Affairs and Trade and Defence on 12 December 2019, a general election was called in Ireland. Following the election and resumption of the Dáil Éireann (Irish parliament), the Bill will return to this Committee for amendments and then continue to Dáil Éireann, for a final vote in 2020.

States and multilateral institutions have otherwise implemented a diverse range of measures and policies across different situations of occupation. As previously discussed, following the annexation of Crimea, the European Union (EU) moved quickly to issue restrictive measures against Russia related to trade, investment, and the supply of services in accordance with the EU’s non-recognition policy.³⁷⁸ The measures have largely proved effective in deterring multinational businesses from operating within the identified sectors in Crimea.

In comparison, in 2015, the European Commission issued an “Interpretative Notice” directing that where indication of origin was mandatory, products originating from Israeli settlements in the West Bank or Golan must be designated as such.³⁷⁹ The objective of the Notice was meant to provide clarity on existing EU legislation, as well as to ensure respect for EU “positions and commitments in conformity with international law on the non-recognition... of Israel’s sovereignty” over the OPT.³⁸⁰ Importantly, the “Interpretative Notice” fell short of meeting State obligations under international law, which according to Amnesty International,

amongst others, required the banning of settlement products.³⁸¹ Nevertheless, the effort has not led to greater cohesion or implementation amongst EU States. For example, a report by the European Middle East Project found that only 10 percent of settlement wines from the West Bank or Syrian Golan on sale in the EU were correctly or partially correctly labeled as such.³⁸²

This finding, however, came as the Court of Justice of the European Union (CJEU) held on 12 November 2019 that foodstuffs originating from the territories occupied by Israel, and further, products produced in Israeli settlements must be indicated as such.³⁸³ The Court further held “the omission of that indication... might mislead consumers,” and noted that under EU law, consumers must be provided with information to make informed choices including as related to “ethical considerations and considerations relating to the observance of international law”.³⁸⁴

While each situation of occupation is unique, by establishing baseline policies grounded in international law, third States can develop consistent policies that serve to protect human rights, effectively regulate their corporate nationals’ activities, and demonstrate a universal commitment to respecting human rights. States should also adopt, where appropriate, measures that ensure non-recognition in order to further human rights protection, including in the context of trade and other cooperation agreements.³⁸⁵ It may also be necessary to consider the impact of such measures and policies on the implementation of the UNGPs. By maintaining inconsistent policies towards contexts of occupation and annexation, third States send businesses’ conflicting messages that may inadvertently serve

381 Ban Israeli Settlement Goods Q & A, Amnesty International, p.3; Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law, Al-Haq, 2013, http://www.alhaq.org/cached_uploads/download/alhaq_files/publications/Feasting-on-the-occupation.pdf

382 Passive enforcement, Origin of indication of Israeli settlement wines on sale in the EU, 12 November 2019 (advanced copy), European Middle East Project, p.1

383 Foodstuffs originating in the territories occupied by the State of Israel must bear the indication of their territory of origin, accompanied, where those foodstuffs come from an Israeli settlement within that territory, by the indication of that provenance, Press Release No 140/19, Court of Justice of the European Union, 12 November 2019, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190140en.pdf>

384 Id.

385 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276(1970), Advisory Opinion of 21 June 1971, International Court of Justice, para. 124; Responsibility of States for Internationally Wrongful Acts, Article 41(2), 2001, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

377 Control of Economic Activity (Occupied Territories) Bill 2018 (Bill 6 of 2018), Tithe an Oireachtais Houses of Oireachtas, available at <https://www.oireachtas.ie/en/bills/bill/2018/6/?highlight%5B0%5D=occupied&highlight%5B1%5D=territories&highlight%5B2%5D=bill>

378 EU restrictive measures in response to the crisis in Ukraine, Council of the European Union, <https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>

379 Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, European Commission, 11 November 2015, para. 5-10, http://www.eeas.europa.eu/archives/delegations/israel/documents/news/20151111_interpretative_notice_indication_of_origin_of_goods_en.pdf

380 Id. at para. 2.

to condone operations and relationships that cause, contribute or are linked to adverse human rights impacts.

VI CONCLUSION AND RECOMMENDATIONS

Businesses face a unique set of risks and challenges when operating in situations of occupation. Foremost is the heightened risk of contributing to gross human rights abuses, which necessitates ongoing, enhanced human rights due diligence. Risks of human rights abuse may also be linked to the manner in which the Occupying Power administers the territory. Accordingly, when conducting human rights due diligence, businesses should account for the different international laws applicable to occupied territories when assessing the Occupying Power's administration of the territory, and within this context, determine how their business operations and relationships may impact the protected population.

Given the complexity of situations of occupation, home States can play an important role in ensuring that businesses respect human rights and understand the legal, financial, reputational, and other risks present. More broadly, third States can ensure that their obligations are upheld by having coherent policies on occupied territories grounded in international law.

The occupations of Western Sahara, Crimea, and Palestinian territory are not identical. Irrespective of their differences, including the length of the occupations and the manner in which the international community has reacted to them, lessons across contexts can be drawn by businesses and States seeking to fully implement the UNGPs and universally respect human rights.

In conducting enhanced human rights due diligence, businesses should:

1. Determine whether or not the operational context is one of occupation, and consider whether the occupied territory, in part or in its entirety, has been subject to annexation through law or practice or is otherwise being retained by the occupying state in violation of: the international laws on self-determination and the use of force, and the intransgressible rules of IHL.
2. Determine whether the Occupying Power's position in regards to the occupied territory (i.e. whether it considers itself as Occupying Power), alongside the laws, policies, and practices that it applies to the territory, are in line with its obligations under international law. In doing so, businesses should consider relevant statements by UN treaty bodies, resolutions by

the UN Security Council and UN General Assembly, opinions by the ICJ, and human rights courts, amongst other sources.

3. Assess whether the administration of the occupied territory is in line with the requirement that occupation be temporary and evaluate the state of the rule of law in the territory.
4. Identify the protected population, and consider how business operations or relationships may cause, contribute, or be directly linked to adverse impacts on their individual and collective rights, including by assessing the economic relationships and structures within the Occupying Power's administration of the territory.
5. Assess whether any potential benefit to the protected population is predicated on a violation of law which adversely impacts the protected population's rights, including by considering:
 - a. if land and natural resources will be used by the business, and the accessibility and control over such resources by the protected population;
 - b. the administration of land and resources by the Occupying Power; and
 - c. the impact of the occupation on the right to development.
6. Evaluate relationships with State-owned companies of the Occupying Power, including by assessing whether contract provisions that limit the territorial scope of operations or distribution channels can prevent or mitigate adverse human rights impacts.
7. Publicly communicate all measures taken to mitigate adverse impacts.
8. Cease operations and relationships should adverse human rights impacts continue.

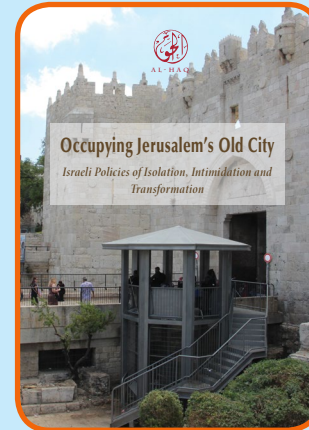
In order to uphold obligations under international law and ensure business respect for human rights, home States should:

1. Examine current unilateral and multilateral policies related to business operations in contexts of occupation, and:
 - a. Assess the impact of such policies on protecting and respecting the human rights of the protected population;
 - b. Determine whether the policies are in line with State obligations

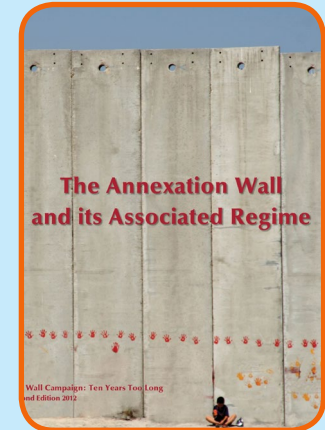
under international law; and

- c. Evaluate whether the policies are consistent with each other.
2. Where such policies do not meet State obligations under international law, home States should identify "red lines" in which consistent actions across contexts can be developed, including non-recognition of territorial acquisition through threat of or use of force.
3. Develop guidance on the risks of conducting business in occupied territory.
4. Design appropriate responses to ensure accountability for businesses who do not respect human rights, ranging from exclusion from public contracts to civil, administrative or criminal liability, in line with the severity of the impact.
5. Ensure that relevant state agencies, embassies, and other government authorities located domestically and abroad understand and implement relevant policies related to business operations, including as related to labeling and other supply chain risks.
6. Update National Action Plans to address situations of occupation.
7. Ensure that legal obligations, including those reflected in the UNGPs, are equally upheld and consistently implemented across different contexts of occupation.

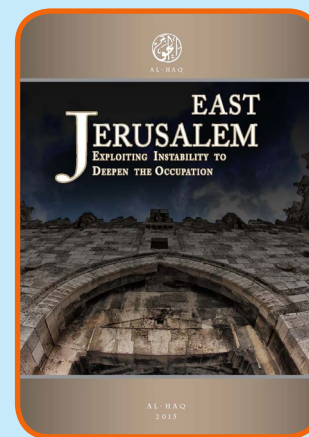
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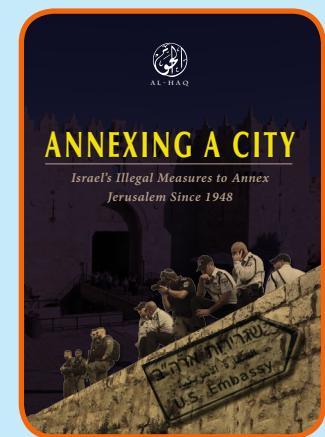
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About AL-HAQ

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

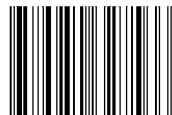
Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net – The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award.

About GLAN

“The Global Legal Action Network (GLAN) is a non-profit organisation that pursues innovative legal actions across borders to challenge states and other powerful actors involved in human rights violations and systemic injustice by working with affected communities. We bring together legal academics, practitioners, and investigative journalists to develop legal interventions from outside the jurisdictions where individuals and communities suffer injustice. Our legal actions address the most pressing instances of human rights concerns and fall within the themes of war and occupation, accountability and supply chains, environmental and economic justice, as well as migration and border violence.”



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