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Mandate of the 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

1. Background and context

Human Rights Council resolution 22/29 entitled “Follow-up to the report of the independent international fact-finding mission to investigate the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem” included the following operative paragraphs:

“2. Calls upon the relevant United Nations bodies to take all necessary measures and actions within their mandates to ensure full respect for and compliance with Human Rights Council resolution 17/4 on the Guiding Principles on Business and Human Rights and other relevant international laws and standards, and to ensure the implementation of the United Nations “Protect, Respect and Remedy” Framework, which provides a global standard for upholding human rights in relation to business activities that are connected with Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem;

3. Requests the Working Group on the issue of human rights and transnational corporations and other business enterprises, including in consultation with relevant special procedures mandate holders, to fulfil its mandate accordingly”.

At its 5th session held in Geneva (17-21 June 2013) the Working Group on the issue of human rights and transnational corporations and other business enterprises (the Working Group) considered the Council’s request and decided to respond by issuing a statement outlining the implications of the Guiding Principles on Business and Human Rights¹ (hereafter the Guiding Principles) in the context of Israeli settlements in the Occupied Palestinian Territory including East Jerusalem (OPT) before the 26th session of the Human Rights Council.²

Whereas the Working Group has not undertaken independent research on the impacts on business activities related to the Israeli settlements in the OPT, several United Nations mechanisms have undertaken fact-finding investigations and assessments into adverse human rights impacts related to the Israeli settlements in the OPT.

Successive reports of the United Nations High Commissioner for Human Rights and the United Nations Secretary General, based on information gathered by the Office of the United Nations High Commissioner for Human Rights and other United Nations entities, have documented human rights

¹ The Guiding Principles on Business and Human Rights were unanimously endorsed by the Human Rights Council in June 2011 in its resolution 17/4 (A/HRC/RES/17/4).

² In the present statement, the term “Occupied Palestinian Territory” refers to the West Bank including East Jerusalem, and Gaza. Moreover, as in the report of the independent international fact-finding mission, “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” (A/HRC/22/63, para. 4).

violations linked to Israeli settlements in the OPT.³ Concerns about such violations have also been expressed in resolutions of the Human Rights Council as well as by special procedures and fact-finding missions mandated by the Human Rights Council and by United Nations human rights treaty bodies.⁴

Applicable legal framework – situations of conflict and the OPT

All States are at all times bound to respect, protect, promote and fulfil the human rights enshrined in international legal instruments to which they are parties, as well as those human rights which are considered part of customary international law. In international conflicts, international humanitarian law — including the treaties to which a State is party and those provisions of international humanitarian law which have become customary international law — also applies. A situation of military occupation is considered to be a conflict situation even if active hostilities may have ceased or occur periodically or sporadically.⁵ A situation of conflict does not release States from their human rights obligations – these obligations continue to exist alongside international humanitarian law and provide complimentary and mutually reinforcing protection.

As noted by the International Committee of the Red Cross, humanitarian law standards also apply to business enterprises in situations of armed conflict.⁶ International humanitarian law provides some protection to business personnel⁷ and assets⁸ but also imposes obligations on managers and staff not to breach international humanitarian law, and provides for exposure of individual personnel and the enterprise to the risk of criminal or civil liability in the event that they do so.⁹

The situation in the OPT is one of military occupation.¹⁰ As the occupying power, Israel is bound by international human rights law and international humanitarian law.¹¹ This is on account of its

³ See, inter alia, report of the Secretary-General “Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem” (A/68/513) of 9 October 2013; Annual report of the United Nations High Commissioner for Human Rights “Implementation of the recommendations contained in the report of the independent international fact-finding mission on the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (A/HRC/22/63)” (A/HRC/25/39) of 10 January 2014; and Report of the Secretary-General “Israeli settlement in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan” (A/HRC/25/38) of 12 February 2014.

⁴ See, for example, Human Rights Council resolution 25/28 “Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan” (28 March 2014); 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, “Mission to Israel and the Occupied Palestinian Territory” (A/HRC/22/46/Add.1); report of the Special Rapporteurs on the human rights situation in the Palestinian territories occupied since 1967 ([A/HRC/25/67](#)); concluding observations concerning Israel of the Committee on the Elimination of Discrimination against Women (CEDAW/C/ISR/CO/5), the Human Rights Committee (CCPR/C/ISR/CO/3), and the Committee on Economic, Social and Cultural Rights concerning Israel (E/C.12/ISR/CO.3); and Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (A/HRC/22/63).

⁵ In a situation of occupation, international humanitarian law establishes specific obligations on the occupying power, codified in treaties (including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949) as well as customary international law, which includes the obligations in the Hague Regulations of 1907, annexed to the Convention with Respect to the Laws and Customs of War on Land.

⁶ ICRC “Business and International Humanitarian Law,” 2006.

⁷ See, for example, article 3 common to the Geneva Conventions of 1949; articles 32 and 34, Geneva Convention IV; Article 75(2) Additional Protocol I; Article 4(2) Additional Protocol II.

⁸ See, for example, articles 46 and 47 Hague Regulations; Article 33 Geneva Convention IV.

⁹ See ICRC “Business and International Humanitarian Law,” 2006, p. 14.

¹⁰ See the International Court of Justice Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004. (A/ES-10/273 and Corr.1, para. 78

ratification of international human rights and international humanitarian law treaties and also on account of the fact that some of these standards reflect customary international law or represent peremptory norms of international law. Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War prohibits the occupying power from transferring parts of its own civilian population into the territory that it occupies.¹² The International Court of Justice,¹³ the United Nations General Assembly¹⁴ the Security Council¹⁵ and other international mechanisms have affirmed that the settlements are illegal under international law. United Nations human rights treaty bodies have also called on Israel to cease all construction of settlements.¹⁶

The Guiding Principles on Business and Human Rights in situations of conflict

The Guiding Principles on Business and Human Rights apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.¹⁷ The Guiding Principles are based on existing obligations and responsibilities under international human rights law – they do not create new international law obligations, nor do they limit or undermine any legal obligations with regard to human rights that a State may have undertaken or to which it is subject under international law.¹⁸

The Guiding Principles are applicable in all operational contexts,¹⁹ including in situations of conflict. The Guiding Principles explicitly recognize that conflict-affected areas present heightened risks of business involvement in human rights abuses, including “gross human rights abuses”,²⁰ and contain specific provisions for preventing and addressing human rights impact of business operating in conflict affected areas. While the Guiding Principles do not explicitly address the situations of occupation, an area under occupation falls within the term “conflict-affected area” in the Guiding Principles.

The Guiding Principles further recognize that in conflict-affected areas, the “host” State may be unable to protect human rights adequately owing to a lack of effective control, or it may itself be engaged in human rights abuses.²¹ Where transnational corporations are involved, their “home” States therefore have crucial roles to play in assisting both those corporations and host States to ensure that businesses

¹¹ As the occupying Power, Israel is bound under international humanitarian law by the obligations in the Hague Regulations of 1907, which are recognized as part of customary international law, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention), to which Israel is a High Contracting Party. See A/HRC/22/63, para. 13. The United Nations human rights treaty bodies have consistently concluded that human rights treaties to which Israel is a party are applicable with regard to acts carried out by Israel in the OPT. This has also been confirmed by the International Court in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 2004 (A/ES-10/273 and Corr. 1), paras. 89-113).

¹² Convention Relative to the Protection of Civilian Persons in Times of War. Geneva, 12 August 1949.

¹³ See the International Court of Justice Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004. (A/ES-10/273 and Corr.1, para. 120.

¹⁴ See, for example, General Assembly resolutions 3092 (XXVIII), 47/172 and 66/225.

¹⁵ See, for example, Security Council resolution 471 (1980).

¹⁶ See e.g. E/C.12/1/ADD.90 (CESCR, 2003) and CCPR/C/ISR/CO/3 (HRC, 2010).

¹⁷ See Guiding Principles on Business and Human Rights, Principles 1 and 14.

¹⁸ Guiding Principles on Business and Human Rights, General Principles.

¹⁹ See Guiding Principles on Business and Human Rights, Principles 1 and 14.

²⁰ Guiding Principles on Business and Human Rights, Principle 7.

²¹ As also noted in section 2.1 below, the term “host State” is obviously ambiguous in situations of occupation. In such situation it is more accurate to refer to the State that exercise effective control over an occupied territory as having obligations equivalent to those of a “host State”, as described in the Guiding Principles on Business and Human Rights.

are not involved with human rights abuse, while neighbouring States can provide important additional support.²²

2. The State Duty to Protect²³

General considerations

The Guiding Principles confirm that States must protect everyone against adverse human rights impacts within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.²⁴

The ‘host State’ within whose territory and/or jurisdiction a business enterprise is operating has a primary obligation to protect individuals and communities against adverse human rights impacts of business activities.

Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own obligations under international human rights law. A State should also take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies, such as official investment insurance or guarantee agencies.²⁵

Guiding Principle 2 makes clear that States should set out clearly the expectation that all business enterprises domiciled in its territory and/or jurisdiction respect human rights throughout their operations. While there is no general requirement for States to regulate the extra-territorial activities of enterprises domiciled in their territory and/or jurisdiction, States are also not generally prohibited from doing so, provided there is a recognized jurisdictional basis.²⁶ Given that the presence of conflict may often suggest that the host State’s own protection mechanisms are not functioning effectively, home States have particularly important roles to play in preventing and addressing human rights abuses by business enterprises domiciled in their territory and/or jurisdiction.²⁷ The role of home States is also particularly relevant in contexts where the host State is unable or unwilling effectively to protect human rights or may itself be responsible for human rights violations, as may be the case in conflict situations.

²² See also the report of the former Special Representative SG on the issue of human rights and transnational corporations and other business enterprises - *Business and human rights in conflict-affected regions: challenges and options towards state responses* on this issue by the former Special Representative of the Secretary General, John Ruggie, A/HRC/17/32, paragraphs 5 and 6.

²³ The most relevant Guiding Principles are: Principle 1 (State duty to protect against human rights abuses within their jurisdiction by third parties including businesses), Principle 2 (extraterritorial activities of businesses domiciled in their territory), Principle 4 (state owned enterprises), Principle 5 (privatization cases), Principle 6 (state commercial transactions with companies), Principle 7 (conflict-affected areas), Principle 9 (domestic policy space/bilateral agreements).

²⁴ Guiding Principles on Business and Human Rights, Principle 1.

²⁵ Guiding Principles on Business and Human Rights, Principle 4.

²⁶ Guiding Principles on Business and Human Rights, Principle 2. This principle recognises that extra-territorial jurisdiction is an evolving area of international law. While according to Guiding Principle 2 there is no general obligation to regulate the extra-territorial activities of a State’s natural or legal persons, specific obligations exist in relation to particular issues, such as child sex tourism under the Optional Protocol of the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. It also refers to the fact that several United Nations treaty bodies have inferred a responsibility to take steps to prevent human rights abuses by business enterprises domiciled in a State’s territory and/or jurisdiction. See e.g. Committee on the Elimination of Racial Discrimination the Human Rights Committee (CERD/C/CAN/CO/18, paragraph 17) and Human Rights Committee (CCPR/C/DEU/CO/6, para 16).

²⁷ See Guiding Principles on Business and Human Rights, Principle 7 and its commentary.

Some human rights treaty bodies recommend that home States take steps to prevent abuse outside their territories by business enterprises domiciled within their jurisdiction as part of their obligations to protect human rights under the international human rights treaties. Specifically in the context of conflict, the Committee on the Convention on the Rights of the Child has stated that: “home States should require business enterprises operating in situations of emergency and conflict to undertake stringent child-rights due diligence tailored to their size and activities. Home States should also develop and implement laws and regulations that address specific foreseeable risks to children’s rights from business enterprises that are operating transnationally.”²⁸

In recognition of the heightened risk of business involvement in human rights abuses while operating in conflict-affected areas, Guiding Principle 7 stipulates that States should help ensure that business enterprises operating in those contexts are not involved in such abuses, including by: engaging with business enterprises to help them identify, prevent and mitigate risks; providing assistance to business enterprises to assess and address risks; denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; and ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses. To this end, States—home as well as host States—should review their policies, legislation, regulations and enforcement measures to ensure that they effectively serve to prevent and address the heightened risk of business involvement in abuses in conflict situations.²⁹

State responses, including those with extraterritorial dimensions, can take a range of forms from guidance and advice through to establishing criminal or civil liability for enterprises in the home State.³⁰ A combination of responses, including both unilateral and multilateral actions, may be appropriate.

Examples of State responses to business and conflict

Multilateral action

The Heads of State of the International Conference on the Great Lakes Region (ICGLR) decided to integrate the processes and standards of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, which are aligned with the Guiding Principles, into the tools of the Regional Initiative against the Illegal Exploitation of Natural Resources.³¹ In March 2014, the European Union (EU) published draft legislation on conflict minerals that proposes a voluntary supply chain certification scheme.³² Other multistakeholder voluntary initiatives, such as the Kimberley Process on conflict diamonds and the Voluntary Principles on Security and Human Rights provide guidance and a common platform for action with regard to

²⁸ Committee on the Convention on the Rights of the Child, General Comment No. 16 (On State obligations regarding the impact of business on children’s rights), para. 50. See also United Nations Global Compact and the Principles for Responsible Investment, Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: a Resource for Companies and Investors. 2010. Available at: www.unitednationsglobalcompact.org/docs/issues_DOCS/Peace_and_Business/.

²⁹ See Guiding Principles on Business and Human Rights, Principle 7 and its commentary.

³⁰ See the report of the former Special Representative SG on the issue of human rights and transnational corporations and other business enterprises - *Business and human rights in conflict-affected regions: challenges and options towards state responses* on this issue by the former Special Representative of the Secretary General, John Ruggie, A/HRC/17/32.

³¹ See the G8/Africa joint declaration “Shared Values, Shared Responsibilities”, May 26-27, 2011, available at: http://summits.au.int/en_v1/content/g8africa-joint-declaration-shared-values-shared-responsibilities.

³² See European Union press release: EU proposes responsible trading strategy for minerals from conflict zones, 5 March 2014, available at: http://europa.eu/rapid/press-release_IP-14-218_en.htm.

specific conflict-related risks. Host and home States both should engage with such initiatives to help mitigate risks.

Conveying expectations through policies, legislation and regulations, including due diligence

Some States, including the United States, have implemented measures to convey the State's expectations of business behaviour in specific conflict situations. To avoid the trade in conflict minerals that may contribute to fuelling the conflict in the Great Lakes region in Africa, the United States has enacted the Dodd-Frank regulations, section 1502 of which requires businesses to report on their due diligence in relation to the sourcing and use of conflict minerals from the Democratic Republic of the Congo.³³

States can also help business enterprises to assess and address the risks of human rights abuses by providing basic information and by assisting in identifying the tools necessary for business enterprises to do so.³⁴ Agencies that act in the market, or abroad, where business enterprises operate, can play a role in communicating expectations about business behaviour.³⁵ For example, the United Kingdom department of Trade & Investment (UKTI) has issued specific guidance to business on political and human rights-related risks, as well as the official UK position in relation to certain conflict-affected areas.³⁶

Establishing corporate liability for involvement in gross human rights abuses

Where enterprises cause or contribute to gross human rights abuses, other additional measures will need to be considered.³⁷ This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. The Working Group in this regard supports the recently launched initiative by the Office of the High Commissioner for Human Rights³⁸ on State practices with regard to corporate liability for involvement in gross human rights abuses.

2.1. The State duty to protect and the situation of Israeli settlements in the OPT

In the context of long-term occupation, the above provisions equally apply. However, in cases such as the OPT and the Israeli settlements the term "host State" is ambiguous and misleading, and it would be more accurate rather to refer to the occupying power exercising effective control over an occupied territory. Still, for the purpose of clarifying the application of the Guiding Principles to the situation of the Israeli settlements in the OPT, and while recalling that the settlements are illegal under international law, it is relevant to note that Israel, as the occupying power exercising effective control over the OPT and the settlements, has obligations equivalent to those of a "host State". Consequently, where business activities connected with Israeli settlements infringe on the human rights of persons living in the OPT, Israel would have the duty to prevent, investigate, punish and redress such abuses.³⁹ Israel also has a duty to ensure an adequate legal and regulatory framework to regulate business respect for human rights and to provide guidance to business enterprises on respecting human rights;⁴⁰ and to ensure, through judicial, administrative, legislative or other appropriate means, that individuals

³³ See Securities and Exchange Commission, Specialized Corporate Disclosure, available at: www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml

³⁴ For examples, see A/HRC/17/32, para. 14.

³⁵ For public sector mechanisms through which this might be implemented, see A/HRC/17/32, paras. 15 and 16.

³⁶ See "UK Trade and Investment, Overseas Business Risk", available at: <http://www.ukti.gov.uk/export/howwehelp/overseasbusinessrisk.html>

³⁷ A/HRC/17/32, paragraph 18.

³⁸ See: <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>

³⁹ See Principles on Business and Human Rights, Principles 1 and 3.

⁴⁰ Guiding Principles on Business and Human Rights, Principle 3 and its commentary.

affected by human rights abuses have access to effective remedy.⁴¹ It is similarly important in the circumstances of the conflict-affected character of the OPT that Israel give particular attention to Guiding Principle 7 concerning the heightened risks associated with such an environment.

As discussed above, home States of transnational corporations operating in the settlements also have an important role to play, and even more so in contexts of occupation, such as the OPT, where the occupying State may be unwilling or unable to protect human rights effectively within the occupied territory or may itself be committing or contributing to human rights violations within the occupied territory. In this regard home States may wish to take into consideration reports of, inter alia, the Secretary-General and the High Commissioner for Human Rights documenting violations by Israel in relation to the settlements.⁴²

The report of the United Nations High Commissioner for Human Rights on the implementation of the recommendations contained in the report of the independent international fact-finding mission on the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (established pursuant to Human Rights Council resolution 19/17), includes examples of responses by United Nations Member States on actions taken as “home States” in regard to business activities in the OPT of companies domiciled in their territory and/or jurisdictions.⁴³

On the multilateral level, the European Union has implemented measures to exclude products produced in the Israeli settlements from preferential tariff and trade treatments between the European Union and Israel.⁴⁴ The EU has also issued a directive that prevents EU funding in the form of grants, prizes and financial instruments (including to dedicated investment vehicles, financial intermediaries, sub-intermediaries and to final recipients) to Israeli entities or their activities if the entity has operations in the settlements in the OPT.⁴⁵ In addition, on 22 June 2013, the European Commission published implementing regulation OJEU L-170 on marketing standards that excluded fresh fruit and vegetables in the Occupied Territories from the possibility of being certified by Israeli authorities.⁴⁶

Some states, such as the United Kingdom, have also issued more specific warnings to business relating to activities with and from Israeli settlements in the OPT. In December 2013, UK Trade & Investment cautioned that: “There are [...] clear risks related to economic and financial activities in the settlements, and we [UK Trade & Investment] 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.”⁴⁷

In some cases, States have also taken measures to withdraw investment in business enterprises that are considered to be at risk of involvement with human rights abuses in the OPT. For example, in 2009,

⁴¹ Guiding Principles on Business and Human Rights, Principle 25 and its commentary.

⁴² See e.g. A/HRC/25/38, A/HRC/25/40, A/68/513, A/67/375

⁴³ For example, guidance issued by the Government of Denmark prohibited the labelling of products from the Occupied Palestinian Territory as originating from “Israel” (A/HRC/25/39, para. 26); and a notice on the website of the Department of Foreign Affairs and Trade of Ireland with a warning to persons considering investing in or buying property in the settlements with regard to their legal status (A/HRC/25/39, para. 33).

⁴⁴ A/HRC/25/39, paras. 29 and 30.

⁴⁵ See A/HRC/25/39, para. 28, and Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards (2013/C, 205/05), available at: http://eeas.europa.eu/delegations/israel/documents/related-links/20130719_guidelines_on_eligibility_of_israeli_entities_en.pdf

⁴⁶ A/HRC/25/39, para. 31.

⁴⁷ UK Trade & Investment, Overseas Business Risk - Israel, 3 December 2013. See: <http://www.ukti.gov.uk/uktihome/premiumcontent/107322.html>

the Norwegian Ministry of Finance excluded Elbit Systems (an Israeli defence electronics company providing surveillance equipment to settlements) from Norway's Pension Fund Global portfolio on the recommendation of the Council of Ethics for the Pension Fund.⁴⁸ Since 2012, the Pension Fund Global also excluded Shikun & Binui Ltd., a large Israeli real estate firm, because of its involvement in constructing settlements. In January 2014, the Ministry of Finance decided to exclude Africa Israel Investments and Danya Cebus from the Fund because of their involvement in settlement construction in East Jerusalem. Both companies were previously excluded during the period August 2010 to August 2013 because of similar activities.⁴⁹

3. The Corporate Responsibility to Respect⁵⁰

The corporate responsibility to respect human rights, as set out in the Guiding Principles, applies to all business enterprises, regardless of size, sector, operational context, ownership and structure.⁵¹ The responsibility to respect human rights is independent of and yet complementary to the State duty to protect the rights of all against violations by third parties. The responsibility to respect refers to all internationally recognized human rights - understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.⁵² Depending on the context, business enterprises may need to consider additional standards, and in situations of armed conflict they should respect the standards of international humanitarian law.⁵³

The Guiding Principles clarify the fact that the responsibility to respect requires that business enterprises a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁵⁴

The Guiding Principles require that if a business finds (either through its own due diligence or other means) that it has caused or contributed to an adverse human rights impact, it has a responsibility to actively engage in remediation, either by itself or in cooperation with other actors.⁵⁵ Where a business enterprise determines that it has caused adverse human rights impacts, it should take the necessary steps to cease the activity that causes the impact, including where appropriate to take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Guiding Principle 22 underlines that where business enterprises identify that they have caused or contributed to adverse human rights impacts, they should provide for or cooperate in their remediation through legitimate processes. The issue of access to remedy is discussed further below.

⁴⁸ See: www.regjeringen.no/en/archive/Stoltenbergs-2nd-Government/Ministry-of-Finance/Nyheter-og-pressemeldinger/pressemeldinger/2009/supplier-of-surveillance-equipment-for-t.html?id=575444

⁴⁹ See: www.regjeringen.no/en/dep/fin/news/news/2014/new-decisions-about-the-government-pensi.html?id=750091

⁵⁰ The most relevant Guiding Principles are: 11 (businesses should respect human rights, avoid infringing on human rights and address adverse human rights impacts), 14 (severity of business' impact is judged by their scale, scope and irremediable character), 17 (human rights due diligence), 18 (conduct impact assessments - actual or potential), 19 (integrate impact assessments and take appropriate action - leverage, ceasing/preventing impact, 'ending the relationship'), 22 (remediation of identified harm), and 23 (issues of context including legal compliance issues).

⁵¹ Guiding Principles on Business and Human Rights, Principle 14.

⁵² Guiding Principles on Business and Human Rights, Principles 11 and 12.

⁵³ See the Guiding Principles on Business and Human Rights, Principle 12 and its commentary.

⁵⁴ Guiding Principles on Business and Human Rights, Principle 13.

⁵⁵ See Guiding Principles on Business and Human Rights, Principle 22 and its commentary.

Guiding Principle 23 stipulates that while particular country and local contexts may affect human rights risks, all business enterprises have the same responsibility to respect human rights wherever they operate. It is specifically recommended that business enterprises should treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. It is also noted that some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors. 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.⁵⁶

The International Committee of the Red Cross, in its guidance on the rights and obligations of business enterprises under international humanitarian law⁵⁷, states that business enterprises run legal risks when operating in conflict zones, based on criminal responsibility for the commission of or complicity in war crimes or on civil liability for damages.

“The nature, implications and extent of these risks are of particular importance to business enterprises operating in conflict zones. International humanitarian law states that not only perpetrators, but also their superiors and accomplices may be held criminally responsible for the commission of war crimes. [...] Moreover, the managers of business enterprises may face prosecution in a personal capacity. [...] In addition, because all States have an obligation to investigate and prosecute certain war crimes irrespective of where the acts occurred, business enterprises or their managers may face proceedings in countries other than those in which they operate. [...] The risk of corporate and individual responsibility for crimes perpetrated in the context of an armed conflict is thus an element of growing importance in a business enterprise's assessment of the range of risks associated with its activities during an armed conflict.”⁵⁸

Human rights due diligence and conflict-affected areas

The Guiding Principles state that in order to meet its responsibility to respect human rights, a business enterprise should have in place policies and processes appropriate to their size and circumstances, including a policy commitment to respect human rights, a human rights due diligence process, and processes to enable remediation of any adverse human rights impacts.

Human rights due diligence is a central element of the Guiding Principles and the process through which enterprises identify, prevent, mitigate and account for how they address their adverse human rights impacts.⁵⁹ The heightened risk to human rights presented by complex operating environments including conflict-affected areas, as well as the potential legal risk of complicity in gross human rights abuses, mandate that enterprises operating in such contexts undertake “enhanced” human rights due diligence. It should be noted, however, that business enterprises conducting 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.⁶⁰

Human rights due diligence as set out in the Guiding Principles comprise the following elements:

- Identify and assess actual or potential impacts with which the business may be involved through its own activities or as a result of its business relationships (see Guiding Principle 18)
- Processes to take effective action on the findings from impact assessments and integrate these (see Guiding Principle 19)

⁵⁶ See Guiding Principles on Business and Human Rights, Principle 17 and its commentary.

⁵⁷ ICRC, Business and International Humanitarian Law, 2006.

⁵⁸ ICRC, Business and International Humanitarian Law, 2006, page 26.

⁵⁹ see Guiding on Business and Human Rights, Principles 17-21.

⁶⁰ Guiding Principles on Business and Human Rights, Principle 17 and its commentary.

- Processes to track the effectiveness of responses to addressing impacts (see Guiding Principle 20)
- Processes to communicate how the business addresses its impacts (see Guiding Principle 21)

“Enhanced” due diligence refers to the heightened care with which these processes need to be executed. Given the increased risks of adverse human rights impacts when operating in complex environments, including conflict-affected areas, a business enterprise may need to, for example:

- Elevate the responsibility for human rights due diligence to executive-level management and/or enhance the visibility of such process and their findings to executive management and the Board of Directors;
- Ensure that top-level management as well as all relevant line managers and personnel have full understanding of the applicable international human and humanitarian law standards, in both management and in the line operations;
- Increase the frequency of human rights impact assessments where relevant, e.g. where the operating context may change rapidly;
- Formally integrate human rights principles into all business contracts relevant to operations in the conflict-affected area; require formal human rights reporting from all project partners;
- Exercise extreme caution in all business activities and relationships involving acquisition of assets in conflict zones;
- Increase attention to persons at heightened risk of vulnerability in specific situations and given specific operating environments;
- Conduct expanded high-level and operational consultations with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives; given that the operating environment may render it difficult to consult first-hand with potentially affected persons, particular care should be taken to identify legitimate representatives of potentially affected persons and recognized experts;
- Seek formal advice and guidance from the enterprise’s home State;
- Seek advice from international organizations and mechanisms.

As noted above, several voluntary initiatives address particular aspects of the role of business enterprises in conflict-affected and/or complex operating environments⁶¹ and may provide guidance on aspects of due diligence or specific issue-areas, such as security or conflict minerals.

Guiding Principle 19 stipulates that business enterprises should integrate the findings from their human rights impacts assessments and “take appropriate action”,⁶² which includes taking the necessary steps to cease or prevent impacts that it causes or contributes to. Ultimately, a business enterprise operating in complex operating environments, including conflict-affected areas, may need to consider whether, given its assessments of the relevant risks and the processes it has in place to mitigate them, it is able to operate with respect for human rights. Where it cannot prevent or mitigate the risks, it may need to consider termination of operations, taking into account the severity of the human rights risks and credible assessments of human rights impact of terminating its operations.⁶³

Furthermore, while appropriate human rights due diligence may assist business enterprises in responding to allegations of having been involved with a human rights abuse, the ICRC notes that business enterprises operating in conflict zones are likely to “carry out a whole range of other activities

⁶¹ Including the Organisation for Economic Cooperation and Development and the World Bank on weak governance zones and fragile States; the Kimberley Process on conflict diamonds; initiatives such as the Voluntary Principles on Security and Human Rights, and the Guidance on Responsible Business in Conflict-Affected and High-Risk Areas of the Global Compact.

⁶² Guiding Principles on Business and Human Rights, Principle 19. See also further guidance in the The Corporate Responsibility to Respect Human Rights – An Interpretive Guide, HR/PUB/12/02, pp. 46-52.

⁶³ See. Principle 19.

which can be more or less connected with an armed conflict [...] business enterprises operating in zones of armed conflict should use extreme caution and be aware that their actions may be considered to be closely linked to the conflict even though they do not take place during fighting or on the battlefield.”⁶⁴

3.1. The corporate responsibility to respect and the situation in the OPT

The Working Group underscores that the Guiding Principles apply to all business enterprises, in all operating contexts, and that all business enterprises have a responsibility to respect internationally recognised human rights wherever they operate.

Business enterprises that have activities in the settlements or have business relationships with entities in the settlements should take due note of reports and resolutions of the United Nations human rights system concerning human rights violations related to Israeli settlements in the OPT.⁶⁵ For example the Working Group notes that the Secretary-General has highlighted a range of human rights which are affected by Israeli settlement policies and practices, involving construction of settlements, land confiscation, zoning and planning regime, forced evictions of Palestinians and demolitions of Palestinian structures, and lack of accountability for settler violence. These include, but are not limited to, rights and freedoms of non-discrimination, liberty, security of person and fair trial, freedom of movement, adequate housing, health, education, work and an adequate standard of living.⁶⁶ The Working Group also notes that the Human Rights Council at its twenty-fifth session condemned the continuing settlement and related activities by Israel and called on Israel “to put an end to the human rights violations linked to the presence of settlements, especially of the right to self-determination”.⁶⁷

The illegal status of the settlements under international law and information available in the public domain about human rights abuses related to the settlements should necessarily preface and inform any human rights due diligence exercise carried out by a business operating in the settlements. The importance of such 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”.⁶⁸

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. Failure to undertake effective human rights due diligence can lead to adverse human rights impacts or to complicity in abuses committed by other actors.

Where a business enterprise finds that it causes or contributes to, or that it may cause or contribute to an adverse human rights impact, it should take the necessary steps to end or prevent such impact and

⁶⁴ ICRC “Business and international humanitarian law”, p. 14.

⁶⁵ For example the report of the Secretary-General on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan As stated in the latter report of 12 February 2014 notes that “Israeli settlement activity, security measures adopted to protect settlers and their movement, and the violence committed by Israeli settlers against Palestinians and their property are behind most of the human rights violations against Palestinians in the West Bank, including East Jerusalem” (A/HRC/25/38, para. 9).

⁶⁶ See e.g. A/HRC/25/38 sections IV and V, A/68/513 paras 13 - 14 and sections IV and V, A/67/375 sections V and VI, A/HRC/25/L.37/Rev.1 especially para. 5.

⁶⁷ A/HRC/25/L.37/Rev.1.

⁶⁸ See Guiding Principles on Business and Human Rights, Principle 11 and its commentary.

use its leverage to mitigate any remaining impact by other parties involved, including parties with which it has a business relationship, such as a supplies and subcontractors.⁶⁹

While an enterprise may have less control or influence over adverse human rights impacts caused by another party with which it has a business relationship, Guiding Principle 19 provides specific guidance as to appropriate action to be taken in such cases. Several factors enters into the consideration of what would be appropriate action in a given situation, including the extent of leverage the enterprise has to effect change in the wrongful practice of an entity (business, governmental or non-governmental) with which it has a business relationship, the severity of adverse human rights impact, and how crucial the business relationship is.⁷⁰ Simply put, where an enterprise is unsuccessful in mitigating risks of adverse human rights impacts, despite its best efforts to use and seek to increase its leverage, it should consider ending the business the business relationship. Moreover, as long as an enterprise is in a business relationship with an entity which causes or contributes to adverse human rights impacts it should be able to demonstrate its own ongoing efforts to mitigate the impact.⁷¹

The Working Group notes that there are several examples of business enterprises that have decided to disengage from relationships or activities associated with the settlements in the OPT due to the risks involved. For example, in early 2014, the Dutch pension fund manager PGGM decided to divest from Israeli banks that operate in or provide financing to construction of the settlements.⁷² The Dutch water firm Vitens disengaged from its relationship with Israel's national water company Mekorot, in December 2013, citing the political context of the settlements.⁷³ In September 2013, the Dutch engineering enterprise Royal HaskoningDHV similarly decided to withdraw from a sewage treatment project that would service settlements in the OPT. Denmark's largest bank, Danske Bank, has included the Israeli bank Bank Hapoalim in its list of entities that are excluded from its investment portfolio, due to the bank's activities in the settlements.⁷⁴ The Swedish bank Nordea has requested the two Israeli banks Bank Leumi and Bank Mizrahi-Tefahot to clarify whether they have any activities in the settlements.⁷⁵

4. Access to remedy

Guiding Principle 25 clarifies that States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that, when business-related human rights abuses occur, those affected have access to effective remedy. Remedy comprises not only compensation, but may include ceasing or reversing the action that is causing an adverse impact, guarantees of non-recurrence, apologies or acknowledgement of harm caused, and other relevant measures.

Judicial remedies are at the core of the human rights system and States have the responsibility to ensure effective access to the courts, which may include identifying and removing barriers to accessing justice (which can be legal and/or practical). However, non-judicial mechanisms (administrative, legislative or other mechanisms) can play important complementary roles and help fill gaps in access to remedy; they may also sometimes be preferred by victims.⁷⁶

⁶⁹ See Guiding Principle on Business and Human Rights, Principle 19 and its commentary, and The Corporate Responsibility to Respect Human Rights – An Interpretive Guide, HR/PUB/12/02, pp. 46-52

⁷⁰ See decision matrix to guide appropriate action to deal with situations of adverse human rights in The Corporate Responsibility to Respect Human Rights – An Interpretive Guide, HR/PUB/12/02, pp. 46-52

⁷¹ Guiding Principle on Business and Human Rights, Principle 19 and its commentary.

⁷² PGGM, Statement on exclusion of Israeli banks, available at: www.pggm.nl/english/what-we-do/Documents/Statement%20PGGM%20exclusion%20Israeli%20banks.pdf

⁷³ See: “Dutch business giants join boycott, causing Israel concern”, Middle East Monitor, 14 January 2014, available at: www.middleeastmonitor.com/articles/middle-east/9212-dutch-business-giants-join-boycott-causing-israel-concern

⁷⁴ See: <http://www.haaretz.com/news/diplomacy-defense/1.571849>

⁷⁵ <http://www.ft.com/intl/cms/s/0/93c1c0f2-7f7e-11e3-94d2-00144feabdc0.html>

⁷⁶ See Guiding Principles on Business and Human Rights, Principle 27.

The Guiding Principles also establish that business enterprises should provide for or cooperate in remediation where they have caused or contributed to adverse human rights impacts (Guiding Principle 22). However, business enterprises operating in conflict-affected areas should be particularly attentive to the fact that judicial and non-judicial grievance mechanisms in the host State and in occupied territories may not function effectively, or may exclude certain groups from equal protection, and so businesses may be expected to take a more active role in ensuring effective remedy for those affected. Guiding Principle 29 states that business enterprises should establish operational-level grievance mechanisms to provide for the resolution of grievances for affected individuals or communities, in accordance with the effectiveness criteria in Principle 31.

4.1. The situation in the OPT

Under the Guiding Principles, States have the responsibility to remove legal, practical and other barriers for victims of corporate-related human rights abuses to access effective judicial remedies. In this regard, the Working Group notes that the independent international fact-finding mission concluded that Palestinians in the OPT are not able to access effective remedy for human rights violations related to the Israeli settlements, a finding which was reaffirmed in subsequent report of the United Nations High Commissioner for Human Rights.⁷⁷

Home States of business enterprises operating in or connected with the Israeli settlements in the OPT may also take a role in providing a forum for remedy where affected individuals are not able to access remedy.

A business enterprise that has, or has had, activities in or connected with the settlements should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted by their operations, taking into account the practical challenges that potentially affected stakeholders may experience in bringing claims or raising concerns.⁷⁸

5. Conclusions

The Guiding Principles apply both in conflict-affected and in areas where peace prevails. In situations of conflict and military occupation such as in the OPT international human rights law, upon which the Guiding Principles are based, are reinforced by States obligations under international humanitarian law. States have a duty to protect against adverse impacts from business activities in conflict-affected areas. In practice, home States may need to take action to prevent such impacts associated with multinational enterprises domiciled in their territory and/or jurisdiction. States have a range of tools at their disposal, from providing guidance to business to regulating the extraterritorial conduct of such enterprises, and a combination of such responses may be appropriate, depending on the risks.

As the occupying power in the OPT, Israel is the primary duty bearer in protecting the population in the OPT against adverse human rights impacts related to the settlements.

The Working Group urges Israel to assess how business activities associated with the settlements may result in adverse human rights impacts on persons living in the OPT and how Israeli national policies and incentives relating to the settlements may permit or facilitate such impacts, and to take the necessary legislative, administrative policy and remedial actions to prevent, mitigate and redress any

⁷⁷ See A/HRC/22/63, paragraphs 44-46, and A/HRC/25/39 (“Implementation of the recommendations contained in the report of the independent international fact-finding mission on the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (A/HRC/22/63) - Report of the United Nations High Commissioner for Human Rights”), para. 9.

⁷⁸ Guiding Principles on Business and Human Rights, Principle 29.

adverse impact. The Working Group notes in this regard that reports of the United Nations Secretary General indicate that the Government of Israel has played a leading role in the creation and expansion of the settlements in the OPT.⁷⁹

The Working Group urges Israel to implement the recommendations and conclusions from human rights treaty bodies and relevant resolutions of the United Nations Human Rights Council, General Assembly and Security Council. The Working Group further urges Israel to prevent, mitigate and redress any adverse human rights impact of business activities related to settlements

Business enterprises are responsible for respecting all internationally recognized human rights, regardless of the operating context. In complex operating environments including conflict-affected areas, business enterprises should undertake enhanced human rights due diligence to identify, assess, and mitigate such impacts, and be prepared to communicate publicly on its steps to do so. However, business enterprises should be aware that whilst undertaking human rights due diligence may help prevent and address risks, it may not absolve a company of legal liability or reputational risks.

The above provisions apply in the context of Israeli settlements in the OPT. States that are ‘home State’ of business enterprises operating in or connected with settlements in the OPT should engage with such enterprises at the earliest possible stage to provide advice and guidance, and should make clear the State’s policy in regard to the settlements. States may also consider additional measures. Businesses that have activities or business relationships in or connected with the settlements in the OPT should be cognizant of the risks of negative human rights impacts that any such activities would entail. In exercising due diligence, enterprises should familiarise themselves with available information on the human rights impacts of Israeli settlements in the OPT and on the existence or absence of measures taken by Israel as the occupying power to effectively protect against such impacts. Business enterprises must also actively avoid complicity in human rights violation by carefully considering how their activities might contribute to adverse human rights impacts caused by other parties, including their ‘suppliers’ and other ‘business relationships’.

Where an enterprise cannot effectively prevent or mitigate an adverse human rights impact, including through its best efforts to use and seek to increase its leverage, it should consider whether its continued operation can be reconciled with its responsibility to respect human rights and act accordingly.⁸⁰ The commentary to Guiding Principle 19 is instructive in this respect when it suggests that: “Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity would have adverse human rights consequences.”

The Commentary advises that where an enterprise has leverage, it should exercise it and if it lacks leverage it should explore ways of increasing its leverage. However, “in situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage, ... the enterprise should consider ending the relationship taking into account credible assessments of potential adverse human rights impacts of doing so.”

Where business enterprises identify that they have caused or contributed to adverse human rights impacts through settlement-related activities such as construction or servicing of the settlements, they should provide for or cooperate in their remediation through legitimate processes.

⁷⁹ See e.g. A/68/513, paras. 3, 15-41

⁸⁰ Guiding Principles on Business and Human Rights, Principle 19 and its commentary.