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**Promotion and protection of human rights: human rights  
situations and reports of special rapporteurs  
and representatives**

## **Situation of human rights in the Palestinian territories occupied since 1967**

### **Note by the Secretary-General**

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, submitted in accordance with Human Rights Council resolution 5/1.

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\* A/68/150.



## Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967

### *Summary*

The present report develops arguments presented in the previous report of the Special Rapporteur to the sixty-seventh session of the General Assembly, which focused on businesses profiting from Israeli settlements and described the involvement of 13 businesses in the activities of Israel in the Occupied Palestinian Territory with reference to the United Nations Guiding Principles on Business and Human Rights. The present report delineates a model for legal analysis by focusing on two illustrative companies chosen for the specific ways in which their activities potentially implicate them in international crimes. The report also takes note of other issues, including the urgent matter of water and sanitation rights.

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## I. Introduction

1. As in all earlier reports during his period as Special Rapporteur, the Special Rapporteur has been denied the benefits of cooperation with the Government of Israel, including permission to enter the territory of the State of Palestine. The Special Rapporteur did benefit from a mission to Gaza in December 2012, facilitated by the then-Government of Egypt via entry at the Rafah crossing. The visit was extremely valuable in providing direct access to those living under occupation. There is no substitute for this kind of direct experience on the ground in assessing allegations of violations of human rights by Israel as the Occupying Power. As the present report to the General Assembly is the final one of his tenure, the Special Rapporteur would like to stress the importance of not allowing this pattern of non-cooperation to become a precedent that will hamper the efforts of future Special Rapporteurs to be as effective as possible in investigating contentions relating to the human rights situation that prevails. It has been disappointing that more has not been done by the United Nations to induce compliance by Member States with their obligation under international law to cooperate with the Organization.

2. This mandate was established in 1993 when it was still appropriate to refer to the West Bank, East Jerusalem, and Gaza as “occupied territories”. To continue such usage at this time seems misleading. On 29 November 2012 the Palestinian presence within the United Nations system was upgraded by General Assembly resolution [67/19](#), conferring the status of non-member observer State. It thus seems more appropriate to refer to the territories administered by Israel as “Palestine” — but at the same time confirm the continuing responsibilities of Israel under international humanitarian law, in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), as the Occupying Power. Beyond the matter of status are issues of substance. The cumulative process of unlawful settlement building and expansion has reached a point where a partially irreversible process of creeping annexation has taken place, which needs to be recognized as such, that undermines the core assumption of “belligerent occupation” as a temporary reality. This alteration of the occupied territories over time has been perversely acknowledged, even provisionally validated, by the widely held assumption that Israeli “settlement blocs” will not be dismantled even in the event that a peace agreement is reached between the Palestinian Authority and Israel.

3. It is more crucial than ever to insist upon the responsibilities of Israel as the Occupying Power under international law. The Geneva Conventions and Additional Protocols I and II, as well as a large number of obligatory international human rights agreements, are indispensable in identifying and evaluating various allegations of practices relating to the administration by Israel of daily life in the West Bank, East Jerusalem and Gaza. This legal framework is important in evaluating such policies and practices as are associated with the construction of the wall on Palestinian land, the wrongful appropriation of Palestinian water resources, the confiscation of land, arrest and detention procedures, the violations of children’s rights, settler violence with the complicity of Israeli security forces, house demolitions and collective punishment via blockades, curfews and restricted movements. While all those policies and practices deserve international attention, the Special Rapporteur focuses some attention in the present report on the wrongful appropriation of water resources, which has been a somewhat neglected aspect of the Israeli occupation.

4. The resumption of direct negotiations designed to resolve the conflict between Israel and Palestine calls particular attention at this time to an emphasis on protecting the rights of the Palestinian people during the course of a diplomatic process that, in the past 20 years, has excluded the relevance of international law. This is true, in particular, of the inalienable Palestinian right of self-determination that is not even mentioned in the Declaration of Principles on Interim Self-Government Arrangements of 1993. This mandate will have failed if the solution reached through diplomatic channels does not uphold the collective right of self-determination and the individual rights of those who have lived without rights under Israel military administration since 1967. There are also additional concerns associated with the population of Gaza, whose *de facto* governing authority since 2007 is not participating in the revived negotiations, raising questions as to whether the rights and interests of Palestinians in Gaza are being adequately represented.

5. The situation of the Gaza Strip is particularly troublesome, as its 1.7 million people have been compelled to live under a blockade since 2007. Gaza seems to be threatened with even greater hardships for its population as a result of recent developments in Egypt. While Israel is the Occupying Power and thus maintains legal obligations to Palestinians in Gaza, the population — for the time being — needs consistent access to and from Egypt by way of the Rafah crossing and also, in order to ensure its survival, needs access to the tunnel network that has been supplying Gaza with basic necessities. It should be recalled that a United Nations report issued a year ago, before the recent complicating developments, concluded that the habitability of the Gaza Strip was in doubt after 2020.<sup>1</sup> During the mission of the Special Rapporteur, several experts on the threatened infrastructure of Gaza observed that even such a dire prediction was too optimistic, and that 2016 was a more realistic date. What is at stake in such a situation of extreme deprivation is a comprehensive assault on the social and economic rights of the people of Gaza, as embedded in the International Covenant on Economic, Social and Cultural Rights, to which Israel is a party. The maintenance of the blockade is a continuing violation of article 33 of the Fourth Geneva Convention, which unconditionally prohibits collective punishment.

6. The emphasis in the present report, as well as in the report submitted to the sixty-seventh session of the General Assembly, in 2012 (A/67/379), on issues of corporate responsibility and potential accountability in relation to Israeli settlements follows the recommendation of the fact-finding inquiry into settlements under the auspices of the Human Rights Council.<sup>2</sup> It is also a reaction to the refusal of Israel to respect the obligation set forth in article 49 (6) of the Fourth Geneva Convention, which prohibits an Occupying Power from transferring citizens from its own territory to the occupied territory. This provision has been widely interpreted as extending explicitly to Israeli settlements that have been continuously established and expanded since 1967 in defiance of this consensus as to the bearing of international law. When compliance with international law cannot be achieved by either self-regulation or persuasion, then it is appropriate to rely on non-violent, coercive means to achieve compliance and thereby contribute to the protection of the rights of those being victimized, that is, Palestinians.

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<sup>1</sup> United Nations country team, “Gaza in 2020: a liveable place?” (Jerusalem, Office of the United Nations Special Coordinator for the Middle East Peace Process, August 2012).

<sup>2</sup> See A/HRC/22/63.

7. Ever since the adoption of Security Council resolutions 242 (1967) and 338 (1973), there has been a widely shared agreement in the international community that the Israel/Palestine conflict can only be solved by the creation of a viable and independent Palestinian State that corresponds to the 1967 de facto borders, altered to a small degree by mutual agreement. There is no doubt that the territorial scope of self-determination for the Palestinian people according to this “two-State” scenario has been continually diminished owing to unlawful settlement activity. It has long been the responsibility of the international community, and especially the United Nations, to take steps to safeguard Palestinian territorial rights. The extent of the Israeli settlement archipelago is putting the very idea of creating a Palestinian sovereign State that is independent and viable in increasing jeopardy.

8. There are many forms of abuse that deserve urgent attention and censure. The Special Rapporteur would like to highlight three for priority attention: abuses by security personnel in the form of arrest and detention procedures involving excessive force and humiliation, including of children; settler violence directed at Palestinians, and extending to their property and communities; and complicity by Israel Defense Forces in relation to settler violence, taking the form of protecting settlers engaged in violent activities rather than apprehending them, while taking punitive measures against Palestinians being victimized by such activities and failing thereby to discharge their primary responsibility under the Fourth Geneva Convention. The Special Rapporteur, in collaboration with five other Special Rapporteurs, issued a press release in connection with the mistreatment and harassment of Issa Amro, a human rights defender in Hebron who participated in the Human Rights Council interactive session devoted to occupied Palestine in June 2013 and was then detained and beaten upon his return, apparently in retaliation.<sup>3</sup>

## II. Methodology

9. It is almost universally accepted that the establishment and expansion of settlements in the West Bank and East Jerusalem violate international humanitarian law and international human rights law. In addition, the ongoing expansion of settlements has proven to be a key obstacle to peace talks and a negotiated settlement between the Israelis and the Palestinians.

10. To date, Israel has refused to comply with international law in relation to its settlement project, and United Nations efforts to induce compliance by censuring such activities have had no discernible effect. In the meantime, the settlements by their nature and expansion act as a quasi-permanent encroachment on fundamental Palestinian rights. It is against this background that the international legal responsibilities and potential implications for non-Israeli companies that profit from the settlement enterprise is approached.

11. The report of the Special Rapporteur to the sixty-seventh session of the General Assembly raised human rights issues arising from undertakings profiting from doing business with the settlements. It took note of the relevance of the United

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<sup>3</sup> “Israel must stop harassment, intimidation and abusive treatment of rights defender Issa Amro”, 13 August 2013. Available from [ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13626&LangID=E](http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13626&LangID=E).

Nations Guiding Principles on Business and Human Rights<sup>4</sup> and, for the sake of concreteness and illustration, described the involvement of 13 businesses in the activities of Israel in Palestine. The present report develops arguments presented in the previous report and sets forth a possible model for legal analysis by focusing on selected companies chosen for the specific ways in which their activities potentially implicate them in international law violations that appear to be in some instances international crimes. The report is presented with the hope that its legal analysis will encourage companies that currently profit from the settlements to change their policies. The Special Rapporteur has consistently conveyed readiness to work with officials of companies to ensure their compliance with principles of corporate responsibility. The primary wish of the Special Rapporteur is to induce voluntary action, and it is only in the event of the failure of this approach that recourse to more coercive initiatives such as boycotts, divestments and sanctions is recommended.

12. The present report is based on information requested and received from civil society actors, United Nations agencies, companies and corporations, non-State entities and other stakeholders. The Special Rapporteur offers a series of recommendations to encourage businesses profiting from the settlements of Israel to take prompt action to bring their activities into line with relevant international law and related rules and standards. The Special Rapporteur notes that, since finalizing the present report, he has brought its content to the attention of the businesses mentioned. The Special Rapporteur will request clarification and further information regarding the relevant contentions in the present report with the goal of achieving prompt and effective responses to his recommendations.

### III. Normative frameworks

13. The present report seeks to bring the issue of corporate responsibility to the attention of that portion of the business community that has or might in the future have commercial relationships with the settlements. It has been firmly established that international law recognizes the legal personality of corporations.<sup>5</sup> The analysis of corporate accountability will focus on relevant normative frameworks, including international humanitarian law, international human rights law and international criminal law. The establishment of settlements violates the duties of an Occupying Power according to international humanitarian law and infringes on the basic human rights of Palestinians. International criminal law creates individual criminal responsibility for the principal perpetrator as well as those who are accomplices in the commission of international crimes. The Special Rapporteur hopes that consideration of international criminal law can advance the debate on businesses and human rights, in particular because of the tangible judicial mechanisms that exist, for example the International Criminal Court and universal jurisdiction exercised by domestic courts, and in this way help guide business leaders in their decision-making. By explicating a model of legal analysis, the Special Rapporteur hopes that it will be used by and useful to other companies faced with these issues.

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<sup>4</sup> A/HRC/17/31, annex.

<sup>5</sup> See, for example, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgement of 5 February 1970, *I.C.J. Reports, 1970*, p. 246, and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, *I.C.J. Reports, 2007*, para. 40.

## A. International humanitarian law

14. International humanitarian law applies to situations of armed conflict and occupation, as set out in common article 2 of the Geneva Conventions of 12 August 1949. The rules that govern belligerent occupation, in particular the Regulations concerning the Laws and Customs of War on Land of 1907 (Hague Regulations) and the Fourth Geneva Convention, are universally accepted as reflecting customary international law and therefore apply to Israel as an Occupying Power. This has been recognized and confirmed by the Security Council, the General Assembly and the Human Rights Council, as well as by the International Court of Justice in its advisory opinion of 2004 on the wall.<sup>6</sup>

15. The Fourth Geneva Convention prohibits an Occupying Power from transferring citizens from its own territory to the occupied territory. The prohibition has been widely accepted to include the voluntary settlement of citizens of the Occupying Power in occupied territory.<sup>7</sup> The Hague Regulations prohibit an Occupying Power from undertaking permanent changes in the occupied area unless necessitated by military needs, or unless undertaken for the benefit of the local population. The prolonged nature of the 46-year occupation by Israel appears to be inconsistent with the accepted legal understanding that an occupation is temporary in nature. The Special Rapporteur has previously emphasized the limits of international humanitarian law in a context of prolonged occupation, especially for failing to capture the extent to which the permanent interests and well-being of the civilian population are infringed.<sup>8</sup> The International Committee of the Red Cross (ICRC) Expert Meeting on occupation and other forms of administration of foreign territory discussed the absence in both the Hague Regulations and the Fourth Geneva Convention of limits on the duration of effective control over foreign territory and noted that many have argued that “prolonged occupation necessitates specific regulations for guiding responses to practical problems arising from long-term occupation”.<sup>9</sup> The Special Rapporteur is of the view that such regulations are required, including steps to establish regimes of law and rights when an occupation lasts for more than five years.

16. Notwithstanding shortcomings in existing law to address prolonged occupation, the temporal focus and underlying conservationist aim of the law on occupation clearly establishes that the applicable legal framework renders the establishment and expansion of Israeli settlements as unconditionally illegal. The permanent changes deliberately made in the West Bank and East Jerusalem contradict the basic aim of international humanitarian law to preserve the rights of an occupied people.

<sup>6</sup> See Commission on Human Rights resolutions 6 (XXIV), 6 (XXV) and 2001/7; Human Rights Council resolutions 7/18, 10/18 and 19/17; Security Council resolutions 271 (1969), 446 (1979), 641 (1989), 681 (1990) and 799 (1992); and General Assembly resolutions 2546 (XXIV), ES-10/2, 36/147 C, 54/78, 58/97, ES-10/18 and 66/225; advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004 (see A/ES-10/273 and Corr.1), paras. 109-113.

<sup>7</sup> See Security Council resolution 446 (1979) and the advisory opinion of the International Court of Justice of 9 July 2004, para. 120.

<sup>8</sup> See A/HRC/23/21.

<sup>9</sup> See ICRC, “Occupation and other forms of administration of foreign territory: expert meeting” (Geneva, 2012). Available from [icrc.org/eng/assets/files/publications/icrc-002-4094.pdf](http://icrc.org/eng/assets/files/publications/icrc-002-4094.pdf).

17. The obligations that derive from international humanitarian law bind not only States, but also non-State entities, as set out in the Geneva Conventions of 12 August 1949 and in Protocol II (relating to the protection of victims of non-international conflicts) and reaffirmed at the international military tribunals held at Nuremberg, Germany, and at Tokyo. Therefore, business corporations directly or indirectly involved in armed conflicts can be held responsible for violating international humanitarian law. According to the ICRC:

International humanitarian law does not just bind States, organized armed groups and soldiers — it binds all actors whose activities are closely linked to an armed conflict. Consequently, although States and organized armed groups bear the greatest responsibility for implementing international humanitarian law, a business enterprise carrying out activities that are closely linked to an armed conflict must also respect applicable rules of international humanitarian law.<sup>10</sup>

Accountability for international humanitarian law violations is illuminated by reference to international criminal law, a body of law that includes serious violations of international humanitarian law.

## **B. International human rights law**

18. International human rights law imposes obligations on States to protect the rights of individuals and groups. The extraterritorial application of human rights has been endorsed by various forums.<sup>11</sup> The establishment of Israeli settlements in occupied Palestine results in manifold violations of international human rights law. Among other violations, the settlements infringe upon the right of property, the right to equality, the right to a suitable standard of living and the right to freedom of movement.<sup>12</sup> The settlements directly impede the responsibility of Israel to protect the human rights of the civilian Palestinian population.

19. The obligations imposed on States include a duty to protect against human rights abuses by third parties. States must take appropriate steps to prevent, investigate, punish and redress abuse by private actors. Moreover, standards have developed that extend the applicability of human rights law to non-State entities, including corporations.<sup>13</sup> Consequently, the obligation of States and companies, and those who act on behalf of such entities, to respect international criminal law norms constitutes a core corporate social responsibility within the evolving legal framework for respecting human rights.

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<sup>10</sup> ICRC, “Business and international humanitarian law” (2006). Available from [icrc.org/eng/assets/files/other/icrc\\_002\\_0882.pdf](http://icrc.org/eng/assets/files/other/icrc_002_0882.pdf).

<sup>11</sup> See, for example, the advisory opinion of the International Court of Justice of 9 July 2004, paras. 109-113; The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, general comment No. 31 (CCPR/C/21/Rev.1/Add.13), paras. 15, 18; and the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission), “Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law” (February 2013), p. 64. Available from [turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf](http://turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf).

<sup>12</sup> See General Assembly resolution 2200 A (XXI), annex.

<sup>13</sup> See, for example, the International Covenant on Civil and Political Rights; the International Covenant on Social, Economic and Cultural Rights; and General Assembly resolution 60/147.



20. Self-regulating mechanisms have been incorporated by many businesses to ensure compliance with ethical standards and international law.<sup>14</sup> The United Nations is acting to bring human rights directly to bear on corporations through initiatives such as the Global Compact, which was launched by the Secretary-General in 2000. The Global Compact Initiative encourages businesses globally to promote voluntarily and show respect for 10 principles relating to human rights, labour standards, the environment and anti-corruption measures. Furthermore, in 2011 the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights, which provide guidance on the responsibilities of business enterprises, as well as the necessary measures to be taken by States arising from their existing human rights obligations.

21. The Guiding Principles on Business and Human Rights are pertinent as a framework for analysis because they “outline steps for States to foster business respect for human rights; provide a blueprint for companies to manage the risk of having an adverse impact on human rights; and offer a set of benchmarks for stakeholders to assess business respect for human rights”.<sup>15</sup> A key concept in the Guiding Principles is due diligence, which outlines an ongoing process that a reasonable business needs to undertake to meet its responsibility to respect human rights. The Guiding Principles also outline the related obligations of States, which include respecting human rights (refrain from interfering with or curtailing the enjoyment of human rights), protecting human rights (protect individuals or groups against human rights abuses, including by business enterprises) and fulfilling human rights (positive action to facilitate the enjoyment of basic human rights).<sup>16</sup> The Guiding Principles have been and will continue to be an authoritative point of reference for Governments and businesses concerned with human rights. In this connection, the Working Group on the issue of human rights and transnational corporations and other business enterprises has been established by the Human Rights Council.<sup>17</sup> It has a central role in developing operational advice regarding the Guiding Principles, promoting and providing support for efforts to implement the Guiding Principles and making recommendations, conducting country visits and working in close cooperation with relevant United Nations bodies.

### C. International criminal law

22. International criminal law establishes individual criminal responsibility over war crimes, crimes against humanity and acts of genocide. International crimes take into account the collective dimension of the offence, and that can aid in attributing aspects of a collective offence to individuals involved. Attribution of responsibility has extended to multinational corporations on account of their ability to perpetrate such violations. Corporations investing, doing business with or otherwise involved in Governments or groups active in conflict zones can find themselves in a situation

<sup>14</sup> See, for example, Organization for Economic Cooperation and Development, *Guidelines for Multinational Enterprises, 2011 edition* (Washington, D.C., 2011). Available from [oecd.org/daf/inv/mne/oecdguidelinesformultinationaleenterprises.htm](http://oecd.org/daf/inv/mne/oecdguidelinesformultinationaleenterprises.htm).

<sup>15</sup> See Office of the United Nations High Commissioner for Human Rights, “The corporate responsibility to respect human rights: an interpretive guide” (2012). Available from [ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf).

<sup>16</sup> A/HRC/17/31, annex, paras. 1-10.

<sup>17</sup> See A/HRC/17/4.

of committing or furthering the commission of an international crime. To date, international criminal complicity has only been imputed to natural persons.<sup>18</sup> There is a need for caution when considering the extension of individual criminal responsibility to business managers or employees. Applying international criminal law to corporations is a developing area of international law.<sup>19</sup>

### 1. Ad hoc tribunals

23. The jurisprudence of the international ad hoc tribunals is pertinent to understanding the concept of complicity. The Furundzija case, heard before the International Criminal Tribunal for the Former Yugoslavia, provides the standard for establishing complicity in the form of aiding and abetting. The assistance given must have a substantial effect on the perpetration of the crime, and the person aiding or abetting must have knowledge that the assistance provided is contributing to the perpetration of a crime, even if he or she did not have a common design with the perpetrators.<sup>20</sup> The Tribunal recently changed its approach to complicity in *Prosecutor v. Momčilo Perišić*, when it held that “specific direction” is now an element of aiding and abetting, although the degree to which this decision generates a precedent for similar litigation before other tribunals is unclear.<sup>21</sup>

### 2. International Criminal Court

24. Under article 25 (1) of the Rome Statute, the International Criminal Court has jurisdiction over natural persons. It does not have jurisdiction over legal entities. The Court could, however, adjudicate corporate involvement in international crimes by focusing on the individuals acting on behalf of a corporation. When a State becomes a party to the Rome Statute, it comes within the jurisdiction of the Statute with respect to the crimes set out in the Statute. The Court may exercise its jurisdiction in situations where the alleged perpetrator is a national of a State party or where the crime was committed in the territory of a State party. Also, a State not party to the Statute may decide to accept the jurisdiction of the Court, as set out in article 12 (3) of the Rome Statute. Palestine did so in January 2009, but the Prosecutor at the time stated that the Court only had jurisdiction over States and pointed to determinations of the General Assembly as a guide for determination of entities that qualify as States. It is unclear whether the subsequent granting of non-member observer State status to Palestine by the Assembly will change the status of Palestine before the Court.<sup>22</sup> Israel is not a party to the Rome Statute.

25. The Rome Statute is the best source of authority with respect to the elements of complicity in international crimes. Article 25 (3) (c) and (d) outlines aiding and abetting liability, according to which any natural person who aids, abets or otherwise

<sup>18</sup> See, for example, *United States of America v. Carl Krauch et al.* (the *I. G. Farben* case), Judgement, 29, 30 July 1948, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1952, vol. VIII.

<sup>19</sup> See Antje K. D. Heyer, “Corporate complicity under international criminal law: a case for applying the Rome Statute to business behaviour”, *Human Rights and International Legal Discourse*, vol. 6 (2012).

<sup>20</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija*, case No. IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 249.

<sup>21</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Momčilo Perišić*, case No. IT-04-81-A, Appeals Chamber, 28 February 2013.

<sup>22</sup> General Assembly resolution 67/19.

assists in the commission or attempted commission of crimes articulated in the statute is individually responsible for such crimes. It consists of a two-pronged test: (1) substantial contribution to the crime; and (2) knowledge and purpose in facilitating or assisting a crime.

26. Therefore, the ability to attribute international criminal responsibility to corporations is not wide in scope. According to the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, it must be attributed to an individual as opposed to a company, and that individual must have knowledge that their acts have causally contributed to the commission of an international crime. “Knowing assistance” (i.e., an awareness that one’s actions are assisting in the commission of a relevant crime) is required.

27. The Rome Statute prohibits “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies”.<sup>23</sup> That information has long been available in the public domain, for example in official United Nations reports and resolutions, and would provide a compelling argument that corporations engaged in business activities with the settlements should by now be fully aware that Israeli settlements violate international law. The argument that requires development is the extent to which the corporation’s activities are causally connected to the international crimes being perpetrated. The International Criminal Tribunal for the Former Yugoslavia has introduced “specific direction”, indicating its belief that the activities in question should be specifically directed to assisting the commission of any crime. If one chooses to follow the Tribunal’s jurisprudence on complicity in relation to Israeli settlements, then questions relevant to some of the corporations discussed in the present and the previous report of the Special Rapporteur to the General Assembly would include the following: Does the provision of equipment or raw materials specifically directed towards the building of settlements and/or related infrastructure constitute a sufficient causal connection to the transfer of the Israeli civilian population to occupied Palestine? Does the provision of loans or similar financial transactions that are specifically directed towards the construction, renovation or purchase of settlements constitute such a connection? Does advertising, promoting the sale of and/or identifying buyers for a settlement constitute such a connection? Whether the Tribunal’s approach to complicity in the *Perišić* case will prove to be authoritative in other future cases is at this point an unknown.

28. What is clear is that prosecuting corporations for complicity at an international level offers a potential avenue for redress. Of course, jurisdictional requirements must be met. For example, the State from which the corporation and its employees are acting must be a party to the Rome Statute for the court to hear the case. The concept of complicity is not limited to international criminal law, however; other judicial mechanisms, such as national courts, could possibly prosecute corporations or their employees for involvement in international crimes.

### 3. Civil liability

29. Domestic law potentially provides an avenue for enforcing corporate liability for violations of international law. Civil liability is consistent with the principle of

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<sup>23</sup> Article 8 (2) (b) (viii) of the Rome Statute prohibits a broader range of actions than article 49 (6) of the Fourth Geneva Convention.

complementarity, which emphasizes the role of domestic legal regimes in the enforcement of international law. Corporate civil liability has the advantage of offering redress and compensation to the victims of the violation.<sup>24</sup> Notwithstanding the recent lack of progress in domestic litigation on corporate complicity generally, including in relation to the settlements, it is established that corporations can be subject to civil liability for the wrongful conduct of corporate agents.<sup>25</sup> Future cases will no doubt be heard on this issue before domestic courts.<sup>26</sup> The United Nations High Commissioner for Human Rights has articulated several reasons why civil liability is an important mode of accountability for corporate complicity:

First, international law obligates States to provide an effective remedy for victims of human rights violations. Second, civil liability for corporations helps promote the international legal principle of ensuring accountability for human rights violators. Third, in accordance with the principle of complementarity, international law necessarily relies on domestic legal mechanisms to ensure the effective protection of human rights. Finally, civil liability for corporations that are complicit in gross human rights violations serves as an avenue for orderly redress of grievances. Absent effective legal mechanisms to provide remedies for victims of gross human rights violations, those victims are likely to resort to extralegal measures to obtain redress for perceived wrongs, thereby threatening the established legal and social order.<sup>27</sup>

#### 4. Civil society tribunals

30. For educational purposes of dissemination about failures of compliance by Israel, there are also important contributions to public awareness made by civil society initiatives such as was achieved by the Russell Tribunal on Palestine at its session in London in 2010 devoted to corporate responsibility. Such initiatives could mount constructive forms of pressure to secure compliance with standards of corporate responsibility, if preferred modes of voluntary adherence fail to uphold legal and moral standards.<sup>28</sup>

### D. Conclusions on a normative framework

31. It should be noted that neither criminal law nor the law of civil remedies requires that the principal actor be held liable before a secondary actor is prosecuted. The difficulty of holding Governments or armed groups accountable for serious violations of international law means that in most cases of alleged business

<sup>24</sup> International Commission of Jurists, *Corporate Complicity and Legal Accountability*, vol. 3 (Geneva, 2008), p. 4.

<sup>25</sup> For recent litigation, see United States Supreme Court, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. \_\_\_\_ (2013) for limitations of the Alien Tort Statute; the Dutch National Public Prosecutor's Office dismissal of the case against Riwal; and the Court of Appeal of Versailles decision that ruled against civil liability for private French companies in the construction of a Jerusalem light rail tramway system, available from [www.volokh.com/wp-content/uploads/2013/04/French-Ct-decision.pdf](http://www.volokh.com/wp-content/uploads/2013/04/French-Ct-decision.pdf).

<sup>26</sup> Corporations and other private legal persons can be prosecuted for genocide and crimes against humanity under article 213-3 of the French Penal Code and under the Canadian Crimes Against Humanity and War Crimes Act.

<sup>27</sup> Brief of Amicus Curiae Navi Pillay, p. 3, in *Kiobel v. Royal Dutch Petroleum*.

<sup>28</sup> See [russelltribunalonpalestine.com/en/sessions/london-session](http://russelltribunalonpalestine.com/en/sessions/london-session).

involvement in those violations the company will be prosecuted independently of the principal actor.<sup>29</sup>

32. Much of the legal analysis has culminated in a discussion of international criminal law and its concept of corporate complicity.<sup>30</sup> The importance of complicity, however, transcends international criminal justice. It has been extended to respect for corporate social responsibility and human rights standards. The Guiding Principles on Business and Human Rights refer to international criminal law in its articulation of corporate complicity for human rights violations. Such initiatives contribute to translating international criminal responsibility standards into guidelines for companies on how to conduct their business in order to avoid responsibility for violations and abuses, for example through due diligence.

#### **IV. Case studies**

33. As noted in the previous report of the Special Rapporteur on this issue, there is a wide range of businesses operating in the settlements. The Special Rapporteur surveyed 13 businesses, including several that were Israeli and others that were international. Some businesses were connected with the occupation generally and others with the settlements in particular. In the present report the Special Rapporteur focuses on two discrete areas that relate to settlements. The first area is banking institutions involved in financial transactions, such as loans to construct or purchase Israeli settlements. The company that the Special Rapporteur discusses is the Dexia Group, a European banking group. This builds upon the analysis by the Special Rapporteur of the Dexia Group in the previous report. The second area that the Special Rapporteur draws attention to is real estate companies that advertise and sell properties in settlements. The activities of Re/Max International, a company based in the United States of America, are the focus of analysis in the present report. The case studies aim to determine whether the Dexia Group and Re/Max International, through providing loans and mortgages and through advertising and selling properties in settlements, provide knowing assistance that amounts to aiding in the commission of international crimes associated with transferring the citizens of the Occupying Power to the occupied territory. The Special Rapporteur reiterates that the businesses highlighted are illustrative examples. There are other companies that profit from Israeli settlement activities, both in the economic service areas in which the Dexia Group and Re/Max International are working and in other areas involving goods and services.

##### **A. Dexia Group**

34. The Dexia Group carries out activities in the fields of retail and commercial banking, public and wholesale banking, asset management and investor services. The Special Rapporteur previously reported on the activities of Dexia Israel Bank

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<sup>29</sup> International Commission of Jurists, *Corporate Complicity and Legal Accountability*, vol. 1 (Geneva, 2008), p. 18.

<sup>30</sup> Word constraints limited the present analysis on corporate responsibility to business activities connected to the settlements; however, the analysis could potentially be extended to all aspects of the occupation.

Limited (Dexia Israel), of which the Dexia Group is the majority shareholder, such as providing loans to Israelis living in settlements on the West Bank.

35. Since the previous report of the Special Rapporteur, the Dexia Group has continued to implement its revised orderly resolution plan, which was established as a result of the European sovereign debt crisis. In January 2013, Belgium, France and Luxembourg signed a tripartite liquidity guarantee agreement in favour of Dexia Crédit Local. The Dexia Group is now 94 per cent owned by Belgium and France (50.02 per cent Belgium and 44.38 per cent France).<sup>31</sup> In 2012, the Dexia Group stated that it planned to sell Dexia Israel and that the sale should be completed within 12 months, following a definitive decision on the various legal actions taken against Dexia Israel and Dexia Crédit Local as a shareholder.<sup>32</sup> A press release in May 2013 stated that there have been no new material developments in relation to this matter, and a mid-year report stated that legal proceedings between minority shareholders and Dexia Israel continue, but no mention was made of its banking activities.<sup>33</sup>

36. The Special Rapporteur previously noted that the Dexia Group was a member of the Global Compact Initiative and that it failed to communicate, in early 2012, on progress made in implementing the standards set by the Compact. The Special Rapporteur has learned that, in April 2013, the Dexia Group withdrew from the Compact, which seems to be a disturbing development from the perspective of securing compliance with the Compact guidelines.<sup>34</sup>

37. For several years the former and current presidents of the Dexia Group (Jean-Luc Dehaene and Karel De Boeck) have stated that no new contracts have been granted in relation to the settlements. The Belgian movement for international solidarity (Intal) questions the accuracy of this position. Intal's research indicates that new loans to construct and expand settlements continue to be granted, bringing the total amount of loans to €35 million.<sup>35</sup> According to Intal, in November 2012 Dexia Israel made a positive financial audit for the Elkanah and Karnai Shomron settlements and Dexia Israel continues to provide services for settlement development. For example, Ariel and Kedumim settlements can open accounts with Dexia Israel to receive Israel National Lottery (Mifal HaPais) grants.<sup>36</sup> Mifal HaPais uses its lottery revenue to support various public projects in the field of health, education and the arts. The settlements are considered one such public project and they receive lottery grants which are transferred through Dexia Israel. Who Profits, an Israeli non-governmental organization, has also conducted research on Dexia Israel. According to their research, Mifal HaPais provided grants in 2012 to Israeli local municipalities and regional councils that were specifically intended

<sup>31</sup> Dexia Group press release, 3 July 2013. Available from [dexia.com/EN/journalist/press\\_releases/Documents/20130703\\_CP\\_Dexia\\_emission\\_dette\\_garantie\\_EN.pdf](http://dexia.com/EN/journalist/press_releases/Documents/20130703_CP_Dexia_emission_dette_garantie_EN.pdf).

<sup>32</sup> Dexia Group, "Annual report 2012" (Brussels, 2012), p. 76. Available from [dexia.com/EN/shareholder\\_investor/individual\\_shareholders/publications/Documents/RA\\_2012\\_EN.pdf](http://dexia.com/EN/shareholder_investor/individual_shareholders/publications/Documents/RA_2012_EN.pdf).

<sup>33</sup> Dexia Group press release, 8 May 2013. Available from [dexia.com/EN/journalist/press\\_releases/Documents/20130508\\_CP\\_resultats\\_1T\\_EN.pdf](http://dexia.com/EN/journalist/press_releases/Documents/20130508_CP_resultats_1T_EN.pdf); Dexia Group press release, 7 August 2013. Available from <http://hugin.info/152020/R/1721538/574033.pdf>.

<sup>34</sup> See [unglobalcompact.org/participant/2887-Dexia-Group](http://unglobalcompact.org/participant/2887-Dexia-Group).

<sup>35</sup> See [intal.be/files/20101121\\_written\\_statement\\_RToP\\_Dexia\\_-\\_mario\\_franssen.pdf](http://intal.be/files/20101121_written_statement_RToP_Dexia_-_mario_franssen.pdf) and [intal.be/fr/article/dexia-et-son-principal-actionnaire-la-belgique-se-portent-garant-pour-couvrir-un-projet-de-l](http://intal.be/fr/article/dexia-et-son-principal-actionnaire-la-belgique-se-portent-garant-pour-couvrir-un-projet-de-l).

<sup>36</sup> See [intal.be/files/20101121\\_written\\_statement\\_RToP\\_Dexia\\_-\\_mario\\_franssen.pdf](http://intal.be/files/20101121_written_statement_RToP_Dexia_-_mario_franssen.pdf).

to support the construction of settlement facilities, such as schools and community centres, all of which were transferred through Dexia Israel.<sup>37</sup> It should be noted that Dexia Israel's activities have also included managing personal bank accounts and mortgage loans for home buyers.<sup>38</sup>

38. Can the Dexia Group be held accountable for mortgages and loans granted by Dexia Israel to Israeli settlements? As a subsidiary of the Dexia Group (the Dexia Group owns 100 per cent of Dexia Crédit Local, which in turn owns 65 per cent of Dexia Israel), there is a strong basis for imputing the activities of Dexia Israel to the Dexia Group. The methodology of the legal analysis set out above will be applied to this case study in order to assess the grounds for making such an argument. Although that analysis focused on corporations generally, it appears to be accepted that providers of financial services can also be held criminally liable for aiding and abetting crimes. The International Commission of Jurists stated that:

The criminal liability of a financier will depend on what he or she knows about how his or her services and loans will be utilised and the degree to which these services actually affect the commission of a crime. Criminal liability may be less likely for a lender or financier who supports a general project or organisation as opposed to the financier who knowingly facilitates specific criminal activities through funding them or dealing with proceeds of the crimes.<sup>39</sup>

## 1. International humanitarian law

39. Dexia Israel's transactions with Israeli settlements render the Dexia Group a business corporation involved in the occupation of Palestine, and it can therefore be held responsible for violating international humanitarian law. Settlements are illegal because of the fact that they are built on occupied land. They are closely linked to the ongoing conflict and the belligerent occupation. Dexia Israel's activities facilitate the growth of settlements, which demonstrates that the majority shareholder Dexia Group is complicit in violating international humanitarian law because, by transferring members of the Israeli population into occupied Palestine, Israel is violating article 49 (6) of the Fourth Geneva Convention, which, owing to its scale and intentionality, is a *prima facie* war crime.

40. Moreover, as States parties to the Geneva Conventions, Belgium and France are obligated to respect and ensure respect for the Conventions. At present, they are majority shareholders in a company that provides loans and mortgages to settlements in occupied Palestine and, in this connection, are violating their obligation to ensure respect for the Conventions.

## 2. International human rights Law

41. Dexia Israel, through its transactions with settlements, is aiding and abetting human rights infringements on the right of property, the right to equality, the right to a suitable standard of living and the right to freedom of movement, among other

<sup>37</sup> Who Profits research paper submitted to the Special Rapporteur, July 2013.

<sup>38</sup> Who Profits, "Financing the Israeli occupation" (2010). Available from [whoprofits.org/content/financing-israeli-occupation](http://whoprofits.org/content/financing-israeli-occupation).

<sup>39</sup> International Commission of Jurists, *Corporate Complicity and Legal Accountability*, vol. 2 (Geneva, 2008), pp. 39-40.

human rights. The Guiding Principles on Business and Human Rights consider the relevance of complicity to its concept of due diligence: “questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties”.<sup>40</sup> As a majority shareholder, liability extends to the Dexia Group. Belgium and France are also under a responsibility to take steps to prevent and punish the activities of private actors within the Dexia Group that have violated the law.<sup>16</sup> Moreover, as owners of the Dexia Group, Belgium and France have an explicit duty to take appropriate action in the face of human rights abuses, including activities of its subsidiary, Dexia Israel, that support the growth of settlements. By failing to do so, these States are not fulfilling their duties under human rights treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This duty is recognized by the Guiding Principles, which highlight that, when a State controls a company, its violations may also constitute a violation of the State’s own international law obligations.<sup>41</sup> If a State owns or controls a business, it has the direct means of ensuring that policies, legislation and regulations that respect human rights are implemented.<sup>42</sup>

42. Self-regulating mechanisms within corporations are relevant to assessing responsibility for potential human rights violations.<sup>43</sup> It is regrettable that the Dexia Group has withdrawn from the Global Compact. The observation of the Special Rapporteur in his previous report that the Dexia Group was not up to date on its reporting requirements was intended to encourage compliance, but indications suggest that the Dexia Group has unfortunately chosen to follow an opposite course of action.

### 3. International criminal law

43. Individual criminal responsibility for the activities of Dexia Israel potentially extends to individual employees of the Dexia Group. Both Belgium and France are States parties to the Rome Statute, rendering their nationals within the jurisdiction of the International Criminal Court. Therefore, charges could be presented against Dexia Group employees for complicity in the war crime of establishing settlements in the occupied territory of Palestine. Take for example Dexia Israel’s proposal to grant a loan of 2.5 million new Israeli shekels to Ariel settlement. Ariel is one of the oldest and most prominent settlements in the West Bank. If Dexia Israel is providing mortgage loans for homebuyers in Ariel or to the regional council, or facilitating grants allocated by Mifal HaPais, these types of assistance directly contribute to the settlement’s growth, and therefore materially facilitate the transfer of Israeli citizens to occupied territory. Based on information available to the Special Rapporteur, there is a reasonable basis for concluding that Dexia Israel’s activities provide the financial assistance for the construction, sustainability and maintenance of settlements such as Ariel and Kedumim. It can be reliably presupposed that Dexia Israel is fully aware of the activities for which it provides financial support, and therefore knowingly assists in the establishment and maintenance of settlements. In turn, it can be assumed that, by owning 65 per cent of the bank, the Dexia Group has

<sup>40</sup> A/HRC/17/31, annex, para. 17.

<sup>41</sup> A/HRC/17/31, annex, para. 4.

<sup>42</sup> Office of the United Nations High Commissioner for Human Rights, “The corporate responsibility to respect human rights: an interpretive guide”, p. 22; see also A/HRC/17/31, annex, para. 14.

<sup>43</sup> A/HRC/17/31, annex, paras. 15 and 16.



knowledge of the loans its subsidiary grants, and therefore individual criminal responsibility can be attributed to employees in the Dexia Group who have knowledge of the activities of their subsidiary in Israel.

#### 4. State responsibility

44. In addition to individual criminal responsibility, the question of State responsibility is relevant to this analysis. When a State commits an internationally wrongful act (complicity in a war crime), it is obligated to cease the act and make appropriate assurances not to repeat it. In this case, it would appear that Belgium and France must ensure that Dexia Israel stops providing loans and ceases the transfer of Government grants to settlements and settlement-related activities. Further, the State must make full reparation for the injury caused by its past wrongful acts. In this case, Belgium and France could be responsible for reparations to Palestinians adversely affected by settlements that received loans and mortgages from Dexia Israel. Reparation can take the forms of restitution, compensation and satisfaction. The fact that the Dexia Group is now State-owned means that State responsibility and individual criminal responsibility are potential modes of liability. Considering the concern and objections that have been voiced by the European Union about Israeli settlement activity, political and civil society pressure on the Governments of Belgium and France to sell its shares in Dexia Israel may be the most appropriate step to take if compliance is to be belatedly achieved.<sup>44</sup>

#### 5. Civil liability

45. Domestic courts have been faced with litigation against financial institutions, albeit resulting in different verdicts.<sup>45</sup> In most jurisdictions it must be proven that the banks knew about the criminal activity of the borrower they were financing and could foresee the effects of the loan and the harmful consequences resulting from the transaction.<sup>46</sup> Civil liability could therefore be potentially imposed on the Dexia Group as an institution, on individuals within the corporation, and/or on Belgium and/or France as owners. The recent Court of Versailles decision on the Jerusalem light rail indicates that, in France at least, civil liability may be difficult to establish in a judicial setting. However, the judicial record of past receptivity by Belgium to universal jurisdiction suggests it may be more ready to respond sympathetically to such an initiative.<sup>47</sup>

46. In relation to civil liability, certain financial entities have demonstrated an increasing awareness of corporate social responsibility and the potential legal

<sup>44</sup> See European Union, "Statement by the Spokesperson of the High Representative Catherine Ashton on renewed plans for Israeli settlements in and around East Jerusalem", 31 May 2013. Available from [consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/137350.pdf](http://consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137350.pdf).

<sup>45</sup> See, for example, *South African Apartheid Litigation*, 617 F. Supp. 2d 228, 260-262 (S.D.N.Y. 2009) and *Almog v. Arab Bank*, 471 F. Supp. 2d at 257 (E.D.N.Y. 2007).

<sup>46</sup> See Juan Pablo Bohoslavsky and Veerle Openhaffen, "The past and present of corporate complicity: financing the Argentinean dictatorship", *Harvard Human Rights Journal*, vol. 23 (2010).

<sup>47</sup> It should be noted that, as a result of issues raised by the Sharon case (*La Cour de Cassation*, 24 September 2003), which was before the Cour de Cassation at the time, legislators in Belgium made changes to the Amendment to the Law of June 16, 1993, Concerning the Punishment of Grave Breaches of Humanitarian Law (5 August 2003), requiring a direct Belgian link for a case to be heard before the courts.

ramifications relating to Israeli settlements. The Norwegian Government Pension Fund Global excluded the construction company Shikun & Binui because of its involvement in the construction of settlements. The Ethical Council of four of the largest pension funds in Sweden excluded Elbit Systems because of its involvement in the construction and maintenance of the wall. The New Zealand Government Superannuation Fund divested from Elbit Systems, Africa-Israel Investments Limited and its subsidiary Danya Cebus, and Shikun & Binui because of their participation in either the construction of settlements or the wall.<sup>48</sup>

47. Investment committees have recommended that large European banks refuse to extend financial assistance to Israeli companies that manufacture, build or sell products in Palestine and to banks that grant mortgages to builders or buyers of housing therein. The Dexia Group would fall within the latter category. According to *Haaretz*, the recommendations have been put on hold following pressure from Israel exerted in the context of a diplomatic initiative led by the United States.<sup>49</sup> Nonetheless, the recommendations, the response by the Government of Israel and related reporting in the Israeli press indicate that financial institutions are increasingly concerned about their legal and moral responsibilities associated with any dealings involving the settlements.

## B. Re/Max International

48. Re/Max International is a privately held real estate company in the United States that has an international network of franchisee-owned and operated offices. Re/Max International receives 1 per cent of the revenue of sales and a flat fee per associate.<sup>50</sup> Re/Max International franchises its international brand name affiliation and recognition, start-up training, ongoing training, technological resources, and advertising and marketing support.<sup>51</sup> Re/Max Israel is itself a franchise of Re/Max International. It opened in 1995 and has more than 100 branches, including in settlements on the West Bank. Israeli branches advertise properties and execute sales of settlement homes in the West Bank.<sup>52</sup> The Re/Max Israel franchise office in Jerusalem, called Re/Max Vision, targets international clients who may be interested in purchasing a home in or around Jerusalem.<sup>53</sup> Re/Max International promotes the same properties on its website. A search of its website in June 2013 indicated that there were 51 residential properties advertised in 9 settlements.<sup>54</sup>

49. Can Re/Max International be held accountable for settlement properties sold by Re/Max Israel? By providing international brand name affiliation and recognition, start-up training, ongoing training, technological resources, and advertising and

<sup>48</sup> Jan Willem van Gelder, Barbara Kuepper and Ewoud Nijhof, "Dutch economic links with the occupation", research paper prepared for Cordaid (Amsterdam, Profundo, 2013), p. 17. Available from [cordaid.org/media/publications/Report\\_Dutch\\_economic\\_links\\_with\\_the\\_occupation\\_1.pdf](http://cordaid.org/media/publications/Report_Dutch_economic_links_with_the_occupation_1.pdf); see also Norwegian People's Aid, "Dangerous liaisons: Norwegian ties to the Israeli occupation" (2012). Available from [npaid.org/Media/20\\_Files/Om-oss/Annual-reports/Dangerous-liaisons](http://npaid.org/Media/20_Files/Om-oss/Annual-reports/Dangerous-liaisons).

<sup>49</sup> "Danger ahead: an Israel boycott", editorial, *Haaretz*, 14 July 2013.

<sup>50</sup> See [remax-franchise.com/fs/home/general\\_content/faqs](http://remax-franchise.com/fs/home/general_content/faqs).

<sup>51</sup> See [remax-franchise.com/fs/helping-you-succeed/training-and-support](http://remax-franchise.com/fs/helping-you-succeed/training-and-support).

<sup>52</sup> See [remax-israel.com/OfficeProfile.aspx?OfficeID=5012](http://remax-israel.com/OfficeProfile.aspx?OfficeID=5012).

<sup>53</sup> See [remax-capital.com/new/html/project\\_2\\_about.php](http://remax-capital.com/new/html/project_2_about.php).

<sup>54</sup> [Http://global.remax.com](http://global.remax.com).

marketing, as well as by profiting from such sales, Re/Max International has constant interaction and influence over its franchises. Similar to the Dexia Group case study, the methodology used in the legal analysis set out below will be applied in order to assess the legal plausibility of such a case.

### **1. International humanitarian law**

50. Promoting the sale of (for example by advertising) or selling property on or as part of a settlement contributes to the commission of the international crime of transferring citizens of the Occupying Power onto occupied territory. In fact, advertising and selling such properties to citizens of the Occupying Power constitute instances par excellence of participating in such transfers.

### **2. International human rights law**

51. The responsibility to respect human rights requires businesses to avoid contributing to adverse human rights impacts and to mitigate such impacts when linked to their operations.<sup>55</sup> Re/Max International, through selling properties on Palestinian land, is directly contributing to adverse human rights impacts, such as the restrictions on freedom of movement that obstruct Palestinians' access to land, which is often used for agricultural purposes, and arbitrary and unlawful interference with Palestinians' privacy, family and home.<sup>56</sup> States parties to the International Covenant on Civil and Political Rights are obliged to regulate the conduct of private groups and ensure that such conduct will not result in violating human rights and, where it does, ensure that effective remedies are available.

52. Re/Max International's code of ethics states that "its affiliates shall undertake to eliminate any practice by real estate professionals in their community which could be damaging to the public".<sup>57</sup> The statement reveals two things. First, if the Palestinian population is considered to be part of the public in Israel (given that Israel effectively controls the population) then the establishment of settlements is clearly damaging to that sector of the public. Second, the code of ethics extends to the "affiliates" of Re/Max International, which form part of its "community", therefore reconfirming the connection between the global company and its local franchises.

### **3. International criminal law**

53. Neither the United States nor Israel are States parties to the Rome Statute. That makes it difficult to bring a case of complicity against a Re/Max International employee, except if the employee is a national of a party to the Rome Statute. In terms of the causal connection between Re/Max International and its franchises, the fact that it advertises on its website the sale of the properties in settlements demonstrates that it knows about such sales and draws a 1 per cent profit from each sale. Again, by providing international brand name affiliation and recognition, start-up training, ongoing training, technological resources, and advertising and marketing, Re/Max International has an ongoing interaction and influence over its franchises. The Special Rapporteur believes that a strong case could be made that this amounts to knowing assistance in the commission of a crime. Further, the explicit connection of

<sup>55</sup> A/HRC/17/31, annex, para. 13.

<sup>56</sup> See General Assembly resolution 2200 A (XXI), annex, articles 12 and 17 and the individual complaint by the Norwegian Refugee Council to the Human Rights Committee, 28 February 2013.

<sup>57</sup> See, for example, [remax-fun.at/?id=qualitaeten&lang=en](http://remax-fun.at/?id=qualitaeten&lang=en).

individual salespersons to the promotion and sale of homes in Israeli settlements greatly increases prospects for holding individuals accountable for such crimes.

#### 4. Civil liability

54. Civil liability for corporate complicity may prove a difficult avenue for redress in this case. The United States Supreme Court decision on *Kiobel v. Royal Dutch Petroleum Co.* presents a challenge to litigation against corporations through the Alien Tort Statute, which had been a valuable mechanism to hold corporations accountable for violating international law.<sup>58</sup> This would make it difficult to bring a case of corporate complicity against Re/Max International in the United States. Nonetheless, civil liability could be prosecuted against individuals within Re/Max International for their role in knowingly assisting in the commission of a crime by providing advertising and other administrative support to Re/Max Israel's property sales in the West Bank, including East Jerusalem. Furthermore, the Guiding Principles on Business and Human Rights emphasize that States must take appropriate steps to ensure that effective remedy is available through judicial, administrative and legislative means.<sup>59</sup>

55. Real estate agents who promote and/or sell properties in settlements in Palestine to citizens of the Occupying Power may be held liable for complicity in the crime of promoting settlement activity in occupied territory. While the present case study examined Re/Max International, the same analysis would apply to other real estate agencies. The unavailability of civil relief in United States court at the present time does not establish that such a remedy might not be available in other national legal systems.

### C. Conclusions on case studies

56. The present report proposed a model for legal analysis by focusing on two companies chosen for the particular ways in which their activities potentially implicate them in international crimes. The legal model can be applied to other situations and other companies. The Special Rapporteur stresses again that the companies discussed herein are illustrative examples; however, some conclusions can be drawn about the case studies.

57. Financial institutions and real estate agents may be held accountable for their involvement with settlements in occupied Palestine. Pressure by the international community to uphold international law is no longer limited to States as the primary duty-bearers. Companies, individuals and groups can be implicated for behaviour that contributes to wrongful acts. The Dexia Group and Re/Max International, in different ways, assist in the growth of settlements: the Dexia Group by providing financial services connected to the settlements, and Re/Max International by selling settlement properties. In terms of assessing the causal connection to the policy and practice by Israel of transferring its citizens to Palestine, this must largely be based on the connection between the global companies and the settlement activity. Do the activities of the global companies directly contribute to the violations of international

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<sup>58</sup> The Alien Tort Statute is a legal instrument that enables plaintiffs to sue persons, including foreigners, who acted outside United States territory for breaches of international law before United States district courts.

<sup>59</sup> A/HRC/17/31, annex, paras. 25 and 26.

law that the settlements constitute? Voluntarily playing a causal role in the commission of a crime can in certain instances be enough to make them accomplices to that crime.

## V. Water and sanitation in the West Bank and Gaza Strip

58. During the mission of the Special Rapporteur to the Gaza Strip in December 2012, a number of interlocutors raised serious concerns about the lack of clean water and adequate sanitation facilities in the Gaza Strip. Some of those issues were briefly touched upon in the previous report of the Special Rapporteur to the Human Rights Council.<sup>8</sup> In the context of the near exclusive control by Israel over all underground and surface water resources in Palestine, the Special Rapporteur reiterates his concerns regarding the occupation-induced water and sanitation crisis.

### The situation in the Gaza Strip

59. In the Gaza Strip, 90 per cent of water in the underlying coastal aquifer beneath the Gaza Strip is unfit for human consumption as a result of pollution caused by raw sewage and rising seawater infiltration. In 2012, the United Nations reported that the coastal aquifer on which the Gaza Strip is almost completely reliant could become unusable as early as 2016, with the deterioration becoming irreversible by 2020. Polluted tap water has forced many families to buy expensive water from external vendors or to rely on desalinated water supplied by the Coastal Municipalities Water Utility, putting an unreasonable burden on average household incomes, which are already struggling at or below subsistence levels. Under these circumstances, most Gazans consume an average of 70 to 90 litres per person per day, which is well below the global standard set by the World Health Organization.<sup>1</sup>

60. The Israeli blockade of Gaza has exacerbated water scarcity and lack of adequate sanitation facilities. Delays and restrictions on the entry of materials through the Israeli-controlled Kerem Shalom crossing have stalled a number of water and sanitation infrastructure projects. Furthermore, Israel not only extracts a disproportionate share of the water from the coastal aquifer for its own benefit but also blocks the Gazan population from accessing water from the Wadi Gaza, a natural stream that originates in the Hebron Mountains and flows to the Mediterranean Sea.

61. Water scarcity in Gaza has been worsened by the repeated destruction of water and sanitation infrastructure in the course of Israeli military operations.<sup>60</sup> Israel has destroyed at least 306 wells in the Access Restricted Areas of Gaza since 2005.<sup>61</sup> In this context, the Special Rapporteur strongly condemns the targeting of water and sanitation facilities during Israeli military operations, which cannot be justified as a military necessity, and cannot be explained as a consequence of accidents.

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<sup>60</sup> See A/HRC/22/35/Add.1.

<sup>61</sup> Emergency Water and Sanitation-Hygiene Group, "Fact sheet 13: Water and sanitation in the Access Restricted Areas of the Gaza Strip" (December 2012). Available from [ewash.org/files/library/factsheet%20jan%202012\[1\].pdf](http://ewash.org/files/library/factsheet%20jan%202012[1].pdf).

### The situation in the West Bank

62. Palestinians in the West Bank are denied their rightful share of water from the underground mountain aquifer and prevented from accessing water from the Jordan River, which are both classified as shared water resources and thus must be shared equitably under customary international law.<sup>62</sup> An estimated 500,000 Israeli settlers in the West Bank and East Jerusalem enjoy approximately six times the amount of water used by the Palestinian population of 2.6 million.<sup>63</sup> Israeli settlers enjoy ample amounts of water channelled directly to the settlements, which allows settlers to irrigate agricultural land and grow water-intensive crops. In contrast, Palestinian farmers depend largely on water supplies transported in tankers or collected by water cisterns, raising agricultural costs and restricting most Palestinian agriculture to unprofitable small-scale operations growing rain-fed crops, which on average is 15 times less profitable than irrigated crops. In this context, only 6.8 per cent of land cultivated by Palestinians in the West Bank is irrigated.<sup>64</sup>

63. The unequal distribution of water resources has been sustained by the Joint Water Committee, which was established as part of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip. Mandated to grant permits for the drilling and rehabilitation of wells and sewage systems, the Committee is also responsible for setting water extraction quotas. The veto power of Israel on decision-making by the Committee has enabled it to constrain the development of water infrastructure for Palestinian communities, particularly in Area C of the West Bank. In addition, all Palestinian water projects located in Area C need to obtain approval from the Israeli Civil Administration. The Special Rapporteur finds it alarming that from 1995 to 2008, the Committee approved Israeli proposals for 3 wells and 108 supply networks and rejected only 1 of 24 proposed wastewater projects, while during the same period it approved only half of all Palestinian proposals for wells.<sup>65</sup>

64. The loss of scarce Palestinian water resources occurs not only through demolitions undertaken by Israeli authorities of “illegal” water collection facilities, including wells and water collection tanks, but also as a result of deep-water drilling activities by Israeli water companies. The Special Rapporteur is also concerned by acts of violence by settlers in the vicinity of Palestinian communities; there are several reports of Palestinian springs being taken over by settlers and fenced off.<sup>65</sup>

65. Israel systematically blocks the development of the Palestinian wastewater and sanitation sector through bureaucratic constraints imposed by the Joint Water Committee and the Israeli Civil Administration. Between 1995 and 2011, only 4 out of 30 Palestinian wastewater treatment plant proposals were approved by the Committee and their construction has been repeatedly delayed. It is of serious

<sup>62</sup> Palestinian Water Authority, “Palestinian water sector: status summary report”, report prepared for the meeting of the Ad Hoc Liaison Committee (September 2012). Available from <http://reliefweb.int/sites/reliefweb.int/files/resources/Water%20summary%20for%20AHLC%20report%20FINAL.pdf>.

<sup>63</sup> Elizabeth Koek, *Water for One People Only: Discriminatory Access and “Water-Apartheid” in the OPT* (Ramallah, Al-Haq, 2013).

<sup>64</sup> Emergency Water and Sanitation-Hygiene Group, “Fact sheet 14: Water for agriculture in the West Bank” (March 2013). Available from [ewash.org/files/library/WB%20factsheet%20final%20march%202013.pdf](http://ewash.org/files/library/WB%20factsheet%20final%20march%202013.pdf).

<sup>65</sup> See A/HRC/22/63 and Oxfam, *On the Brink: Israeli Settlements and Their Impact on Palestinians in the Jordan Valley* (Oxford, 2012).

concern to the Special Rapporteur that there is only one functioning Palestinian wastewater treatment plant in the West Bank, which has the capacity to treat less than 3 per cent of sewage.<sup>62</sup>

66. Meanwhile, Israeli authorities profit from the occupation-induced crisis by treating up to 21 per cent of Palestinian sewage in facilities established inside Israel and paid for by Palestinian tax revenues withheld by Israel. The treated wastewater is then reused for the exclusive benefit of the Israeli agricultural sector.<sup>62</sup> The difficulties experienced by Palestinian communities in securing sewage treatment facilities contrasts with the wastewater treatment plants servicing the settlements, which makes a mockery of the relevance of international humanitarian law in the protection of an occupied people.

### **The Palestinian right to water and development**

67. Considering the unlawful policies and practices of Israel that induce a water and sanitation crisis in occupied Palestine, the Special Rapporteur stresses that the Palestinian Authority has neither been able to uphold Palestinian water rights nor embrace the right to development of water and sanitation facilities.<sup>66</sup> Support from the international donor community for ad hoc solutions, such as financing desalination plants and sanitation facilities to meet the immediate needs of the Palestinian population, must go hand in hand with pressure exerted on Israeli authorities to put an end to its discriminatory policies. In sum, the discriminatory pattern disclosed is aggravated by the fact that while the Palestinians are being denied their rights to resources situated within Palestine, settlements have been the beneficiaries of these Israeli policies. In effect, illegality is compounded by illegality, with the result being impending threats of de-development hanging over the Palestinian future in the Gaza Strip, and to a lesser degree in the West Bank.

## **VI. Recommendations**

**68. If current diplomacy fails to produce a solution to the underlying conflict, the Special Rapporteur recommends that the General Assembly request an advisory opinion from the International Court of Justice as to the legal consequences of the prolonged occupation of Palestine.**

**69. The Special Rapporteur recommends that the Government of Israel cease expanding and creating settlements in occupied Palestine, start dismantling existing settlements and returning its citizens to the Israeli side of the Green Line and provide appropriate reparations for the damage due to settlement and related activity since 1967.**

**70. The Special Rapporteur recommends that the Government of Israel inform Israeli businesses that are franchises and subsidiaries of global companies that profit from activity with the settlements of their corporate**

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<sup>66</sup> The International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities entail obligations for States parties in relation to access to safe drinking water and sanitation. Israel has ratified the aforementioned Conventions except for the Convention on the Rights of Persons with Disabilities, to which Israel is a signatory.

responsibilities and the international legal ramifications of such business activities, in particular concerning potential liability for corporate complicity in overseas domestic courts.

71. The Special Rapporteur recommends that Belgium and France compensate Palestinians who have been directly affected by the settlements to which Dexia Israel has provided mortgages or administered grants.

72. The Special Rapporteur recommends that copies of the present report be forwarded to Robert de Metz (Chair of the Board of the Dexia Group) and David Liniger (Chair and founder of Re/Max International). It is strongly recommended that each of these two companies undertake a prompt review so as to bring it, its affiliates and its employees' policies and practices into full compliance with the laws and standards mentioned in the present report.

73. The Special Rapporteur recommends that the Dexia Group and Re/Max International should agree to comply with and adopt clear guidelines for future corporate social responsibility based on the Guiding Principles on Business and Human Rights.

74. The Special Rapporteur recommends that civil society in Belgium and France be urged to pressure their Governments to sell their shares in the Dexia Group and encourages civil society to demand that all businesses cease their activities that relate to the settlements and henceforth insist that companies act in accordance with the Guiding Principles on Business and Human Rights.

75. The Special Rapporteur recommends that all companies with relations to the settlements comparable to those of the Dexia Group and Re/Max International review their arrangements with an eye towards respect for international law and the Guiding Principles on Business and Human Rights.

76. The Special Rapporteur recommends that Israel immediately end its discriminatory policies and practices that serve to deny Palestinians their rightful share of water resources in the West Bank and the Gaza Strip. In particular, Israel must cease the demolition of water collection facilities, including wells and water tanks, on the pretext that they operate without valid permits.