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Submission of the Institute for NGO Research to the Committee to review the Guidelines for Observation and Exclusion of Companies from the Government Pension Fund Global

The Institute for NGO Research[1] presents this submission to the Committee in advance of its review of the Guidelines for Observation and Exclusion of Companies from the Government Pension Fund Global (GPFG). We hope this submission provides the Committee with information to aid in its review process and corrects several inaccuracies in some of the recent inputs provided to the Committee**.**

We understand that the review process is intended to be general in focus and not aimed at addressing specific conflict situations. Therefore, we are concerned that several NGOs are using this process to advance a narrow and discriminatory anti-Israel BDS (boycott, divestment, and sanctions) agenda in Committee policymaking. In particular, we wish to respond to a 3 March 2020 submission by UNI Global Union and the International Trade Union Confederation (UNI/ITUC). The UNI/ITCU submission, as well as an April 2019 input from Norwegian People's Aid and the Norwegian Union of Municipal and General Employees (NPA/NU), seeks to push the Committee to adopt standards that are inconsistent with international business and human rights guidelines and international law. We urge the Committee to reject this effort.

In addition, given the on-going economic devastation caused by the Covid-19 global pandemic, and the potentially lengthy period of uncertainty, we believe the Committee should take into account the altered economic landscape and the potentially serious human rights impacts that would result from adopting and implementing major policy shifts at this time.[2]

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[1] The Institute for NGO Research is a Jerusalem-based research organization. Members of the Institute have published multiple studies and policy papers on international human rights and humanitarian law, business and human rights, the UN system and NGOs, and fact-finding in situations of armed conflict. Members of the Institute's Advisory Board include Elliott Abrams, Senior Fellow for Middle Eastern Studies at the Council on Foreign Relations; former Canadian Ambassador to Israel, Amb. Vivian Bercovici; Hon. Michael Danby, former MP Australian Labor Party; Harvard Professor Prof. Alan Dershowitz; Canadian Senator, Hon. Linda Frum; Colonel Richard Kemp, former commander of British forces in Iraq and Afghanistan; Douglas Murray, Director of the Centre for Social Cohesion; former Member of Italian Parliament, Hon. Fiamma Nirenstein; UCLA Professor and President of the Daniel Pearl Foundation, Prof. Judea Pearl; US Jurist and former Legal Advisor to the State Department Judge Abraham Sofaer; Dr. Einat Wilf, former member of Knesset and advisor to Shimon Peres; Harvard Professor Prof. Ruth Wisse; R. James Woolsey, former US Director of Central Intelligence; and Israeli Supreme Court Justice, Justice Elyakim Rubinstein.

[2] See statement of David Beasley, Executive Director of the World Food Programme, to the UN Security Council, "The economic and health impacts of COVID-19 are most worrisome for communities in countries across Africa as well as the Middle East, because the virus threatens further damage to the lives and livelihoods of people already put at risk by conflict." https://www.wfp.org/news/wfp-chief-warns-hunger-pandemic-covid-19-spreads-statement-un-security-council; OECD, https://read.oecd-ilibrary.org/view/?ref=132_132646-g8as4msdp9&title=Foreign-direct-investment-flows-in-the-time-of-COVID-19.

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Business and Human Rights Principles in Conflict Situations

In the Norwegian National Contact Point 2018 Annual Report, Chair Ola Mestad stated, "The requirements made of Norwegian enterprises should be in line with the requirements set out in other Western countries, reflecting the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (MNE Guidelines) with pertaining guidance documents."

Unfortunately, UNI/ITUC advocates that the Pension Fund adopt a much more radical approach than applied by either UNGPs or the OECD MNE Guidelines. In particular, UNI/ITUC, quoting an obscure paragraph from a 2018 report by the Palestine department at the UN Office of the High Commissioner for Human Rights (OHCHR), claims that "it is difficult to imagine a scenario in which a company could engage in listed activities [activities purportedly linked to Israeli settlements] in a way that is consistent with the Guiding Principles and international law."

This claim marks a radical and unsupported departure from international guidelines, including the UNGPs, the OECD, and Principles for Responsible Investment, as well as from international law. Such an approach is not applied in any conflict zone, and despite the ubiquity of situations of occupation and settlements globally (the legal paradigm UNI/ITUC applies to the Palestinian-Israeli conflict),[3] UNI/ITUC does not advocate for this standard elsewhere.

In addition, the term "settlements" is not defined in this report, and the "listed activities" referred to are arbitrary, exceedingly broad, discriminatory, and often contradictory. Several of these activities are unconnected to settlements. None of them is illegal in and of itself. The report makes no distinctions as to the purpose of the business activity, nor the types of services provided. It also ignores the potential human rights impacts that might occur due to the cessation of business activity. Essentially, this report equates any business activity whatsoever occurring over the 1949 Armistice lines with "illegal settlement activity" and calls for it to be prohibited.[4]

In contrast to the extreme standard advanced by UNI/ITUC, the UNGPs, OECD MNEs, and other international guidelines (as well as case law, NCP decisions, and business due diligence reviews) wholly reject the adoption of broad exclusionary criteria based solely on location of operations in a conflict zone. Instead, these widely accepted instruments advise case-by-case evaluation of human rights impacts; balancing of applicable and competing human rights, IHL, domestic, and international regulations; consultation with stakeholders; engagement with host governments; and development of mitigation strategies. They do not recommend a

[3] Eugene Kontorovich, "Unsettled: A Global Study of Settlements in Occupied Territory," Northwestern Public Law Research Paper 16-20, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835908
[4] http://www.ngo-monitor.org/nm/wp-content/uploads/2017/01/Submission-to-HRC-on-Blacklist.pdf at 4-7.

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blanket cessation of or barring of economic activity in either areas of occupation or settlements.[5]

It should be noted that under international law and specifically IHL, the *lex specialis* governing conflict zones and occupied territory, there is no prohibition to conducting business therein. Importantly, whether the economic or business activity is directly linked to state conduct or not, the reason for such standard is clear: adopting such an approach would mean the blocking of all economic activity, which would inherently deprive civilians of employment and vital services such as water, gas, food, transport, and medicine. Doing so, besides the practical implications and the unmitigated suffering such situation would cause, is a violation of international human rights law and IHL. Under human rights law, people have the right to food, water, medical care, and the right to livelihood. Under the law of occupation (e.g. 1907 Hague Convention Articles 43, 55; 1949 Fourth Geneva Convention Articles 55, 56), the Occupying power is required to maintain public order and safety as well as public infrastructure. How is an Occupying Power supposed to provide such goods and services if not through business and economic activity?

In fact, despite the claim by UNI/ITUC, many courts, administrative bodies, and regulators have explicitly rejected the claim that "it is difficult to imagine" a way in which a company could operate over the 1949 Armistice lines in keeping with international standards and law. Not only have these judicial bodies imagined it, they have found that such is the case with regards to businesses operating in these areas.

For example, in March 2013, a French appellate court dismissed a lawsuit brought by the Palestine Liberation Organization (PLO) and the Palestinian activist group Association France-Palestine Solidarité (AFPS) against three French companies: Alstom, Alstom Transport, and Veolia Transport.[6] The PLO and AFPS accused the companies of violating international law, in particular complicity in "war crimes" due to violations of Article 49(6) of the Fourth Geneva Convention, by participating in contracts to build the Jerusalem light rail, which the claimants alleged was settlement activity in occupied territory. In addition, they claimed that these contracts violated Israel's obligations under the Hague Convention and the UN Global Compact. The plaintiffs sought the cancellation of the contracts.

The French appellate court rejected these claims. The court looked to whether the legal norms relied upon provided non-state entities with a private right of action and decided that

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[5] For a more in depth discussion see Anne Herzberg, Submission to the Working Group on Business and Human Rights Project on Business in Conflict and Post-conflict Contexts: Corporate Due Diligence in Situations of Armed Conflict, available at https://www.ngo-monitor.org/submissions/submission-on-business-in-conflict-and-post-conflict-contexts-corporate-due-diligence-in-situations-of-armed-conf/

[6] Cour d'appel [CA] [regional court of appeal] Versailles, 3 ch., March 22, 2013, 11/05331 (Fr.), *available at* http://fr.slideshare.net/yohanntaieb3/decision-de-lacourdappel [hereinafter Cour d'appel], *translated at* http://blog.eur.nl/iss/hr/files/2012/02/Decision-Versailles-Appeal-Court-22-March-2013.pdf). Anne Herzberg Submission to OHCHR, Remedies Project, 2014 https://www.ngo-monitor.org/submissions/submission_of_the_amuta_for_ngo_responsibility_to_the_office_of_the_high_commissioner_for_human_rights_for_the_study_of_domestic_law_remedies_for_corporate_involvement_in_gross_human_rights_abuses/#easy-footnote-bottom-30;

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the obligations of the Geneva and Hague Conventions only apply between state parties. In addition, the court considered whether an unlawful act had even been claimed. The court noted that building the Jerusalem light rail was not illegal because military occupation itself is not illegal, and Article 43 of the Hague Convention allows for the governance of occupied territory, including the building of transportation infrastructure.

The court also discounted the claims that use of the light rail was illegal because it would entrench "illegal settlements." Importantly, the court emphasized that the determination of the purpose of a contract and its legality cannot hinge on "the individual assessment of a social or political situation by a third party." Moreover, the alleged "political motive attributed to the State of Israel" in the court's opinion, could not "be applied by 'contamination' to the purpose of the contracts."[7]

Importantly, as stressed in the "Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors", jointly issued by the UN Global Compact and the Principles for Responsible Investment Initiative,[8] business operations in conflict zones can bring substantial benefits to conflict-affected areas including "economic development and/or recovery"; "generating tax revenue," "creating job opportunities," "fostering coexistence and mutual beneficial development," creating local value; and improving infrastructure.[9] We believe these principles should guide the Committee.

The "Settlement Database" Violates International and UN Standards

In addition to lobbying the pension fund to adopt a broad standard barring investments in businesses operating in the Palestinian-Israeli conflict, UNI/ITUC also advocates that the Fund exclude companies listed on a "settlement database" published on 13 February 2020 by the Palestine office at OHCHR. UNI/ITUC claims that this list was compiled based on an "extensive fact finding process" and should be "welcomed" by the Fund.

In contrast to the NGO claims, this list, discriminatory in intent and effect, was conducted without due process, defames the listed companies, and departs from international business and human rights guidelines, including the UNGPs and the UN Global Compact.

The fundamental problems with the database are precisely why many Western democracies, as well as the EU, opposed adoption of UN Human Rights Council (UNHRC) Resolution 31/36 calling for a database. The resolution was proposed by Pakistan, on behalf of the Organization for Islamic Cooperation, and supported by authoritarian regimes. During the

[7] For more examples, see Anne Herzberg, "*Kiobel* and Corporate Complicity: Running with the Pack," *American Journal of International Law* Special Kiobel Agora, (January 2014); **"**When International Law Blocks the Flow: The Strange Case of the Kidron Valley Sewage Plant," *10 Regent J. of Int'l L.* 71 (2014); *NGO 'Lawfare': Exploitation of Courts in the Arab-Israeli Conflict*, (September 2008, 2d edition December 2010). See also, *Jesner v. Arab Bank*, 584 U.S. __ (2018), slip opinion at 24 (active corporate investment in conflict zones "contributes to the economic development that so often is an essential foundation for human rights.")
[8] https://www.unpri.org/download?ac=1724
[9] https://www.unpri.org/download?ac=1724 at 10

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vote, 15 countries abstained (Albania, Belgium, France, Georgia, Germany, Ghana, Latvia, Netherlands, Paraguay, Portugal, South Korea, Slovenia, Macedonia, Togo, and the UK).[10]

It is also false to claim, as UNI/ITUC do, that this database is comparable to initiatives involving the Democratic Republic of Congo and Myanmar. In 2002, the UN Secretary General, under the auspices of the Security Council, published a list of companies directly involved in with the conflict minerals trade. Unlike the UNHRC that proposed a "settlement database," the Security Council is the sole body authorized to compile and publish such lists under the UN Charter. Nevertheless, at the time, even this list was highly controversial, and the Security Council was forced to backtrack,[11] removed many names, and ended the initiative shortly thereafter. With regards to Myanmar, a list of companies and shell entities directly controlled or owned by senior military officials was annexed to a report produced by an independent Fact Finding Mission, not OHCHR. In contrast, the "settlements database" was conducted *ultra vires*. It targets private companies.[12] There is no ownership connection of these companies to senior Israeli officials, military or otherwise, unlike in the Myanmar case.

The database violates due process

The database purports to identify companies "directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements." In essence, it accuses listed companies of complicity in violations of human rights and IHL. Yet the list provides no evidence in its report to support these accusations. Instead, it accuses companies of serious wrongdoing based on ten vague categories – again with no explanation as to how each company falls within each category.

The database shows no direct involvement, nor causality, to "construction and growth of settlements". For instance, one international company is listed as stealing Palestinian "natural resources" (one of the ten categories) apparently because a branch of an Israeli company licenses the name of a product of a subsidiary of the international company and rents a small commercial bakery space in an industrial zone[13] operated by the Jerusalem municipality (an industrial zone that rents to both Palestinians and Israeli businesses alike). The database does not show how this small business operation in any way uses Palestinian "natural resources" or has any connection to "construction and growth of settlements," as this industrial zone commercial space has existed and been in operation for several decades and would exist and

[10] https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/ResDecStat.aspx; https://unwatch.org/wp-content/uploads/2016/03/Settlements-in-OPT-1.pdf
[11] https://www.raid-uk.org/sites/default/files/unanswered-qq.pdf
[12] In addition to Israeli companies OHCHR focused on American, British, French, and Dutch companies. In keeping with the BDS objective, the database targets large Israeli companies in order to maximize the economic damage to Israel's economy as a whole.
[13] The area of the industrial zone comprised Jewish neighborhoods prior to the 1948 war. The Jordanian army ethnically cleansed all Jews from this area during the war. Only after Israel was able to push back the Jordanian army in 1967 were Jews allowed to return. Thousands of Palestinians and Israelis work side by side in the industrial zone.

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continue to operate without this particular tenant. The database also did not demonstrate that the company even made any profit off of the foodstuffs baked at this location.

In addition to the lack of any evidence of "enabling, facilitating, or profiting" from "construction and growth" of settlements, the information contained in the database is at least six-months old, if not several years out of date. According to the database, OHCHR contacted companies "between September 2017 and October 2018." OHCHR then "re-screened all business enterprises prior to the submission of this report to confirm that the activity for which they were included in the database met the applicable standard of proof, during the relevant temporal period." This "rescreening" supposedly took place between 1 January 2018 and 1 August 2019, but little information is provided as to what was done to "rescreen." Some companies that were included on the list told the author of this submission that they had not received any follow-up contact or notifications from OHCHR about the 2020 publication.

The OHCHR Palestine department also sent harassing and incriminating letters to the companies, threatening them with inclusion on the database based on flimsy accusations and single sentence bullet points. These bullet points made generalized allegations without any supporting evidence. Whether to include a company on the database was then based on arbitrary determinations by the two staff members who compiled the list. These staffers do not appear to have been subject to any oversight or accountability for the content of their work by senior level officials. Several UN Member states from Western countries also reported to the author of this submission extreme concern surrounding the secrecy and lack of due process in compiling this list.

The author of this submission has seen several examples of correspondence between the OHCHR Palestine office and the companies and is greatly concerned by the thin and unsupported allegations. The way in which OHCHR staffers minimized and cavalierly dismissed legitimate company concerns, legal evidence, and other proof that OHCHR's accusations were wholly inaccurate was also highly disturbing. Multiple meetings and phone discussions with OHCHR staffers compiling the list also indicate that discriminatory determinations regarding inclusion on the blacklist were made based on the basis of ethnicity/religion/nationality of the company ownership.

The authors of the database admit that they relied on highly attenuated and indirect links between companies. While the database says it defines "involved" as "substantial and material business activity that had a clear and direct link to one or more of the listed activities," it offers little to no information as to how it defined "substantial" or "material." It appears that several of the companies are several levels removed from activity alleged in the report's accusations.

Database targets consumer goods and services

The vast majority of listed companies are those providing consumer goods and services (food, telecommunications, transportation, gas, water) to both Palestinians and Israelis. The authors of the list seek to bar such companies from operating or to impose discriminatory

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business criteria with little regard as to the human rights and economic impacts on the local population and the employees of the companies.

- Many of the companies on the list have previously rejected BDS campaigns on the basis that they are facially discriminatory and violate both international and domestic anti-discrimination and human rights laws. This dimension was ignored in the preparation of the database.
- Four tourism companies are included for the alleged violation of "The provision of services and utilities supporting the maintenance and existence of settlements, including transport." The services at issue facilitate the promotion of Jewish and Christian heritage and tourism in Jerusalem and the West Bank. In other words, the database targets companies for promoting Jewish and Christian history in the Holy Land.
- Six companies involved in the food industry are included in the database for "the provision of services and utilities supporting the maintenance and existence of settlements, including transport" and/or "The use of natural resources, in particular water and land, for business purposes." The inclusion of these food companies is in direct violation of articles 55-56 of the 4th Geneva Convention state that the Occupying Power, to the extent means are available, must "ensure sufficient hygiene and public health standards, as well as the provision of food and medical care to the population under occupation." Such obligations include security services, law enforcement, and the construction and maintenance of infrastructure related to roads, telecommunications, water, and health.
- The database includes 9 Israeli banks for "The provision of services and utilities supporting the maintenance and existence of settlements, including transport" and/or for "Banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses." Given that the database includes East Jerusalem in its definition of "settlements," and at least 5 of the above banks operate branches in East Jerusalem, the discrimination against banks by demanding that they not provide services in East Jerusalem would make it difficult for Palestinian populations to access such services.
- The database includes businesses that operate in East Jerusalem, and is discriminatory in two directions. Specifically, the database advances a discriminatory policy wherein Jerusalem's Arab and Jewish populations can and should be differentiated from each other, and requires the cessation of what it deems "Israeli" economic activity in East Jerusalem. Moreover, if the companies targeted withdrew their services and goods from East Jerusalem, the end result would economically damage all of Jerusalem's population and be discriminatory: Palestinians would be excluded from receiving basic goods and services in their neighborhoods, while an ethnic/religious test would be created to determine who can provide (i.e. that Jews cannot provide) services. It also appears that the database considers Palestinian-owned businesses in West Jerusalem to be legal, while only Jewish or Israeli-connected businesses in East Jerusalem are considered illegal. The result is therefore religious and national origin discrimination under Israeli domestic and international human rights law.

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- Discussions with the OHCHR staffers responsible for the list also suggest that there is flawed understanding of how business and infrastructure function. They seem to believe that if an Israeli phone, cable, water, gas, or other utility stopped providing services to "settlements"[14] that it would be simple matter for another (it is unclear what type of company would be acceptable) company to easily and immediately step in, build infrastructure, and provide the same level of services. The same faulty understanding also applies to the other listed businesses.

Violation of the Oslo Accords

Another significant problem with the database is that it lists companies that are responsible for carrying out obligations mandated by the Oslo Accords, the agreement that governs the West Bank, mutually agreed to between Israel and the Palestinian Authority, and guaranteed by the international community, including Norway (highlighted by the agreements' moniker). For example:

- Six Israeli telecommunications companies are targeted for "The provision of services and utilities supporting the maintenance and existence of settlements, including transport" and/or for "The use of natural resources, in particular water and land, for **business purposes**" (emphasis added). This inclusion of such telecommunications companies directly violates Article 36 of the Oslo Accords, which emphasize that "the supply of telecommunications services in Area C to the Settlements and military locations, and the activities regarding the supply of such services, shall be under the powers and **responsibilities of the Israeli side**" (emphasis added).
- Five of Israeli public transportation companies are listed for "The provision of services and utilities supporting the maintenance and existence of settlements, including transport." This is in direct violation of Annex III of the Israeli-Palestinian Interim Agreement (Article 38) that stipulates that "powers and responsibilities regarding Israeli public transportation to and between Israel and the Settlements and military locations shall be **exercised by Israel**" and that "Israeli public transportation routes from Israel to and between Settlements and military locations, and/or to other places in Israel, **shall be determined by Israel**" (emphasis added). In other words, the existence of and parameters of this business activity was explicitly stipulated in mutually agreed upon treaties between Israel and the Palestinians.
- Five oil and gas companies are included for "The provision of services and utilities supporting the maintenance and existence of settlements, including transport" and "The use of natural resources, in particular water and land, for **business purposes**" (emphasis added). This is in direct violation of Annex IV of the Economic Protocol of the Gaza-Jericho Agreement which codifies the import of petroleum products and enables the PA to import gasoline from Jordan and/or Egypt if "they meet the average

[14] It should also be noted that it is immoral to argue that those living in settlements should be deprived of food, water, gas, electricity, and other basic necessities. One may not agree with Israel's settlement policy but that does not mean that the civilians currently living in those settlements should be starved, denied water, etc… particularly if, as UNI/ITUC claim, the Israeli government forcibly transferred those civilians in violation of Article 49 of the Fourth Geneva Convention.

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of the standards existing in the European Union countries, or the USA standards."[15] The PA signs contracts with Israeli companies to meet its oil and gas needs, including companies targeted by the database.

- The Israeli water company Mekorot is included for "The use of natural resources, in particular water and land, **for business purposes**" (emphasis added). The inclusion of Israel's national water company is in direct violation of articles 55-56 of the 4th Geneva Convention, which state that the occupier, to the extent means are available, must "ensure sufficient hygiene and public health standards, as well as the provision of food and medical care to the population under occupation." Such obligations include water. Additionally, Israel's involvement in the water sector in the West Bank, supplying water to some Palestinian communities and to settlements, is entirely dictated by the 1995 Interim Agreement (Oslo II) and the PA-Israeli Joint Water Committee, which states the exact obligations of both sides. In essence, OHCHR claims **providing** water to Palestinians is a human rights violation.

Inaccurate Factual Claims in the NPA Submission

Lastly, we are concerned by several inaccurate factual claims and misrepresentations made in the NPA/NU submission and incorporated by UNI/ITUC.

In addition, to the extent that the activities attributed to Israel in the NPA/NU submission are factually substantiated, the links to the companies to these alleged human rights violations are highly attenuated, if such links exist at all.

Moreover, NPA/NU omits the context of Palestinian terrorism. It is impossible to evaluate human rights in the conflict without factoring in Palestinian attacks on civilians.

Another primary methodological flaw by NPA/NU is the failure to consult primary sources for information and data about Israel and the West Bank. The NPA/NU input has an almost exclusive reliance on secondary and tertiary references that lack credibility. More troubling, several of the NPA/NU claims are not supported by the given citation. Furthermore, the authors of the NPA/NU submission clearly did not verify the citations of the consulted documents, since, upon closer examination, the original source material does not comport with the presentations in the cited secondary and tertiary sources. In many instances, these sources are significantly outdated.

NPA's claims relating to water are a representative example. Their allegations date to 2012; they ignore that 60-80% of Israel's water supply is desalinated water from the Mediterranean; more than 40% of recycled wastewater is used for agricultural purposes – the highest level in the world;[16] and they omit the role of the Joint Palestinian-Israel Water Committee that determines water allocations and location and maintenance of water infrastructure. It is simply false to claim that water is diverted from Palestinians to settlements or that

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[15] http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Gaza-Jericho Agreement Annex IV - Economic Protoco.aspx
[16] https://ensia.com/notable/reuse-recycling-wastewater-in-agriculture/

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Palestinians suffer water shortages as a result. The presence of settlements in no way impacts the amount of water available for Palestinians. In fact, Israel supplies the Palestinians with water from its own freshwater and desalinated water sources. According to the Israeli Water Authority, in 2020, it provided 81.8 MCM of water to the PA in the West Bank and 15 MCM to Gaza. The Palestinian Central Bureau of Statistics notes that in 2017 (latest figures available), 83 MCM was provided by Israel, 265 MCM was pumped from wells, and 24 MCM of desalinated water was used by Palestinians.[17]

The NPA/NU inaccuracies omissions, and misrepresentations demonstrate that best practices in fact-finding and due diligence require verifying and confirming claims. As the NPA/NU submission accuses entities of criminal activity and gross human rights violations, and seeks to use these claims as the basis to economically damage companies, accurate reporting is critical and legally required.

The following highlight a few of these misrepresentations:

- *Violence in the West Bank is pervasive, and at times it becomes particularly alarming. Between 9 and 16 December 2018 – 7 days – the UN reported that over 400 Palestinians were injured, 200 arrested, and 5 killed. In comparison, 3 Israelis were killed and 13 injured. The UN does not indicate that any Israelis were arrested for their participation in the violence. While some of these deaths likely comply with international law, the disproportionate impact raises serious questions about the use of force*

NPA withholds salient details about these events. Its account falsely suggests riots on all sides, presenting an image of Palestinian and Israeli civilians attacking each other, resulting in the injuries and deaths.

In reality, as widely reported, the violence of the week of 9 December 2018 began with a drive-by shooting attack at a bus stop perpetrated by Palestinians, which injured seven Israeli civilians, including a pregnant woman whose baby died a few days later. The other Israeli casualties came in additional attacks in the West Bank (two soldiers killed, two wounded) and the Old City of Jerusalem (two police officers wounded).

Of the Palestinian deaths, in contrast, four were terrorists killed while perpetrating attacks or resisting arrest;[18] the last was killed during violent clashes. The arrests were of Palestinian accomplices or rioters;[19] there is no evidence, despite NPA/NU's implication, that any Israelis participated in riots or other violence that would obligate arrests.

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[17] 49 MCM of water is also provided by Israel to Jordan. http://www.water.gov.il/Hebrew/ProfessionalInfoAndData/Allocation-Consumption-and-production/20183/Intro.pdf#page=5

[18] https://www.i24news.tv/en/news/israel/diplomacy-defense/190869-181213-israeli-forces-terminate-barkan-attacker-ending-months-long-manhunt

[19] https://www.algemeiner.com/2018/12/14/idf-soldier-in-critical-condition-after-fresh-terror-attack-outside-beit-el/

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- *The construction of the Palestinian border wall has been acknowledged by the International Court of Justice to breach international law. Both activities take public and private Palestinian property for purposes that are not militarily necessary. As such, the constructions cause breaches of the human rights to property and contribute (minimally) to a breach of the right to self-determination. It appears that SPU invests in two companies that undertake such activity. Alstom is helping to construct the rail while Cemex has provided cement for the construction of the wall. SPU is, therefore, undoubtedly directly linked to these violations.*

With regards to the mischaracterized "Palestinian border wall": NPA/NU entirely ignores the broader human rights perspective of the security barrier, which was built in response to mass suicide bombings and other terror attacks targeting civilians and emanating from the West Bank. The barrier has saved countless lives since its construction. More specifically, NPA/NU provides no evidence that Cemex was involved in the construction of the security barrier, and even if it did so in the past, the report fails to explain how this translates into linkage for investors at the present time or a current evaluation of the company's human rights impacts. NPA/NU also erases hundreds of petitions heard by the Israeli Supreme Court on the route of the barrier, in which the Court required changes or compensation where the impact was deemed to be disproportionate.[20]

With regards to the Jerusalem light rail line (elsewhere, NPA/NU apparently conflates the Jerusalem light rail and the Jerusalem-Tel Aviv train line under the term "rail line"): NPA/NU never explains how building the light rail violates international law, speculating that it is part of "annexation" and inaccurately stating that "rail line [will] serve the settlements in the West Bank." In fact, the Jerusalem light rail was constructed and is being expanded for the benefit of both Israelis and Palestinians in Jerusalem neighborhoods. Indeed, as discussed, a French court confirmed that occupation law allows for the governance of occupied territory, including the building of transportation infrastructure.

- *SPU's portfolio includes Heidelberg Cement, which is currently engaged in quarrying in the OPT. Quarrying in occupied territory without the permission of the occupied government breaches the law of occupation as it constitutes the war crime of pillage….In the case of Heidelberg Cement's Nahal Raba quarry, the border wall – which does not align with the border and therefore prevents Palestinians from free movement within the occupied territories – is being constructed in a way that ensures discriminatory access to the quarry areas. By generally encouraging the build-up of settlements, quarries are also directly linked to violations of the rights to housing and water.*

NPA/NU offers no evidence that the company is "generally encouraging the build-up of settlements" or that its existence in any way depresses the amount of water available to Palestinians (see above for more details). It does no analysis as to how the company has mitigated adverse human rights impacts, nor does it evaluate the impact on the human rights of local communities should the plant shut down in terms of employment, access to

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[20] https://foi.gov.il/sites/default/files/%D7%9B%D7%A8%D7%9A 2.pdf

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construction materials, availability of alternative resources. In contrast to the NPA/NU claims, the Israeli Supreme Court examined the activities of Heidelberg and found no violations of international law.[21] The Court noted that for many decades that the quarries had been operating in accordance with international agreements, the significant numbers of Palestinians employed by the quarries at wages equal to that of their Israeli counterparts, and the supplying of both Israeli and Palestinian customers. The Court noted that under Article 31 of the 1995 Interim Agreement (Oslo II), that Israeli Civil Administration was made responsible for regulating and licensing quarries, with disputes to be addressed by a joint Israeli-Palestinian Committee. Regarding the use of natural resources, the Court found that the amount of existing and projected quarried material constituted half of one percent of existing reserves in accordance with the laws of usufruct and occupation. During the proceedings, the Israeli government also agreed to restrict the issuance of any new quarry licenses while the territory was under dispute, rehabilitate any environmental damage, and to separate out royalties and duties collected from these companies for the sole use of the Palestinian population.

Conclusion

We hope that this submission will clarify several issues raised in some of the inputs provided and aid the Commission in the preparation of its report. We welcome the opportunity to discuss matters with the Committee in more detail.

Respectfully submitted,

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[21] https://casebook.icrc.org/case-study/israel-high-court-justice-quarrying-occupied-territory