



**Joint Submission on the Implementation of Human Rights Council
Resolution 31/36 through the Establishment of a Database of Businesses
Operating in Israeli Settlements**

**By the Global Legal Action Network (GLAN), the Centre for Research on
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This submission analyses the international law violations related to settlements, emphasizing the systemic violations entailed by Israeli acts and the responsibilities of businesses operating in the occupied Palestinian territory under Israel’s domestic jurisdiction. On the basis of this analysis of the nature of the internationally unlawful acts underpinning the establishment and maintenance of the settlements, the submission sets out the ways in which businesses “enable, facilitate and profit from” the existence, maintenance and growth of the settlements, so as to contribute to the implementation of paragraph 17 of Human Rights Council Resolution 31/36 providing for the establishment of a database of businesses involved in activities in Israel’s settlements. It therefore considers both direct and indirect conditions of proximity, based on a hard factual test of a business’ actual contribution to human right harms.

To do so, the submission, first, examines the international law violations entailed by the establishment and maintenance of the settlements by the Israeli authorities, including through the implementation of a legal and administrative regime that effectively furthers the de facto absorption of the territory into Israel. It observes the ways in which businesses are either established in or come to operate in settlements, thereby contributing to the likelihood, frequency and severity of human rights harms, and considers the consequences of such activities on the shared responsibilities of businesses' and their home-states' in international law.

1. Background

The database for businesses based or operating in settlements was established by the March 2016 Human Rights Council (HRC) Resolution 31/36 on Israeli settlements, which:

“17. Requests the United Nations High Commissioner for Human Rights, in close consultation with the Working Group on the issue of human rights and transnational corporations and other business enterprises, in follow-up to 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, and as a necessary step for the implementation of the recommendation contained in paragraph 117 thereof, to produce a database of all business enterprises involved in the activities detailed in paragraph 96 of the aforementioned report, to be updated annually, and to transmit the data therein in the form of a report to the Council at its thirty-fourth session”.¹

Paragraph 96 of the International Fact-Finding Mission on Israeli Settlements (FFM) report published in 2013, referred in Resolution 31/36, provides a list of specific types of settlement-related business activities that have an adverse impact on human rights illustrative of cases of business that would be considered for inclusion in the database:

“96. Information gathered by the mission showed that business enterprises have, *directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements*. In addition to the previously mentioned violations of Palestinian worker rights, the mission identified a number of business activities and related issues that raise particular human rights concerns. They include:

- a) The supply of equipment and materials facilitating the construction and the expansion of settlements and the wall, and associated infrastructures

¹ Human Rights Council Resolution 31/36, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, A/HRC/31/L.39, 22 March 2016, para. 17.

- b) The supply of surveillance and identification equipment for settlements, the wall and checkpoints directly linked with settlements
- c) The supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olives groves and crops
- d) The supply of security services, equipment and materials to enterprises operating in settlements
- e) The provision of services and utilities supporting the maintenance and existence of settlements, including transport
- f) Banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses
- g) The use of natural resources, in particular water and land, for business purposes
- h) Pollution, and the dumping of waste in or its transfer to Palestinian villages
- i) Captivity of the Palestinian financial and economic markets, as well as practices that disadvantage Palestinian enterprises, including through restrictions on movement, administrative and legal constraints
- j) Use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements.”²

This paragraph however does not explain the principal wrongs underpinning the human rights harms to which business activities in or related to the settlements contribute, nor the ways in which businesses contribute to the likelihood, frequency and severity of the human rights abuses these entail, so as to be considered for inclusion in the database.

The report adds that the involvement of *Israeli* business in the settlements often occurs with their full knowledge, and that businesses are growing aware of the risks such activity attracts:

“97. It is with the full knowledge of the current situation and the related liability risks that businesses unfold their activities in the settlements and contribute to their maintenance, development and consolidation. Industrial parks in settlements, such as Barkan and Mishor Adumim, offer numerous incentives including tax breaks; low rents, and low cost of labour. Economic activities in these zones are growing. A number of banks provide mortgage loans for homebuyers and special loans for building projects in settlements.

² 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, 16 January 2013, para. 96. (emphasis added) (hereafter: UN Fact-Finding Mission on Settlements Report)

They also provide financial services to businesses in settlements and, in some cases, are physically present there.

98. The Mission notes that some businesses have pulled out of settlements because it harms their image and might *entail legal consequences*.³

The Fact-Finding mission's report also emphasises the role of home-states:

“117. Private companies must assess the human rights impact of their activities and take all necessary steps – including by terminating their business interests in the settlements – to ensure they are not adversely impacting the human rights of the Palestinian People in conformity with international law as well as the Guiding Principles on Business and Human Rights. The Mission calls upon all Member States to *take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, that conduct activities in or related to the settlements respect human rights* throughout their operations. The Mission recommends that the Human Rights Council Working Group on Business and Human Rights be seized of this matter.”⁴

2. International Law Violations Related to Business in Settlements

Israeli settlements are understood “to encompass all physical and non-physical structures and processes that constitute, enable and support the establishment, expansion and maintenance of Israeli residential communities beyond the Green Line of 1949 in the Occupied Palestinian Territory.”⁵ This includes the legal and administrative order set up to enable the appropriation of land and its development into settlements, as well as the laws applied to all activities and persons, natural and legal, residing and operating in the settlements. The establishment, maintenance and growth of settlements through this order gives rise to violations of both international humanitarian law (IHL) and international human rights law (IHRL).

Both IHL and IHRL prohibits unlawful transformations under occupation, while also prohibiting the occupying power from seeking to acquire title over territory.⁶ Insofar as Israel's activities amount to such prohibited acts, and are intended to entrench the permanent characteristics of the settlements and its underpinning legal and administrative regime they also have the effect of hampering the internationally-recognised right to self-determination of the

³ *Ibid*, para. 97 (emphasis added).

⁴ *Ibid*, para. 117.

⁵ Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, 6 June 2014 <http://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>.

⁶ Security Council Resolution 465, 1 March 1980. See also, Security Council Resolution 2334, 23 December 2016.

Palestinian people.⁷ This collective right is placed in a state of abeyance (suspension) for the duration of occupation, so as to protect against an occupying power's attempts to infringe on or erode the ability of the people to fully enjoy it after the end of occupation.

Businesses' involvement in activities in or related to the settlements contribute to the likelihood, frequency and severity of human rights abuses resulting from their establishment and maintenance. This includes the internationally unlawful acts of force to maintain control over the Palestinian territory, which is the reason for the unlawfulness of the provision of surveillance and identification equipment to defend the emplacement of settlements established in furtherance of an unlawful objective, i.e. the acquisition of territory by force.

2.1 Violations Related to the Establishment and Maintenance of Settlements

The establishment and expansion of Israeli settlements by the military commander entail continuous violations of Israel's legal obligations as the occupying power of Palestinian territory under IHL and IHRL. The view that Israel's practice of establishing and expanding settlements constitutes violations of these provisions has been affirmed by numerous UN reports, an ICJ advisory opinion, and legal experts.⁸

In particular, by authorising the military commander to obtain control and possession of large swaths of Palestinian land and to allocate it for use by settlements, the acts of the military commander are violating its IHL obligations as the occupying power. Insofar as businesses in settlements, such as agriculture, divert the use of natural resources including land for Israeli civilian benefit, they contribute to the military commander's violation of the usufruct rule, which prohibits an occupying power from exploiting the natural resources of the occupied territory unless it is for the benefit of the local population or for legitimate military use (Art 55 Hague Regulations 1907).⁹ Such unlawful acts may also amount to pillage.¹⁰ The wanton and

⁷ United Nations General Assembly Resolution 3236 (XXIX), 22 November 1974: recognizing the Palestinian people's right to self-determination, officialises United Nations contact with the Palestine Liberation Organization, and adding the "Question of Palestine" to the UN Agenda. Common Article 1, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

⁸ UN Fact-Finding Mission on Settlements Report, paras. 32-38. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, UN Doc A/HRC/22/46/Add.1, 12 December 2012. See also, Professor James Crawford, Opinion Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 24 January 2012 <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

⁹ Rule 51. Public and Private Property in Occupied Territory, ICRC Customary IHL Study http://www.icrc.org/customary-ihl/eng/print/v1_rul_rule51. It is a customary rule of international humanitarian law, used to prosecute military officials in international and national courts, and enshrined in a preponderance of main military manuals.

¹⁰ James G Stewart, Corporate War Crimes: Prosecuting the Pillage of Natural Resources (Open Society Justice Initiative 2011). See also, emphasis on significance of land grabs in ICC Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (2016) p 5.

unlawful appropriation of land may also entail acts of unlawful destruction of property without military necessity (Art 53 GC IV).¹¹

According to Article 147 of the 1949 Fourth Geneva Convention, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” are grave breaches. The unlawfulness of the appropriation results from the purpose for which the land is allocated. The law of occupation prohibits the use of land by an occupying power for purposes other than those intended to serve the benefit of the local population or the imperative military and security needs of the occupying power (which excludes the protection of the habitual residence of Israeli citizens in the settlements).¹²

The Israeli legal and administrative system in the occupied territory enables the appropriation of land and other natural resources for the use of settlements, including private businesses. The most common method of land appropriation used by the military commander is the ‘state land’ declaration issued on the basis of Military Order No 59 regarding Government Property of 1967, which authorises the military custodian to administer the land “as he sees fit”,¹³ including by leasing and granting the right to construct on the land to private development companies.¹⁴ Since the beginning of the occupation in 1967, the ICA allocated only 0.7% of state land in Area C (860 hectares) to Palestinians.¹⁵ In Mitzpe Shalem settlement, for instance, Ahava operates an excavation site (as of mid-2016) and a production facility on the basis of a license granted to it by the Custodian. The Custodian signed a permit agreement and development

¹¹ Rule 50. Destruction and Seizure of Property of an Adversary, ICRC Customary IHL Study https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule50.

¹² Immovable public property must be administered according to the rule of usufruct, and private property must be respected and may not be confiscated: Articles 53 and 55, Hague Regulations 1907. Articles 34 and 57, Fourth Geneva Convention 1949.

¹³ Order No 59 is based on an interpretation of Jordanian and Ottoman law. The Israeli interpretation of the Ottoman law ignores the 1913 amendment, which provided that *miri* land that was cultivated for ten years enters into private ownership. Since land registration was never properly conducted, many cannot prove their ownership when they are required to do so by the Custodian to rebuke the ICA’s claims to administer and use the land. B’Tselem, *Under the Guise of Legality: Israel’s Declarations of State Land in the West Bank* (February 2012) http://www.btselem.org/download/201203_under_the_guise_of_legality_eng.pdf. According to the ICA’s data as of 2012, Israel has declared about 913,000 dunums of land in the West Bank as ‘state land’: B’Tselem, *By Hook and By Crook: Israeli Settlement Policy in the West Bank* (July 2012) 24. In 2015 alone, UN OCHA published that Israel appropriated some 60,000 dunums of land throughout the West Bank.

¹⁴ The allocation of the land by the Custodian for the purpose of constructing a settlement is based on an existing decision of the Israeli Government Secretariat (the Cabinet) to establish a settlement. The plans are then authorised by the Custodian, who proceeds to conclude a development agreement with a development company transferring the rights in the land to the company. The private developer company undertakes the preparation of the plans in coordination with the WZO Settlement Division and through Israeli line ministries such as the Ministry of Construction and Housing, the Ministry of Industry and Trade and the Ministry of Agriculture.

¹⁵ B’Tselem, *Acting the Landlord: Israel’s Policy in Area C, the West Bank* (June 2013) http://www.btselem.org/download/201306_area_c_report_eng.pdf. See also, on the closed of areas in the West Bank for settlements, Kerem Navot, *Closed Garden: Declaration of Closed Areas in the West Bank* (2015) http://media.wix.com/ugd/cdb1a7_5d1ee4627ac84dca83419aebf4fad17d.pdf.

contract with the World Zionist Organization (WZO) for the establishment of a settlement on 2,410 dunums of land, from October 1978 until September 2047.¹⁶

The aforementioned acts are part of the broader settlement enterprise that facilitates the unlawful transfer of the civilian population of the occupying power into the occupied territory (Art 49(6) GCIV).¹⁷ Israeli law offers private individuals and legal persons, including businesses, a range of financial benefits that incentivise their transfer into the occupied territory. Benefits from the Ministry of Industry and WZO Settlement Division include grants and subsidies to cover start-up costs, including rent payments and operational costs. Whereas regional and local councils often receive lump-sum allocations for distribution to individual businesses in settlements.¹⁸ These elements further the broader policy of seeking the permanent acquisition of the occupied territory and the pursuit of economic activity there for the benefit of the national economy of the occupying state.

The existence and maintenance of settlements in the occupied territory entails continuous and systematic violations of IHRL, for which Israel is obligated to ensure respect under its jurisdiction and authority as an occupying power.¹⁹ These include infringements on the property rights of Palestinian landowners and customary usufruct right-holders as well as violations of the rights to work and livelihood, because of the effects that the settlements have on access to agricultural land and other resources such as water.²⁰ The location of Israel's settlements and their associated infrastructure unlawfully impairs and creates impediments to the exercise of fundamental human rights to freedom of movement, health, education, and family life.²¹

The Israeli military commander is also charged with the protection of Israeli settlements and their inhabitants' enjoyment of property rights. The expansion of settlements has in a number of cases led to the unlawful forcible transfer of Palestinian communities located in their vicinity.²²

¹⁶ It obtained a planning permit from the civil administration for 1,000 dunums of land, from July 1994 until July 2004, and another planning permit for expansion of the settlement on 250 dunams from November 1998 until November 2003. See Spiegel Database, under 'Mitzpe Shalem' (in Hebrew).

¹⁷ Israel's establishment of settlements constitutes an internationally unlawful form of transfer of its civilians into occupied territory, despite Israel's contention that their transfer is not 'forcible': Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, paras. 115-122. ICRC, 'What does the law say about the establishment of settlements in occupied territory?', 5 October 2010.

¹⁸ See, e.g., a call made for applications by regional and local councils for grants in the area of infrastructure, society and settlement, and supporting system and 'conditional settlement assistance': Announcement concerning assistance in settlement development activities in the year 2013 (on file with author).

¹⁹ ICJ Advisory Opinion on the Construction of the Separation Wall in Occupied Palestinian Territory, ICJ Report 2004. Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Israel, UN Doc CCPR/C/ISR/CO/4, 21 November 2014.

²⁰ Settlements exploit mineral extraction and fertile agricultural lands, denying Palestinians access to their natural resources: UN Fact-Finding Mission on Settlements Report, para. 36.

²¹ *Ibid*, paras. 105, 109.

²² UN OCHA, Under Threat: Demolition Orders in Area C of the West Bank (September 2015) http://data.ochaopt.org/demolitionos/demolition_orders_in_area_c_of_the_west_bank_en.pdf.

The application of Israeli domestic law to settlements and their integration with Israel's domestic domain amounts to an unlawful exercise of sovereign authority in occupied territory. Article 47 of the Fourth Geneva Convention explicitly states that an occupying power cannot absolve itself from its IHL obligations by making changes to the demographic characteristics or legal status of any part of the occupied territory, including through a special agreement (even if it is based on the alleged consent of the representative of the occupied territory).²³ Under Article 43 of the 1907 Hague Regulations, and Article 64 of Fourth Geneva Convention, an occupying power is *inter alia* prohibited from undertaking sweeping legal and institutional reforms in the occupied territory.

2.2 Violations Related to the Establishment and Operation of Business in the Settlements

Israeli legislative and administrative acts that drive and maintain the existence of settlements include the legislation applied by Israel's domestic ministries and public bodies to exercise their jurisdiction as well as Israeli domestic law to all activities in or related to the settlements.²⁴ All settlement-based businesses established as legal persons in the occupied Palestinian territory under Israeli domestic law are considered Israeli companies, for having been created under Israel's domestic laws. All Israeli and foreign companies based or operating in the settlements are registered in Israel's Companies Registrar based at the Israeli Ministry of Justice under Israeli domestic law.²⁵

The Israeli military custodian confers control and possession rights over the land and other resources in the occupied territory to Israeli settlement municipal and regional councils – the local governmental bodies that administer the settlements – and to property development companies. Israel's domestic law, routinely applied in the settlements, purports to vest such Israeli businesses (legal persons) with the property rights, permits and licenses that wrongfully enable them to establish and control commercial operations in the occupied territory.

Agricultural enterprises in the settlements are often administered as cooperative associations registered with the Cooperative Associations Registrar that is based in Israel and operates under the Cooperative Associations (or Societies) Ordinance of 1933. Land (e.g. in the Jordan Valley) is rented to individuals by the settlement's secretariat by decision of the association's board. The individual is entrusted to harvest the land on behalf of the cooperative, and pays council

²³ The Israeli authorities rely on the Interim Agreements with the PLO to claim full control in military and civil affairs in Area C, where all settlements are located and which constitutes over 60% of the West Bank. No special agreement shall adversely affect the situation of protected persons (Article 7, Fourth Geneva Convention 1949) who are protected in law from renouncing any of their inviolable rights (Article 8, Fourth Geneva Convention 1949).

²⁴ ACRI, *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (June 2014) <http://www.acri.org.il/en/2014/11/24/twosysreport/> (hereinafter: *ACRI One Rule report*).

²⁵ Israel's Business Licensing Law 1968 is applicable to businesses based in settlements with minor amendments: Military Order concerning the management of local councils (correction no 86), p 361 of volume of local and regional council laws in Judea and Samaria, [http://www.mifam.org.il/Uploads/dbsAttachedFiles/1\(51\).pdf](http://www.mifam.org.il/Uploads/dbsAttachedFiles/1(51).pdf) (in Hebrew).

taxes (*Arnona*) to the settlement regional council. To export or wholesale agricultural produce, most settlement farms will contract with companies based inside Israel.²⁶

Business transactions, including contracts, rights and entitlements enjoyed by Israeli and foreign businesses in the context of their activities in the settlements, are governed by Israel's domestic company, contract, and tax laws, among elements of its domestic jurisdiction which which Israeli authorities routinely extend to the occupied territory in contravention of international law (e.g. rent and tax payments to regional and local authorities).²⁷ The application of this legal regime in occupied territory enables the routine unlawful creation of rights to possession, use, and control of land, as well as routine dealings with entities, businesses and public bodies, whose operations in the occupied territory are internationally unlawful.

The operations of a company are contingent on these wrongful acts of the Israeli authorities, which further the government-sanctioned policy of creeping annexation, entail systemic and structural violations of IHL and IHRL, including the right to self-determination of people.

3. Human Rights Obligations of Businesses as related to the Settlements

Under the UN Guiding Principles on Business and Human Rights (UNGPs), businesses and home-states share the burden of ensuring corporate respect for human rights. The UNGPs provide guidance on the separate but complementary responsibilities and duties of business and their home-states as regards ensuring businesses respect human rights, which additionally involves respect for IHL and other applicable international law and standards.²⁸

The 2008 report of the Special Representative of the Secretary General on Business and Human Rights (SRSG-BHR) states that due diligence is part of the responsibility of businesses to “avoid complicity by knowingly contributing to human rights abuses, whether or not there is a risk of legal liability.” The duty of due diligence in relation to cases of complicity or contribution to an adverse impact on human rights requires that businesses use leverage to identify, prevent and mitigate any remaining impact to the greatest extent possible, and encourage the business to cease such activities.²⁹

²⁶ The certification of agricultural products and companies for export purposes is handled by the Ministry of Agriculture; Export, Ministry of Agriculture http://www.moag.gov.il/agri/yhaidotmisrad/sahar_hutz/%D7%99%D7%A6%D7%95%D7%90/default.htm. Guidelines for export permits for fruits, vegetables and citrus, Plant Production and Monitoring Board, Ministry of Agriculture <http://www.plants.org.il/uploadimages/NohalExp08.pdf>.

²⁷ ACRI One Rule report, p 19.

²⁸ ICRC, Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law <http://www.securityhumanrightshub.org/content/guidance-companies-operating-conflict-affected-and-high-risk-areas>.

²⁹ Principle 19, UNGPs.

3.1 Immitigability of the Adverse Effect on Human Rights

The limitation is that this standard assumes direct control for the abuse. Foreign businesses are operating – whether through Israeli subsidiaries or through contractual relations with Israeli businesses – in a context where there is a high-risk and broad range of ways in which they could contribute to the likelihood, frequency and severity of human rights harms. Due to the *de facto* absorption of the settlements in Israel’s economy and domestic legal order, Israeli businesses routinely operate in the settlements. Thus, foreign businesses are required to guarantee that their Israel-based business partners do not extend their joint operations to settlements.

Due to the systemic and structural character of the violations entailed by the establishment and maintenance of the settlements, the settlements represent an environment in which businesses cannot adequately mitigate the actual harm to which their operations contribute. In other words, the accumulation of risk factors is such that businesses are required to abstain from any operations in or related to the settlements.³⁰ In June 2014, the UN Working Group on BHR released a report on Israeli settlements, where it sets out the responsibilities of businesses to assess and mitigate their adverse impact on human rights as follows (at p. 11):

“[...] due diligence is also particularly important in a situation where the occupying power, exercising obligations equivalent to those of a ‘host State’, may be unable or unwilling effectively to protect human rights or may itself be implicated in human rights abuses. In this regard, *even if businesses in the settlements are operating in compliance with Israeli laws, the corporate responsibility to respect human rights ‘exists over and above compliance with national laws and regulations’.*”

“Business enterprises doing business, or seeking to do business, in or connected to the Israeli settlements in the OPT need to be able to demonstrate that they neither support the continuation of an international illegality nor are complicit in human rights abuses; that they can effectively prevent or mitigate human rights risks; and are able to account for their efforts in this regard – including, where necessary, by terminating their business interests or activities.” (emphasis added)

Businesses that operate in settlements facilitate giving legal effect to the internationally unlawful extension of Israeli domestic law to the occupied territory as part of the broader set of actions in the pursuit of its annexation.³¹ Such activities invariably contribute to, facilitate,

³⁰ Shift, Due Diligence in High Risk Circumstances (March 2015). SOMO, Multinationals and Conflict (2014) <https://www.somo.nl/multinationals-and-conflict/>. The Danish Institute for Human Rights, Doing Business in High-Risk Human Rights Environments (2010) [http://nhri.ohchr.org/EN/Themes/BusinessHR/DocumentsPage/Highrisk Environments ENG.pdf](http://nhri.ohchr.org/EN/Themes/BusinessHR/DocumentsPage/Highrisk%20Environments_ENG.pdf).

³¹ The report of the UN panel of experts on illegal exploitation of natural resources in the DRC defined the standard of “illegality” as including all activities undertaken “without consent of the legitimate government” in the context of an ongoing belligerent occupation of the territory, as well as those that contravene “widely accepted practices

and may profit from the human rights abuses entailed by the existence and maintenance of the settlements. This includes giving effect to unlawfully constituted rights of use, possession, and control of property rights, as well as the revenues that are generated through their wrongful enjoyment. Hence, businesses have a responsibility to respect human rights *inter alia* by ensuring that their activities do not cause or contribute to – by enabling, facilitating and profiting from – the likelihood, frequency and severity of ongoing human rights abuses.

In the case of Israeli settlements, this includes Israeli and foreign businesses that (i) rent or buy property in settlements; or (ii) enter into direct and ongoing contractual relations with a settlement-based entity to sell, buy or provide services, products or financial capital. Contractual relations with any entity based or operating in the settlements – by virtue of its wrongful enjoyment of rights to possession, control and use of land and resources in occupied territory – contributes to the existence and maintenance of the settlements. Such activities also contribute to the conversion of possession, control and property rights, as well as wrongfully utilized assets such as state benefits for settlements, into revenue.

Where the businesses do not themselves have operations in settlements, but instead, for instance, buy products on the Israeli market, a more prudential standard should be applied to account for the business' due diligence measures in the specific case, as discussed below. To make sure they have adopted “appropriate human rights due diligence” and “took every reasonable step to avoid involvement with an alleged human rights abuse”,³² businesses need to guarantee that their business partners also adhere to these rules.

Even the most thorough due diligence measures would not shield a business from responsibility for *actual harm* resulting from its operations in or related to the settlements. It would be inappropriate for a foreign or Israeli business to rely on the practice of another Israeli business, where the latter is unable to conform to its obligations under the UNGPs, including due to restrictions in Israeli domestic law that prevent many businesses from refusing to service entities and persons based on their location of residence.³³

3.2 Home-States' Duties

Such a context also triggers concrete duties for third party home-states, who are required to protect against businesses' human rights abuses with adequate regulatory measures. Home-states should inform corporate nationals of the economic and reputational risks entailed by such activities, notify businesses of the legal risks and potential liabilities entailed by settlement-

in trade and business” (para 15). Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 12 April 2001 <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202001%20357.pdf>.

³² Principle 17 of the UNGPs states that “business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.”

³³ UPDATED: On the new law adding "place of residence" as a ground for prohibited discrimination in places of public accommodation: Human Rights Watch, Israeli Law and Banking in West Bank Settlements (2017).

related activities, and adopt effective measures to regulate such (transnational) conduct in domestic law. The FFM on settlements report also recalls the role of home-states in ensuring that businesses “that conduct activities in or related to the settlements respect human rights” (para. 117).

Home-states also are under an obligation as third states in international law, as affirmed by Security Council resolution 465, “not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories.”³⁴ Human Rights Council Resolution 25/28 adopted in March 2014 urges states to curb their corporate nationals’ involvement in settlement related activities:

“(b) To implement the Guiding Principles on Business and Human Rights in relation to the Occupied Palestinian Territory, including East Jerusalem, and to *take appropriate measures to encourage businesses* domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, *to refrain from committing or contributing to gross human rights abuses of Palestinians*, in accordance with the expected standard of conduct in the Guiding Principles and relevant international laws and standards;

(c) To *provide information to individuals and businesses on the financial, reputational and legal risks*, as well as the possible abuses of the rights of individuals, of getting involved in settlement related activities, *including economic and financial activities, the provision of services in settlements and the purchasing of property;*” (emphasis added)

Some 18 European governments issued advisories to companies about the risks of business activities in the settlements. The operative passage of the United Kingdom’s advisory, which is similar to others’, provides as follows:

“There are therefore clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity. *Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks* stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel’s territory. This may result in *disputed titles to the land, water, mineral or other natural resources* which might be the subject of purchase or investment.”³⁵

³⁴ Security Council Resolution 465 (1980) was adopted as a standard by the Norwegian authorities when reviewing the charitable character of Norwegian charities.

³⁵ UK Foreign and Commonwealth Office, Overseas Business Risk – Israel, Settlements, <https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel--3>. (emphasis added)

In recent years, a growing number of businesses have decided to review and terminate their settlement related dealings in light of the legal consequences and risks such activities entail. This includes businesses based primarily in European countries, such as financial institutions, pension funds, engineering, telecommunications, and retail companies.³⁶ Concomitantly, a series of corrective measures at the level of intergovernmental relations are being implemented by the EU, its member states, as well as the US and other States, to ensure that activities in Israeli settlements are excluded from the scope of their bilateral relations.³⁷

4. Business Proximity to International Law Violations related to the Settlements

The FFM on settlements report sets out a normative standard for analysing the modes of business involvement in settlements, in terms of the commercial relations that “enable, facilitate and profit, directly or indirectly,” from the activities listed in paragraph 117. Corporate actors that determine that they cannot enable, facilitate, or profit from the unlawful acts underpinning the establishment and existence of the settlements, will need to articulate a set of bright-line rules to ensure that their employees and business partners limit the business’ operations territorially to exclude the settlements.

The appropriate *hard factual test* is based on robust and uncontestable bright-line rules to determine whether a business is directly involved in activities that maintain the existence of the settlements. The decisive criteria are whether the business is established in the occupied territory under Israeli domestic law, such that it is wrongfully allocated property rights (in or in a manner associated with the settlements), or whether it is engaged in dealings with Israeli entities based in the settlements and contributes to the generation of illicit financial flows from their wrongfully enjoyed property rights in the occupied territory.

The division between tier-one and tier-two conditions of proximity is in line with the distinction between direct and indirect forms of contribution to the likelihood, frequency and severity of the human rights abuses in the settlements, which depends both on the business’ intention and

³⁶ See, e.g., PGGM Dutch pension fund excludes Israeli banks from investment portfolio <https://www.pggm.nl/english/what-we-do/Documents/Statement%20PGGM%20exclusion%20Israeli%20banks.pdf>. Danske bank exclusion of Bank Hapoalim for involvement in settlements <http://www.danskebank.com/en-uk/csr/business/sri/pages/areasofconflict.aspx>. United Methodist Church pension fund, Wespath, excludes five Israeli banks http://www.wespath.com/investment_philosophy/human-rights-guideline-implementation/. Orange announces termination of contract with Israeli Partner Communications for operations in settlements <https://www.theguardian.com/world/2015/jun/04/orange-says-it-plans-to-terminate-contract-with-brand-partner-in-israel>. Dutch engineering company Royale Hakoning cancels water project for settlements in East Jerusalem <http://www.haaretz.com/israel-news/.premium-1.545605>.

³⁷ See for a discussion of these developments: European Council for Foreign Relations, EU Differentiation and Israeli Settlements (June 2015). Krassimiar Nikolov, ‘Ashton’s Second Hat: The EU Funding Guidelines on Israel as a Post-Lisbon Instrument of European Foreign Policy Making’, *Diplomacy* (2014). See also, Patrick Mueller and Peter Slominski, ‘The Role of Law in EU Foreign Policy-making: Legal Integrity, Legal Spillover, and the EU Policy of Differentiation towards Israel’, *Journal of Common Market Studies* (2016).

knowledge, and on the conditions it places on its business partners to ensure their compliance with an equivalent standard.

4.1 Tier-One Proximity

Tier-one proximity pertains to businesses that maintain contractual relations with a settlement-based entity (or legal person), including businesses, public bodies and individuals. Such contracts are not only predicated on unlawfully constituted property rights, but are intended for the purpose of profiting (or benefiting, hence irrespective of the scale of the gains) from activities that give effect to them. The key question is whether the business is predicating its contractual relations on unlawfully constituted rights of other entities, and undertaking to contribute to the conversion of such rights into revenues.

The definition of business operators that fall into the category of first-tier proximity should be based on a hard factual test, which is in line with the UNGPs responsibilities of businesses and the nature of the wrongs in which businesses become involved. Businesses that engage in contractual relations that extend to settlement related activity become wilful recipients of unlawfully created property rights. As noted, all contractual relationships with settlement-based entities (businesses or public bodies) facilitate and enable the settlement-based entity's enjoyment of rights of use, possession and control over land and resources that were constituted and transferred to it in contravention of international law.

A business would be deemed in close proximity to the human rights abuses resulting from the establishment and maintenance of the settlements where *prima facie* evidence demonstrates that it is based in or operates out of a settlement, in whole or in part. This includes businesses that are based or maintain branches in settlements, their Israeli and foreign parent companies and franchise grantors, as revenue generators that unlawfully organize and conduct economic activities in settlements.

It further includes businesses based in Israel or abroad that maintain contractual relations or regularly contract with businesses or public bodies based in the settlements. To fulfill a standard of close (tier one) proximity, a company's contractual relations with a settlement based entity must be substantial: increasing the scale of the wrongful acts committed or the severity of the human rights harms they entail.³⁸

Businesses that contribute to the construction and expansion of settlements increase and aggravate the human rights abuses that they maintain. Moreover, insofar as such business relations enable the generation of revenue from wrongfully enjoyed property rights, they increase the efficiency (and sustainability) of the internationally unlawful acts underpinning the establishment and maintenance of the settlements.

³⁸ Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity and Legal Accountability, Volume I: Facing the Facts and Charting a Legal Path (2008) p 12.

The integration of the settlements into the Israeli private market, including through the extension of Israeli domestic law to the settlements, means that many Israeli companies routinely contract with settlement-based entities (legal persons). Businesses that contract with settlement-based companies and public bodies, are *directly* enabling, facilitating and profiting from the settlements (first-tier list of activities, below), as distinct from those that are doing so *indirectly* (see second-tier proximity below).

Tier-one proximity: established in or maintain regular and ongoing contractual relations with settlement-based businesses or public bodies

- 1) Based in settlements in whole or in part
 - a. A manufacturer whose factory is based in a settlement industrial zone
 - b. An exporting company whose warehouses are based in a settlement industrial zone
 - c. A branch of a retail chain or service provider like a bank or supermarket chain
- 2) Foreign parent companies of subsidiaries based in settlements or franchise grantors with franchise branches based in a settlement
 - a. E.g., a foreign real estate company that licenses Israeli franchisees based in settlements, and that market settlement-based properties through its global properties database
 - b. E.g., a foreign telecommunications company with a brand licensing agreement with an Israeli company that extends to its activities in the settlements
- 3) Israeli or foreign companies that contract with settlement-based entities to buy or supply products, equipment or services
 - a. Suppliers of goods or services to settlement-based businesses, including producers and wholesalers that supply settlement-based retailers
 - i. E.g., Israel-based producer, with its own trucks that contracts to sell and supply pharmaceuticals to settlement-based businesses, such as small pharmacies and retail chains
 - ii. E.g., Israeli manufacturer or retailer that contracts to distribute and sell to shops and wholesalers in settlements, including cable and internet providers, construction and engineering companies
 - iii. E.g., retailer of supplies or services to contractors or development companies based in settlements
 - iv. E.g., an Israeli subsidiary of a foreign company that supplies garbage collection services through contract with settlement municipalities
 - b. Suppliers of services or equipment that contract with Israeli public bodies for the implementation of illegal policies
 - i. E.g., a business that supplies demolition equipment or services to an Israeli public authority for use in the occupied territory
 - ii. E.g., a business that enter a contract for construction of housing units or other infrastructure for the benefit of the settlements
- 4) Israeli or foreign parent or part-owners of a company that maintain operations in settlements, or serve as the principal financiers of projects that extend to the settlements
 - a. E.g., a foreign parent company of an Israeli subsidiary that works in Israeli-operated quarries

- b. E.g., a foreign company that owns shares in an Israel-based company that regularly operates in the settlements
- 5) Israeli or foreign purchasers of services or products, including parts and materials, directly or indirectly from settlement-based service-providers, producers and wholesalers
 - a. Israeli supermarkets that buy settlement agricultural products to sell to the Israeli public, e.g. a farm's products sold in Israeli supermarkets
 - b. Israeli wholesale and export companies that contract with settlement-based manufacturers
 - c. Foreign importers of settlement products
 - i. E.g., a foreign retailer or wholesaler that contracts directly with a settlement-based exporter or manufactures textiles in a settlement industrial zone
 - d. Companies that contract to buy component parts from settlement based entities and include them in their production line to manufacture other products
 - i. E.g., an Israeli dairy company that buys milk from a settlement-based farm
 - ii. E.g., a foreign textile producer that buys unfinished textiles directly from a settlement-based manufacturer
 - iii. E.g., a foreign company that buys from a settlement-based factory

4.2 Tier-Two Proximity

The tier-two category of proximity pertains to businesses “indirectly” involved in settlement-based activities. For instance, businesses that contract with a business that maintains operations in the settlements (tier-one proximity). A business in this category is either: (i) one that provides services to another business based in Israel or abroad, such as a contractor, distributor, or service-provider for instance in the information technology (IT), retail or construction sectors, and that Israeli or foreign business regularly contracts with settlement-based entities; or (ii) one that is a parent company of, invests in, or sells goods to or procures goods from a settlement-based business.

Companies that maintain tier-two proximity relations with the settlements are not directly engaged in dealings with settlement-based companies and may be unaware of their Israeli business partners’ transactions with settlement-based companies and public bodies. However, by maintaining dealings with an Israeli business, they incur – given the integrality of the settlements to the Israeli economy, and the nature of Israeli legislation that prevents companies from refusing to operate in the settlements – an unjustifiably high level of risk of contributing to human rights abuses by operating in the settlements.

A business maintaining transactional relations with Israeli companies has the responsibility to review, firewall and, where appropriate, terminate relations with a business that is regularly involved in settlement related activity. However, a business cannot be presumed to know of its contribution to wrongful acts unless it has been informed. Businesses in this position should therefore be placed on notice about the potentially unlawful nature of their business activities,

and asked to perform an “enhanced” due diligence³⁹ and review their contractual relations so as to ensure that they are not “enabling, facilitating and profiting, directly or indirectly” from the existence and maintenance of the settlements, and to provide evidence that they have done so. In some cases, an Israeli company will be required to establish a special purpose company in order to ring-fence investments from foreign companies.

If the business in question, having been notified, fails to follow these rules and ensure that its business partners do the same, by adequately reviewing and firewalling its contractual relations with the Israeli business, it would contribute to human rights abuses.⁴⁰

Tier-two proximity: a business that maintains an ongoing contractual relationship, or regularly contracts with businesses that operate in the settlements

- 1) Foreign or Israeli manufacturers or distributors that supply wholesalers or distributors who maintain contractual relations or regularly contract with settlement-based entities
 - a. E.g., a foreign construction equipment company that supplies an Israeli distributor that contracts with a settlement-based municipality or development company
- 2) Foreign companies that buy settlement products from Israeli exporters or from subsidiaries of settlement-based companies
 - a. E.g., a foreign supermarket that buys agricultural products such as herbs or cherry tomatoes from an Israeli exporter of settlement-grown produce
 - b. E.g., a foreign retailer or wholesaler who buys products made in the settlements from a European subsidiary of a settlement-based company
- 3) Financial institutions, e.g. a bank or pension fund, with loans from or investments in a company with operations in the settlements

5. The Workings of the Database

The database has the function of providing interpretative guidance to duty-bearers and interested parties so as (i) to enable home-states to exercise their duty to regulate business activities so as to ensure that they respect human rights by appropriately advising their businesses (Pillar I, UNGPs); and (ii) to enable businesses to guarantee that they are adopting due diligence measures and terminating activities where doing so is required to respect human rights in their operations (Pillar II, UNGPs). While the inclusion of a business in the database is not based on establishing civil or criminal liability, as would be the case in judicial proceedings, basic due process and fairness parameters need to be respected to ensure the integrity and legitimacy of this mechanism.

³⁹ “Enhanced” due diligence refers to the heightened care with which these processes need to be executed: UN Working Group on Business and Human Rights, Statement on the implications of the Guiding Principles on Business and Human Rights in the context of the Israeli settlements in the Occupied Palestinian Territory, 6 June 2014 <http://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>.

⁴⁰ If it has agreed with the Israeli-based business that their contractual relations should not include operations in the settlements and the Israeli business continues to do so, the foreign business should be encouraged to either undertake enforcement action with its partner, or terminate the contract.

The inclusion of a business that “enable, facilitate and profit, directly or indirectly” from the existence and maintenance of the settlements in the database places an exigent demand on said business to cease its settlement-related operations in line with its international legal obligations. The standard for including a business in the database is different from a standard of *proximity to the wrongdoer*, since businesses that contract with wrongdoing authorities would not be eligible *on that basis alone* for inclusion on the database; the territorial scope of such dealings would need to be reviewed. By separating the wrongdoing from the authority responsible for such acts, even settlement-based businesses that may be unaware of the international implications of their activities would be afforded the chance to relocate into Israel without risking inclusion on the database.

In addition to those businesses that maintain a registered presence in settlements through their principal or branch operations, the standard for including a business in the database should reflect the nature of its relations with settlement-based entities. A business that maintains ongoing contractual relations or regularly contracts with settlement-based businesses or public bodies to sell, buy, or provide services would be considered for inclusion on the database if it undertakes such contracts directly with the settlement-based entity, as opposed to an Israeli branch; or if it contracts with a company (e.g. a supermarket chain) to distribute to its branches, including those located in the settlements.

Contractual relations with an entity substantiate a business’ close control over, proximity to, and knowledge of the operations, as well as its contribution to or profit from the internationally unlawful acts that enable such activities. Hence, foreign businesses that contract with Israel-based businesses would, through the articulation of an unequivocal standard for direct involvement, be made aware of the absorption of the settlements into Israel’s economy and the need to ensure their ability to appropriately rely on their Israel-based business partners to guarantee that they do not become indirectly involved in settlement-based activities.

In all cases, businesses should be notified and given the opportunity to take corrective action and challenge the propriety of being included in the database. In particular, a business that falls into the tier-two proximity category of involvement could be included on the database only after being placed on notice and being instructed of their duties if they default in reviewing and effectively firewalling within a reasonable time (as to be specified in the notice) their relations with another business that regularly engages in settlement related activity.

The database should include an adequate procedure for businesses to be able to challenge their inclusion in the database. A business should have standing to petition to be removed from the database through a fair and transparent procedure. The decision-making process and procedures of the database should include clear and transparent timeframes, reasonable evidentiary and burden of proof standards, and well-founded criteria for assessing the adequacy of a business’ efforts to terminate or review settlement related operations in line with its responsibilities. Fair procedural safeguards are paramount requirements for upholding the rule of law, particularly when legal consequences may ensue.