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ARTICLE

Storm in an Ice Cream Cone: Was Ben & Jerry's Decision to End Ice Cream Sales in Israeli Settlements a Responsible Corporate Exit from Occupied Territories?

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Abstract

Ben & Jerry's – the famous ice cream brand known for its quirky flavours and social justice ethos – announced in 2021 that it would withdraw its products from Israeli settlements in the Occupied Palestinian Territory (OPT). This announcement sparked controversy, with an impact on the company and its parent, Unilever. While the UN Guiding Principles on Business and Human Rights (2011) (UNGP) have established themselves as the leading international governance framework for the social responsibilities of businesses, their application to conflict-affected areas lacks clarity. Questions remain, including when is a company legally complicit in violations of international humanitarian law (IHL), and when is a corporate exit from an area under military occupation the appropriate and responsible thing to do. This article uses Ben & Jerry's withdrawal from the OPT as the basis for investigating these questions. It finds that while it is unlikely that Ben & Jerry's would be exposed to any legal liability for violating IHL through its product sales in Israeli settlements in the OPT, its withdrawal aligns with its responsibilities under the UNGP as a reasonable and prudent corporate action in response to its activities being linked to enduring and severe IHL violations.

Keywords: business and human rights; international humanitarian law; responsible business; law of occupation; responsible exit

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1. Introduction

> We believe business is among the most powerful entities in society. We believe that companies have a responsibility to use their power and influence to advance the wider common good.
>
> *Bennett Cohen and Jerry Greenfield*[1]

In July 2021, Ben & Jerry's (B&J) – the famous ice cream brand known for its quirky flavour names and social justice ethos – announced that it would withdraw its branded ice cream products from Israeli settlements in the Occupied Palestinian Territory (OPT). This set off a storm of controversy, backlash and ramifications for the company and its parent company, Unilever. From an international governance perspective, it raises the question of what responsible corporate behaviour is when it comes to doing business in conflict-affected areas and, in particular, areas considered occupied under international humanitarian law (IHL).

Since 2011, the governance landscape around the human rights responsibilities of businesses has been shaped by the United Nations Guiding Principles on Business and Human Rights (2011) (UNGP).[2] Six years in the making, with rigorous stakeholder engagement throughout, the UNGP were unanimously endorsed by the UN Human Rights Council.[3] While the UNGP have established themselves as the leading governance framework for businesses' social responsibilities, their application to conflict-affected areas lacks clarity.

Scholars such as Ramasastry and Tripathi helped to craft the UNGP guidance on challenging and conflict-affected contexts generally;[4] others such as Azarova, Duval, and Ronen have specifically explored business activities in the OPT in the light of the UNGP.[5] Yet issues around defining what constitutes

[1] Bennet Cohen and Jerry Greenfield, 'We're Ben and Jerry. Men of Ice Cream, Men of Principle', *The New York Times*, 28 July 2021, https://www.nytimes.com/2021/07/28/opinion/ben-and-jerry-israel.html.

[2] John Ruggie, UN Office of the High Commissioner for Human Rights, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), UN Doc HR/PUB/11/04 (UNGP). The UNGP were appended to John Ruggie's final report as Special Representative of the UN Secretary-General on Business and Human Rights, UN Doc A/HRC/17/31, 21 March 2011.

[3] UN Human Rights Council Resolution 17/4, Human Rights and Transnational Corporations and Other Business Enterprises (16 June 2011), UN Doc A/HRC/Res/17/4.

[4] eg, Mark Thompson and Anita Ramasastry, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries* (Institute for Human Rights and Business 2011), https://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf; Salil Tripathi, 'Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards' (2010) 50 *Politorbis* 131.

[5] Valentina Azarova, 'Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel's Settlements' (2018) 3 *Business and Human Rights Journal* 187; Antoine Duval and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives* (Routledge 2020); Yaël Ronen, 'The Responsibility of Businesses Operating in the Settlements in Occupied Territory' in Joseph E David and others (eds), *Strengthening Human Rights Protections in Geneva, Israel, the West Bank and Beyond* (Cambridge University Press 2021) 130.

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responsible business practice in the OPT remain unresolved; such issues include the question of just when is a corporate exit from an area under military occupation the appropriate and responsible thing to do.[6] As Ronen identified, applying the UNGP framework to guide business conduct in the 'unique situation' of the OPT is challenging and has its 'shortcomings'.[7]

The UNGP state that the corporate responsibility to respect human rights extends to all internationally recognised human rights, and a company should mitigate or avoid being party to any adverse human rights impacts that it causes, contributes to or is linked to through its business activities.[8] In conflict-affected areas, including occupied territories, the UNGP make clear that businesses should respect IHL as well.[9] Indeed, B&J invoked IHL issues – the occupation and the illegality of Israeli settlements in the OPT – in its decision to end the sale of its ice cream products in the OPT.[10]

This article uses B&J's withdrawal from the OPT as the basis for investigating the issues surrounding responsible business practice in situations of occupation and armed conflict. It ponders the sticky question: does selling ice cream in Israeli settlements in the OPT breach a company's responsibilities as reflected in the UNGP?

1.1. Substance and process: Two aspects of the UNGP framework

The UNGP 'do not encourage, much less require, binary approaches to decisions to remain in or exit from challenging operating contexts … Rather they set out considerations that businesses (and others) should consider when deciding on "appropriate action."'[11] As will be elaborated upon below, an essential element of the guidance provided by the UNGP is the detailing of both the international legal human rights *standards* that companies should respect in such contexts,[12] and *practical steps and processes* of how companies should implement their respect for those standards.[13] This article examines the related questions of whether B&J fell afoul of either or both of these aspects of the UNGP governance framework. This requires complementing a legalistic evaluation of the company's activities vis-à-vis the relevant specialised IHL norms designed to regulate behaviour in situations of occupation, with an assessment of B&J's compliance with, albeit more vague, more subjective considerations of social expectations and responsibilities, as reflected in the UNGP framework.

[6] Office of the High Commissioner for Human Rights (OHCHR), 'Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting', August 2023, https://www.ohchr.org/sites/default/files/documents/issues/business/bhr-in-challenging-contexts.pdf.

[7] Ronen (n 5) 150–56.

[8] UNGP (n 2) Principles 12–13.

[9] ibid Principle 12.

[10] Ben & Jerry's, 'Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territory', July 2021, https://www.benjerry.com/about-us/media-center/opt-statement.

[11] OHCHR (n 6) 17.

[12] UNGP (n 2) Principle 13.

[13] ibid Principles 16–24.

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After providing background information on the history of the OPT and B&J's decision to withdraw from it in Section 2, the following section of the article (3) analyses whether B&J's selling of ice cream in Israeli settlements contravened IHL – the relevant, *substantive* international legal standards to adhere to under the UNGP governance framework in situations of occupation and armed conflict.[14] Section 4 turns to examine whether B&J adhered to the *procedural* expectations for corporate action that the UNGP envisage a company will undertake when doing business in a conflict-affected area, including an area under occupation. Section 5 offers some concluding observations derived from the preceding analysis.

2. Background

2.1. The Occupied Palestinian Territory

Article 42 of the Hague Regulations IV of 1907 states that 'territory is considered occupied when it is actually placed under the authority of the hostile army'.[15] However, the scope of application of IHL and the law of occupation was extended in 1977 by Additional Protocol I to the Geneva Conventions of 1949 to all cases of 'alien occupation'.[16] Whether a territory is occupied, and thus subject to the law of occupation, is a matter of objective determination. While some commentators suggest that 'occupation of foreign territory will usually be self-evident to all observers', in many situations of disputed territory, recognition of an occupation is frequently subject to political considerations.[17] This divergence between the legal and political understanding of the status of a territory can be seen in the treatment of the OPT and other territories where, according to the majority of international legal opinions, the law of occupation applies: Crimea (occupied by Russia), Western Sahara (occupied by Morocco), Northern Cyprus (occupied by Turkey), to name just three.[18]

[14] Aside from being recognised as violating IHL, Israeli settlements and related infrastructure, such as road and security networks, also give rise to a range of adverse impacts on internationally recognised human rights of Palestinian people. This has been well documented by the UN and human rights advocacy organisations over many years. Nevertheless, the key concern expressed by B&J in its withdrawal decision is the occupation and the illegality of the settlements under IHL. Moreover, the application of IHL norms to business conduct is underserved in the literature. For these reasons, the focus of this section of the article focuses on B&J's compliance with IHL and not international human rights law.

[15] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land (entered into force 26 January 1910), *Martens Nouveau Recueil* (ser 3) 461 (Hague IV), art 42.

[16] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 1.

[17] Ben Clarke, 'Military Occupation and the Rule of Law: The Legal Obligations of Occupying Forces in Iraq' (2005) 8 *Murdoch University Electronic Journal of Law*, para 12, http://classic.austlii.edu.au/au/journals/MurdochUeJlLaw/2005/8.html.

[18] eg, Emile Badarin, 'Politics, Geography and Recognition in the Emerging Multipolar World Order' (2023) *Territory, Politics, Governance* 1–19; Christopher Borgen, 'The Art of the Deal or "Abandoning" Self-Determination? US Recognition of Morocco's Territorial Sovereignty over

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In the June 1967 Six Day War, Israel conquered and occupied territories that were previously controlled by Egypt (the Gaza Strip) and Jordan (East Jerusalem and the West Bank), who had captured those areas of Mandatory Palestine during the 1948–49 Arab–Israeli war, which followed the establishment of the State of Israel on 14 May 1948.[19] (In the 1967 war, Israel also occupied the Golan Heights and the entire Sinai Peninsula. In 1978, Israel ceded control of Sinai to Egypt as part of the Camp David Accords – the landmark first peace treaty between Israel and an Arab state). Aside from East Jerusalem, which it formally claims to have annexed in 1967, Israel has not claimed sovereignty over the remainder of the West Bank, but it exercises effective control over that territory.[20]

The status of territories occupied by Israel during the 1967 Arab–Israeli conflict is a matter of political dispute. Indeed, their current and future status (such as whether and what parts may constitute Israeli or Palestinian sovereign territory) lies at the heart of the ongoing Israeli–Palestinian conflict.[21] However, the *legal* status of these territories is less subject to dispute, with the vast majority of IHL scholars (including those based in Israel) understanding these territories, including East Jerusalem, to be 'areas under belligerent occupation' in which the Hague Regulations and Geneva Conventions apply.[22] Moreover, the International Court of Justice (ICJ), the International Committee of the Red Cross (ICRC), the UN Security Council (UNSC), General

Western Sahara' (2022) 55 *Israel Law Review* 127; Peter Stirk, *The Politics of Military Occupation* (Edinburgh University Press 2009).

[19] For historical overviews of the Arab–Israeli conflict see, generally, Ian Bickerton and Carla Klausner, *A History of the Arab-Israeli Conflict* (8th edn, Routledge 2018); Ilan Pappe, *A History of Modern Palestine: One Land, Two Peoples* (Cambridge University Press 2004); Martin Gilbert, *The Routledge Atlas of the Arab-Israeli Conflict* (10th edn, Routledge 2012).

[20] This annexation was achieved via government decrees and legislative amendments in the immediate aftermath of the 1967 Arab–Israeli war; they include Article 11B, Law and Administration Ordinance of 1948, amended 27 June 1967, to include 'the law, jurisdiction and administration of the state shall apply to all the area of the land of Israel which the government has determined by order'. On 28 June 1967, the Israeli government issued the Law and Administration Order, which applied 'the law, jurisdiction and administration of the state to East Jerusalem' and issued other decrees extending the municipal boundaries of the city. Subsequently, on 30 July 1980 the Israeli Knesset passed Basic Law: Jerusalem Capital of Israel, and a subsequent amendment in 2000 affirmed the municipal boundaries of Jerusalem were those created through the 1967 government decrees; see Clause 5, Basic Law: Jerusalem Capital of Israel (as amended 27 November 2000). For further discussion of the history (and possible future) of the status of Jerusalem see Moshe Hirsch, Deborah Housen-Couriel and Ruth Lapidoth, *Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem* (Nijhoff 1995) 22–23; Moshe Hirsch, 'The Legal Status of Jerusalem Following the ICJ Advisory Opinion on the Separation Barrier' (2005) 38 *Israel Law Review* 298, 299–302.

[21] ibid.

[22] eg, Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) 239–41; Orna Ben-Naftali, 'Geneva Law' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018) 141; Emma Playfair (ed), *International Law and the Administration of the Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press 1992).

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Assembly (UNGA), and other UN organs have all recognised the West Bank's status (including East Jerusalem) as occupied, and indeed most refer to it as Occupied Palestinian Territory.[23]

For its part, the government of Israel has formally annexed East Jerusalem and considers it sovereign Israeli territory.[24] The current Israeli government refers to the remainder of the West Bank as either 'disputed' territory or by the region's biblical labels: Judea and Samaria.[25] Nevertheless, despite these political designations, the Israeli Supreme Court recognises the West Bank's occupied status, and the applicability of IHL and the law of occupation to the area.[26] Indeed, it is on this understanding that the Israeli military applies the law of occupation in the OPT.[27]

The particular circumstances of the OPT, including the prolonged length of time of Israeli military occupation and its status prior to Israel assuming control in 1967, have given rise to suggestions that the law of occupation is ill-equipped to manage such a situation, while others query the lawfulness of Israel's protracted occupation of the West Bank.[28]

Regardless, the purpose of this article is not to engage in the debate over whether the OPT is occupied for the purposes of international law, but rather to grapple with the subsequent questions of corporate responsibilities in areas under occupation. Therefore, the applicability of the IHL law of occupation to the OPT is assumed. In this way, the article takes as its starting point the determination, shared by B&J, that the law of occupation applies to the OPT. This is the entire basis of its decision to withdraw from those territories.

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[23] See, generally, David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn, Oxford University Press 2021) 1; David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94(885) *International Review of the Red Cross* 207; UNSC Res 446 (22 March 1979), UN Doc S/RES/446; UNSC Res 2334 (23 December 2016), UN Doc S/RES/2334; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [109]–[113]; International Committee of the Red Cross (ICRC), 'What Does the Law Say about the Responsibilities of the Occupying Power in the Occupied Palestinian Territory?', 28 March 2023, https://www.icrc.org/en/document/ihl-occupying-power-responsibilities-occupied-palestinian-territories. Note: 'OPT' can also refer to 'territories' – plural (i.e., the West Bank *and* the Gaza Strip – the two separate territories on the land of mandatory Palestine that Israeli forces occupied in the 1967 conflict).

[24] See sources at n 19.

[25] eg, Israel Ministry of Foreign Affairs, 'Israeli Settlements and International Law', 30 November 2015, https://www.gov.il/en/departments/general/israeli-settlement-and-international-law; 'Israel Uses "Judea and Samaria Governorate" to Refer to West Bank', *Middle East Monitor*, 15 March 2023, https://www.middleeastmonitor.com/20230315-israel-uses-judea-and-samaria-governorate-to-refer-to-west-bank; 'Annexation Legislation Database', *Yesh Din*, https://www.yesh-din.org/en/legislation.

[26] For examples of the recognition of the application of the law of occupation to the OPT see, eg, HCJ 1661/05 *Gaza Beach Regional Council et al v Knesset of Israel* (2005); HCJ 2690/09 *Yesh Din – Volunteers for Human Rights and Others v Shamni and Others*, ILDC 2098 (IL 2010).

[27] For more information on the Israeli military oversight of the OPT see Israel Ministry of Defence, 'Coordination of Government Activities in the Territories', https://www.gov.il/en/departments/coordination-of-government-activities-in-the-territories/govil-landing-page.

[28] eg, Yutaka Arai-Takahashi, 'Unearthing the Problematic Terrain of Prolonged Occupation' (2019) 52 *Israel Law Review* 125; Yaël Ronen, 'Illegal Occupation and Its Consequences' (2008) 41 *Israel Law Review* 201.

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2.2. Ben & Jerry's announcement to withdraw from the OPT

Ben & Jerry's (B&J) is a world-renowned ice cream company and brand, founded in 1978 in Vermont (US) by Bennett Cohen and Jerry Greenfield. Known for its quirky flavours and social justice ethos, B&J has become one of the world's most well-known and successful ice cream brands. Since its inception, B&J embraced a 'Social Mission' alongside its commitment to 'profitable growth' and to making 'fantastic ice cream – for its own sake'.[29] B&J's website declares that that Social Mission 'compels us to use our company in innovative ways to make the world a better place'.[30]

In 2000, B&J sold the entirety of its company to Unilever, a sprawling global food and consumer goods giant. However, as part of the purchase agreement, a 'unique corporate governance structure' was agreed.[31] While Unilever, as the sole owner of the company, would decide operational and financial issues, it was stipulated that B&J would retain an independent board to 'take decisions about its social mission and the "Essential Integrity of the Brand"'.[32] A precise demarcation of responsibilities for this board was not elaborated upon in the agreement, and was left untested until 22 years later, when the B&J independent board made its fateful decision to withdraw its ice creams from the OPT.

Since 1987, B&J's ice cream was manufactured and sold throughout Israel and the OPT through an exclusive licensing agreement with Israeli-based American Quality Products (AQP), owned by Israeli entrepreneur, Avi Zinger. Along with the exclusive right to sell B&J ice cream in Israel and the OPT, B&J supplied AQP with lists of ingredients and flavour formulations, and the right to use the B&J trade marks. This licensing agreement predates Unilever's takeover of B&J and continued uninterrupted for two decades thereafter.[33]

Then, on 19 July 2021, B&J's independent board announced that the ice-cream maker would not renew Zinger's long-standing licence agreement, citing an intention to end sales of its products in the OPT. By terminating its relationship with AQP, B&J's decision would also have the practical effect of ceasing the manufacture and sale of its products also in Israel proper (as well as the OPT) until an alternative arrangement was put in place.[34] This decision was made by B&J's board, unbeknown to its parent company, Unilever.

[29] Ben & Jerry's, 'Our Values, Activism and Mission: We Believe that Ice Cream Can Change the World', https://www.benandjerry.com.au/values.

[30] ibid.

[31] *Ben & Jerry's Homemade, Inc. v Conopco, Inc.*, Complaint, US District Court SDNY, 2022, para 3.

[32] Unilever, 'Unilever Statement on Ben & Jerry's Decision', press release, 19 July 2021, https://www.unilever.com/news/press-and-media/press-releases/2021/unilever-statement-on-ben-and-jerrys-decision. See also filings by Ben & Jerry's and Unilever in the subsequent litigation (n 31), which made public the purchase agreement; and Richa Naidu and Jessica DiNapoli, 'Unilever Says Litigation with Ben & Jerry's Board Has "Been Resolved"', *Reuters*, 16 December 2022, https://www.reuters.com/business/retail-consumer/unilever-says-litigation-with-ben-jerrys-board-has-been-resolved-2022-12-15.

[33] Carl Hoffman, 'The Scoop on Ben & Jerry's in Israel', *The Jerusalem Post*, 28 December 2018, https://www.jpost.com/magazine/cookies-n-cream-and-tikkun-olam-575562.

[34] Ben & Jerry's (n 10).

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B&J's statement announcing its withdrawal was titled 'Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territory'.[35] It made clear, along with subsequent statements to the media and in court filings, that ending its involvement with the Israeli settlements in the OPT was the reason for its decision to end its Israeli licensing agreement and end sales of its B&J-branded ice cream in the OPT.[36] The withdrawal announcement declared that it is 'inconsistent with our [B&J] values for our product to be present within an internationally recognized illegal occupation'.[37]

The board's chair, Anuradha Mittal, discussed the motivation for this decision in media interviews. She noted that B&J's independent board had already passed a resolution a year before (July 2020) to 'end sales of B&J's products in Israeli settlements' but B&J's CEO, appointed by Unilever in 2018, had failed to implement that decision.[38] Moreover, throughout 2021 the board had 'pushed to release a statement pledging to withdraw B&J's products from Israeli settlements' but Unilever executives had intervened to prevent this.[39] That led the B&J independent board, under Mittal as chair, to make public its determination to end sales of its ice cream in Israeli settlements in the OPT.

Significantly, Unilever – B&J's parent company – amended the board's intended withdrawal statement posted to its corporate website to note: 'We will stay in Israel through a different arrangement'. It did so without the independent board's approval.[40] Indeed, it seems that the withdrawal decision generated a fair degree of acrimony between B&J's independent board (and B&J's founders) on the one hand, and its parent company, Unilever, on the other. This even led to commercial litigation between the parent and subsidiary companies (see below).

B&J's decision came after years of lobbying and public pressure campaigns by human rights organisations, such as Human Rights Watch,[41] and pro-Palestinian groups, such as Vermonters for Justice in Palestine, advocating B&J to 'end their complicity in Israel's occupation'[42] (Vermont is the US state in which B&J was founded and headquartered). In a subsequent *New York Times* op-ed, Cohen and Greenfield (who lent their first names to the company they founded) endorsed the decision; 'In our view,' they argued, 'ending the sales of ice

[35] ibid.

[36] ibid. See also 'Axios on HBO, 'Ben and Jerry's Founders on Sales in the Occupied Palestinian Territory' *HBO*, https://www.youtube.com/watch?v=4mwoiAUM6nA.

[37] ibid.

[38] Olivia Solon, 'Ben & Jerry's Withdraws Sales from Israeli Settlements but Clashes with Parent Company Unilever', *NBC News*, 20 July 2021, https://www.nbcnews.com/business/business-news/ben-jerry-s-withdraws-sales-israeli-settlements-clashes-parent-company-n1274403.

[39] ibid.

[40] Ben & Jerry's (n 10).

[41] Sari Bashi, 'Ben & Jerry's Is Shunning Israeli Settlements. The U.S. Should Too', *Democracy for the Arab World Now (DAWN)*, 23 July 2021, https://www.hrw.org/news/2021/07/23/ben-jerrys-shunning-israeli-settlements-us-should-too.

[42] VTJP, 'Vermonters Call on Ben & Jerry's to End Complicity with Israel's Occupation and Settlements', *BDS*, 16 March 2013, https://bdsmovement.net/news/vermonters-call-ben-jerrys-end-complicity-israels-occupation-and-settlements.

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cream in the occupied territories is one of the most important decisions the company has made in its 43-year history'.[43]

2.2.1. Aftermath of the decision

The decision to withdraw B&J ice cream products from the OPT is one of the most prominent instances of corporate withdrawal from the OPT, before or since. It made headlines across the world and prompted a 'storm of diplomatic, political and consumer reactions'.[44] The political furore was instantaneous, with B&J and Unilever criticised by the Israeli government and its supporters.[45] For instance, Israeli Foreign Minister Yair Lapid called it a 'shameful capitulation to antisemitism, BDS, and everything bad in the anti-Israel and anti-Jewish discourse'.[46] On the other hand, Palestinians and their supporters, including the BDS (Boycott-Divest-Sanctions) Movement, welcomed the decision. The BDS Movement has long campaigned for an end to corporate engagement with the OPT and declared the withdrawal was 'a decisive step towards ending the company's complicity in Israel's occupation'.[47]

On the legal front, the Israeli licensee, Avi Zinger, launched legal action against both B&J and Unilever to prevent them from following through with the withdrawal.[48] A shareholder class action was filed in the Manhattan Federal Court alleging that Unilever had mishandled the decision by B&J to stop selling ice cream in the OPT.[49] US authorities, in federal and state legislatures, threatened legal action against Unilever and B&J, including under anti-BDS legislation passed in several states.[50] Zinger lodged a formal complaint with the Israeli anti-trust regulators to investigate whether Unilever had breached the regulator's guidance

[43] Cohen and Greenfield (n 1).

[44] Tova Lazaroff, 'Ben & Jerry's Board Wanted To Boycott All of Israel', *The Jerusalem Post*, 21 July 2021, https://www.jpost.com/israel-news/ben-and-jerrys-board-wanted-to-boycott-all-of-israel-674405.

[45] JC Reporter, 'Boycott "Antisemitic" Ben & Jerry's, Says Simon Wiesenthal Center', *The Jewish Chronicle*, 21 October 2021, https://www.thejc.com/news/world/boycott-%27antisemitic%27-ben-and-jerry%27s-says-simon-wiesenthal-center-1.521790.

[46] 'Lapid: Ben & Jerry's Move a "Disgraceful Capitulation to Antisemitism"', *The Times of Israel*, 19 July 2021, https://www.timesofisrael.com/liveblog_entry/lapid-ben-jerrys-move-a-disgraceful-capitulation-to-antisemitism.

[47] ibid. For more on the BDS Movement see BDS Movement, 'What is BDS?', https://bdsmovement.net/what-is-bds.

[48] *Avi Zinger and American Quality Products Ltd v Ben & Jerry's Homemade Inc and Unilever United States, Inc, and Conopco, Inc.*, Memorandum on behalf of Plaintiffs' Motion for Preliminary Injunctive Relief, US District Court, NJ, 3 November 2022, Civil Case No: 2:22cv01154(KM)(JBC). For more detail see Melissa Weiss, 'Ben & Jerry's Israeli Distributor Files Lawsuit against Ice Cream Company, Unilever', *Jewish Insider*, 3 March 2022, https://jewishinsider.com/2022/03/ben-jerrys-israeli-distributor-files-lawsuit-against-ice-cream-company-unilever.

[49] Jonathan Stempel, 'Unilever Shareholder Sues over Ben & Jerry's Israel Boycott', *Reuters*, 16 June 2022, https://www.reuters.com/business/unilever-shareholder-sues-over-ben-jerrys-israel-boycott-2022-06-15.

[50] As per *Ben and Jerry's Homemade Inc v Conopco Inc*, *Unilever IP Holdings BV and Unilever Plc*, US District SDNY, Memorandum of Law in Support of Defendants Conopco Inc, Unilever UIP Holdings B.V. and Unilever Plc's Motion to Dismiss pursuant to General Rule of Civil Procedure 12(B)(6), 9.

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on the 2001 merger between Unilever and B&J, and US Congressmen demanded the US Securities and Exchange Commission do likewise.[51] In a remarkable move, then Israeli Prime Minister Naftali Bennett even protested against the decision directly to Alan Jope, Unilever CEO. Calling it a 'clearly anti-Israel step,' Bennett told Jope that if the decision were allowed to stand it would have 'serious consequences, legal and otherwise, and that [Israel] will act aggressively against all boycott actions directed against its citizens'.[52]

As Vivienne Walt of *Fortune* magazine observed, Unilever found itself 'wrestling political crosswinds in an age of intense brand sensitivity'.[53] Unilever opted to override B&J's decision to withdraw; however, instead of renewing the licensing agreement with Zinger, Unilever sold the B&J Israel business to him, thereby divesting itself of the controversy – or so it thought. In July 2022, B&J launched legal action against its own parent company in Unilever, seeking injunctive relief to prevent the sale from proceeding.[54] A few months later, B&J dropped the suit and the sale went ahead.[55] The upshot of this was that Unilever carved out B&J's Israeli business from B&J, it no longer being a Unilever-controlled or owned entity, nor subject to B&J's independent board. It is an entirely separate business from B&J elsewhere in the world. On the ground, throughout the saga, there was no interruption to the supply of B&J branded ice cream across the OPT, including in the Israeli settlements.

While many of the political and legal ramifications of B&J's decision to withdraw will continue to unfold over the coming years, this article evaluates B&J's original decision to exit from the OPT by questioning whether a responsible company may do business in the Israeli settlements in the OPT. It assesses a company's responsibilities and liabilities arising from IHL and under the UNGP framework when doing business in a situation of occupation.

3. 'Boom Chocolatta': Corporate IHL responsibilities in the OPT

The UNGP state that:[56]

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[51] ibid. See also ILH staff, 'Ben & Jerry's Decision to Restrict Sales in Israel "Illegal", Says Former Anti-Trust Chief', *Israel Hayom*, 23 July 2021, https://www.israelhayom.com/2021/07/23/ben-jerrys-decision-to-restrict-sales-in-israel-illegal-says-former-antitrust-chief; The Brandeis Center, 'Ben & Jerry's Israel Tells NJ Court: "Unilever Effectively Concedes Their Only Reason for Not Renewing Our License Is We Refused to Break the Law"', 6 April 2022, https://brandeiscenter.com/ben-jerrys-israel-tells-nj-court-unilever-effectively-concedes-their-only-reason-for-not-renewing-our-license-is-we-refused-to-break-the-law.

[52] Bethan McKernan, 'Israeli PM: Ben & Jerry's Sales Ban Will Have "Serious Consequences"', *The Guardian*, 21 July 2021, https://www.theguardian.com/world/2021/jul/20/israel-pm-aggressive-action-ben-jerrys-ban-ice-cream-naftali-bennett-occupied-territories-unilever.

[53] Vivienne Walt, 'Unilever Has Settled Its Battle with Ben & Jerry's over West Bank Ice Cream – but the Minefield of Doing Business in Israel Remains', *Fortune Magazine*, 17 December 2022, https://fortune.com/2022/12/16/unilever-ben-jerrys-israel-west-bank-ice-cream.

[54] *Ben & Jerry's v Conopco* (n 31).

[55] Walt (n 53); Judith Evans, 'Unilever Resolves Ben & Jerry's Lawsuit over Palestinian Sales,' *Financial Times*, 15 December 2022, https://www.ft.com/content/b26ec3e1-2a80-4c91-a222-2174d6d450a9.

[56] UNGP (n 2) Principle 13.

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> [businesses should] avoid causing or contributing to adverse human rights impacts through their own activities … and 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.

Among its key recommendations, the UNGP state that for a company to meet its responsibility to respect human rights it must 'know and show that they respect human rights' and that to do so they must have the following processes in place:[57]

1. Develop and publish a human rights policy commitment.[58]
2. Conduct ongoing effective human rights due diligence, including human rights impact assessments, and act upon the findings.[59]
3. Establish and support effective, safe mechanisms for remediation of any adverse human rights impacts they cause or contribute to.[60] These expectations – to 'show' (Principle 16), 'know' (Principles 17–21) and help to 'remedy' (Principle 22) one's adverse human rights impacts – have become the well-accepted benchmark expectations for responsible companies, and have been embraced by other international corporate governance instruments, such as the OECD *Guidelines on Multinational Enterprises*, as well as corporate human rights reporting and evaluation initiatives.[61] When it comes to 'knowing', the UNGP elaborate on the concept of human rights due diligence, noting that it consists of four elements: 'The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[62]

3.1. Heightened UNGP responsibilities in situations of occupation

During his tenure as UN Special Rapporteur on Business and Human Rights, John Ruggie, the author of the UNGP, identified that special attention is needed in conflict-affected areas, for '[i]t is well established that some of the most

[57] ibid Principle 15, Commentary. UNGP Principle 15 lists these three steps that a responsible business should undertake; the subsequent Principles 16–24 elaborate on them.

[58] ibid Principle 16.

[59] ibid Principles 17–21.

[60] ibid Principle 22.

[61] Organisation for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD 2023), https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en;jsessionid=12sE3XQaqXo3Fqh4udwBtdzhUBIXEyWOlof8Cj_z.ip-10-240-5-61. The OECD Guidelines were amended in 2011 with the creation of a new human rights chapter that is consistent with the UNGP. See also World Benchmarking Alliance, 'Corporate Human Rights Benchmark: Core UNGP Indicators', 29 September 2021, https://www.worldbenchmarkingalliance.org/research/corporate-human-rights-benchmark-core-ungp-indicators.

[62] UNGP (n 2) Principles 17–21.

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egregious human rights abuses, including those related to corporations, occur in conflict zones'.[63] This is reflected in the UNGP and subsequent guidance produced by the UN Working Group on Business and Human Rights.[64] The key enhancements in a company's human rights responsibilities, when doing business in conflict-affected areas, is to respect IHL (alongside human rights law) and conduct 'heightened' human rights due diligence.[65] *Heightened* human rights due diligence is understood to require a company to assess and respond not only to its direct adverse human rights impacts, but also its actual or potential adverse impacts on the conflict or occupation.[66] As with regular human rights due diligence, this assessment should include any adverse impacts that the company 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'.[67]

Additionally, when doing business in conflict-affected areas, a company should include reference to IHL in its relevant human rights policies and integrate IHL rules into its due diligence and risk management policies and processes.[68] Patently, when doing business in a situation such as the OPT, special attention must be given to the provisions of IHL relating to the particular circumstance, namely the 'law of occupation'. Subsequently, the UN, Red Cross and others have produced further guidance for companies to implement both effectively in a conflict-sensitive manner.[69]

In 2014, the United Nations' Working Group on Business and Human Rights (the successor entity to John Ruggie's tenure as Special Representative) issued a statement on the application of the UNGP to business activities in Israeli settlements in the OPT.[70] It notes that 'in situations of armed conflict [and occupation] they [i.e. companies] should respect the standards of international

[63] John Ruggie, UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (7 April 2008), UN Doc A/HRC/8/5, para 47.

[64] UNGP (n 2) Principle 7; UNGA, Report of the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises. Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action (21 July 2020), UN Doc A/75/212 (UN Working Group).

[65] UN Working Group (n 64) 4–6.

[66] ibid 13.

[67] UNGP (n 2) Principle 17(a).

[68] Jonathan Kolieb and Fauve Kurnadi, 'Seven Indicators of Corporate Best Practice in International Humanitarian Law', *Australian Red Cross and RMIT University*, 2021, https://www.redcross.org.au/globalassets/cms-assets/documents/ihl--no-ihl/7-indicators-of-corp-best-prac-final-2021.pdf.

[69] Gerald Pachoud and Siniša Milatović, 'Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide', *United Nations Development Programme*, 16 June 2022, https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide.

[70] OHCHR, 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.

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humanitarian law'.[71] It was Israel's occupation – and, in particular, the illegality under IHL of the Israeli settlements in the OPT – that led to B&J's decision to withdraw from business activities there. B&J concluded that continuing to sell its ice cream products in Israeli settlements – widely recognised as violating IHL norms – was contrary to its corporate values and social justice mission.[72]

This section interrogates B&J's decision to withdraw from the OPT from an IHL perspective, querying whether it complies with the specific substantive international legal norms relevant to the context: namely, the IHL law of occupation. In plain vanilla terms: Is the selling of ice-cream in Israeli settlements contrary to IHL norms? To put it in more provocative terms: Is a company that sells ice cream in Israeli settlements in the OPT complicit in a grave breach of IHL, or even a war crime?

While some may view this characterisation of the issue as hyperbole and/or hypothetical, it is precisely this allegation of complicity in war crimes that is levelled against many companies (Israeli and foreign-owned) that do business in the OPT.[73] It also forms the basis for calls from some human rights groups and pro-Palestinian activists for divestment and withdrawal of businesses from the OPT, and even for the prosecution of those that fail to do so.[74] For instance, successive UN Special Rapporteurs on the situation of human rights in the Palestinian territories occupied since 1967 and human rights organisations (such as Human Rights Watch, Amnesty International and al Haq) have argued that corporate involvement in the Israeli settlement enterprise is a violation of international law and a war crime, and have called on companies to stop doing business in the OPT.[75]

The claims are frequently couched in broad language. Amnesty and others, for example, argue that mere involvement by a company in the occupation of Palestine means that it can therefore be held responsible for violating IHL.[76] The logic presented is usually two-fold. Firstly, the Israeli settlements are illegal and a violation of IHL, in particular, citing Article 49(6) of the Fourth Geneva Convention's prohibition on the occupying power on transferring its own civilian population from its own territory into occupied territory.[77]

[71] ibid 8.

[72] Ben & Jerry's (n 10).

[73] eg, Bashi (n 41).

[74] eg, The BDS Movement, https://bdsmovement.net; Al-Haq, https://www.alhaq.org.

[75] eg, Amnesty International, 'Think Twice, Can Companies Do Business with Israeli Settlements in the Occupied Palestinian Territories while Respecting Human Rights?', MDE 15/9717/2019, 2019, https://www.amnesty.org.uk/files/2019-03/Think%20Twice%20report.pdf; Human Rights Watch, 'Occupation Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights' 19 January 2016, https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations; Maryah Farah, 'Business and Human Rights in Occupied Territory: Guidance for Upholding Human Rights', *al Haq and Global Legal Action Network*, 27 April 2020, https://docs.wixstatic.com/ugd/14ee1a_ff45366d84f04a0d9326b002c1449e5a.pdf

[76] Amnesty (n 75) 2; Human Rights Watch (n 75).

[77] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 49(6).

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This is usually coupled with a reminder that such conduct is also recognised as a war crime under the Rome Statute of the International Criminal Court (ICC).[78] Secondly, invoking the 'aiding and abetting' mode of liability drawn from international criminal law (ICL), they argue that businesses, in supplying products and services and otherwise facilitating the Israeli settlement enterprise, are in breach of IHL and are complicit in war crimes.[79] To avoid legal liability (and the public criticism and pressure campaigns of the BDS movement and human rights groups), companies are encouraged to end their involvement in settlements and exit from the OPT.[80]

Unpacking each element of this argument, including identifying the relevant IHL norms as well as the modes and thresholds of legal liability arising from breaches thereof, will provide a better understanding of whether B&J's selling of its ice cream products in Israeli settlements constitutes a violation of IHL and exposes it to legal accountability.

3.2. Law of Occupation 101 for business

IHL is the specialised set of international legal rules regulating behaviour during armed conflict and situations of military occupation. The international law of occupation, or 'belligerent occupation', is a core part of IHL. It stems from an understanding by the drafters of IHL treaties that specific rules were warranted to protect the civilian population of territories occupied by hostile militaries during wartime, as distinct from situations of open and ongoing hostilities.[81] The laws relating to belligerent occupation are found in the Hague Convention concerning the Laws and Customs of War (Hague Regulations) (1907), the Fourth Geneva Convention (1949) (GC IV) and its First Additional Protocol (AP1) (1977) relating the protection of victims of international armed conflict.[82] What follows is a brief overview of its key provisions pertinent to business activities, many of which are nowadays accepted as reflecting customary international law.[83]

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[78] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90, art 8.

[79] eg, Richard Falk, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, UN General Assembly (19 September 2012), UN Doc A/67/379, 11.

[80] eg, UN Human Rights Council, Database of All Business Enterprises Involved in the Activities Detailed in Paragraph 96 of the Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem, Report of the United Nations High Commissioner for Human Rights (1 February 2018), UN Doc A/HRC/37/39, para 41.

[81] See generally Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019); Kretzmer and Ronen (n 23) 83–98.

[82] Hague IV (n 15); GC IV (n 77); AP I (n 16).

[83] See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (ICRC and Cambridge University Press 2005, revised 2009), especially rr 41, 51, 52, 130.

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3.2.1. IHL norms relevant to business conduct in the OPT

Fundamental principles of an occupying power's obligations are found in Article 43 of the Hague Regulations, which states that the occupying power should restore, and ensure as far as possible, public order and safety in the occupied territory.[84] For the duration over which it exercises effective control over the occupied territory, the occupying power has responsibilities under IHL, intended primarily to protect the civilian population which enjoys all the benefits of the Geneva Conventions,[85] and to ensure that the status quo ante of the occupied territory is not unduly altered.[86] Several provisions of the law of occupation are especially pertinent in the context of the Israeli settlements in the OPT, and the question of the legality of corporate activities in and for those settlements.

Among an occupier's responsibilities is the obligation to 'not deport or transfer parts of its own civilian population into the territory it occupies'.[87] This is the provision that Israeli settlements in the OPT fall foul of according to most international legal scholars.[88] Theodor Meron observes that this prohibition is 'categorical and not conditioned on the motives or purposes of the transfer, and is aimed at preventing colonization of conquered territory by citizens of the conquering state'.[89] The voluntary and state-sponsored construction of homes for Jewish Israeli citizens in the OPT (and the security infrastructure that sustains it) have been deemed a violation of IHL by the UN Human Rights Council, UN Security Council, International Court of Justice, and the ICRC.[90]

Israeli settlements have been constructed on privately owned lands claimed by Palestinian residents of the OPT.[91] This contravenes another provision of the law of occupation which prohibits the taking of private property unless militarily necessary.[92]

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[84] Hague IV (n 15) art 43; Benvenisti (n 22); Kretzmer (n 23) 218–19.

[85] Geneva IV (n 77) art 47. See also AP I (n 16) art 75.

[86] ibid. For an overview of law of ICRC, 'Contemporary Challenges to IHL – Occupation: Overview', 11 June 2012, https://www.icrc.org/en/doc/war-and-law/contemporary-challenges-for-ihl/occupation/overview-occupation.htm; Benvenisti (n 22).

[87] GC IV (n 77) art 49(6).

[88] For a good overview: Ben-Naftali, Sfard and Viterbo (n 22).

[89] Theodor Meron, 'The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War' (2017) 111 *American Journal of International Law* 357, 358.

[90] Marya Farah and Maha Abdallah, 'Security, Business and Human Rights in the Occupied Palestinian Territory' (2019) 4 *Business and Human Rights Journal* 7, 23–28; ICRC, 'What Does the Law Say about the Responsibilities of the Occupying Power in the Occupied Palestinian Territory?', 28 March 2023, https://www.icrc.org/en/document/ihl-occupying-power-responsibilities-occupied-palestinian-territories.

[91] eg, Rami Ayyub, 'Israel's Supreme Court Strikes Down Law Legalising Settlements on Private Palestinian Land', *Reuters*, 10 June 2020, https://www.reuters.com/article/idUSKBN23H0DD; Yotam Berger, 'Revealed: Nearly 3,500 Settlement Homes Built on Private Palestinian Land', *Ha'aretz*, 23 August 2017, https://www.haaretz.com/israel-news/2017-08-23/ty-article/.premium/revealed-3-500-settlement-homes-built-on-private-palestinian-land/0000017f-dc6e-df62-a9ff-dcff7abb0000; Dror Etkes and Hagit Ofran, 'One Violation Leads to Another: Israeli Settlement Building on Private Palestinian Property', *Peace Now*, November 2006, https://peacenow.org.il/wp-content/uploads/2009/01/Breaking_The_Law_in_WB_nov06Eng.pdf.

[92] Hague IV (n 15) art 46; GC IV (n 77) art 53.

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Israeli companies are also involved in the extraction and use of the OPT's natural resources, including underground water reserves, quarried stone and even Dead Sea minerals.[93] These economic activities primarily benefit the Israeli economy and are said to be in breach of other elements of the IHL law of occupation.[94] 'Pillage is formally forbidden' in areas under occupation, declares Article 47 of the Hague Regulations.[95] This is restated in Article 33, GC IV: 'Pillage is prohibited'.[96] The Hague Regulations also state that 'the occupying State shall be regarded only as administrator … and administer [the assets and resources of the occupied territory] in accordance with the rules of usufruct'.[97] This rule makes clear that the occupier may use such lands, but not behave as if it were their owner.[98] It requires an occupying power to utilise the resources of the occupied territory primarily for the benefit of the local protected people and not for its own economic benefit, and to not unduly deplete the resources.[99] The rule of usufruct makes clear that the occupier of territories must 'not behave as if it were their owner'.[100] These principles were affirmed as applicable to the OPT by none other than the Israeli Supreme Court in the *Iscan* case, in which Justice Aharon Barak noted that '[a] territory held under belligerent occupation is not an open field for economic or other exploitation'.[101]

3.2.2. Violations of the law of occupation may amount to war crimes

Severe violations of IHL precepts may amount to war crimes. This is reflected in GC IV, which, in Article 146, calls on states to provide 'effective penal sanctions' for persons who commit grave breaches of IHL.[102] AP I, more plainly, declares that 'grave breaches' of IHL 'shall be regarded as war crimes'.[103] Among the acts listed therein as a grave breach include the transfer by an

[93] Claudia Nicoletti and Anne-Marie Hearne, 'Pillage of the Dead Sea: Israel's Unlawful Exploitation of Natural Resources in the Occupied Palestinian Territory', *al Haq*, 2012, https://www.alhaq.org/cached_uploads/download/alhaq_files/publications/Dead-sea-web.pdf; Yonatan Kanonich, 'The Great Drain: Israeli Quarries in the West Bank: High Court Sanctioned Institutionalized Theft', *Yesh Din*, 14 September 2017, https://www.yesh-din.org/en/great-drain-israeli-quarries-west-bank-high-court-sanctioned-institutionalized-theft.

[94] ibid.

[95] Hague IV (n 15) art 47. See also Dinstein (n 81) 207–09; Jean Pictet (ed), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Times of War* (ICRC 1958) 226–29.

[96] GC IV (n 77) art 33.

[97] Hague IV (n 15) art 55.

[98] Michael Sfard, 'Usufruct' in Ben-Naftali, Sfard and Viterbo (n 22) 417.

[99] UN Human Rights Council, Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem, with a Focus on Access to Water and Environmental Degradation, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967 (15 March 2019), UN Doc A/HRC/40/73, paras 29–34.

[100] Meron (n 89).

[101] HCJ 393/82 *Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Masuliya v Commander of the IDF Forces in the Area of Judea and Samaria and Others* (28 December 1993), para 13, https://hamoked.org/items/160_eng.pdf ('A territory held under belligerent occupation is not an open field for economic or other exploitation').

[102] GC IV (n 77) art 146.

[103] AP I (n 16) art 85(5)

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occupying power of its own civilians into the occupied territory.[104] Moreover, ICL – commonly seen as the accountability arm of IHL – has long recognised that grave breaches and other serious violations of IHL may amount to war crimes.[105] Since its modern inception at the Nuremberg and Tokyo war crimes trials following the Second World War, ICL has held individual perpetrators accountable before international tribunals and courts for the commission of and complicity in such war crimes.[106] Among the war crimes listed in the Rome Statute of the International Criminal Court is the 'transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies'[107] and 'pillaging a town or place'.[108]

By applying these provisions of IHL and ICL to settlement activities in the OPT, UN entities and many pro-Palestinian activists and human rights advocacy organisations (such as Human Rights Watch and Amnesty International) label Israeli settlements and their exploitation of the natural resources of the OPT as war crimes.[109] Michael Lynk, an academic and former UN Special Rapporteur on the situation of human rights in the OPT, stated that not only are they war crimes but that the Israeli settlement enterprise by 'the creation of demographic facts on the ground to solidify a permanent presence, a consolidation of alien political control and a claim of sovereignty – tramples upon the fundamental precepts of humanitarian law'.[110]

3.3. Corporate involvement in IHL violations

By extension, these bodies contend that business activities associated with Israeli settlements and the exploitation of natural resources in the OPT are violations of IHL norms and constitute war crimes themselves or complicity therein.[111] Some, like Richard Falk (an academic and former UN Special Rapporteur on the situation of human rights in the OPT), urge the boycott of businesses that profit from Israeli settlement enterprise and for businesses to withdraw from the OPT to avoid their ongoing 'complicity in international crimes'.[112] It is to this allegation of *corporate* complicity in IHL violations to which this article now turns.

[104] ibid art 85(4)(a).

[105] Hortensia Gutierrez Posse, 'The Relationship between International Humanitarian Law and the International Criminal Tribunals' (2006) 88 *International Review of the Red Cross* 65.

[106] Antonio Cassese and others, *International Criminal Law: Cases and Commentary* (Oxford University Press 2011); Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, Cambridge University Press 2019).

[107] Rome Statute (n 78) art 8(2)(b)(viii).

[108] ibid art 8(2)(b)(xvi).

[109] eg, Michael Lynk, UN Human Rights Council, Situation of Human Rights in the Occupied Palestinian Territory, including East Jerusalem, with a Focus on the Legal Status of the Settlements, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967 (29 July 2021), UN Doc A/HRC/47/57, paras 39–42.

[110] ibid para 38.

[111] Falk (n 79).

[112] ibid.

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Traditionally, it is states and non-state armed actors that have been understood to have obligations arising from IHL treaties and customary international law. Similar and complementary to the recent move to explore and strengthen business respect for human rights, so too there is a complementary effort to enhance the corporate sector's respect for IHL.[113] This is seen through various initiatives of the ICRC and other members of the Red Cross family – the 'guardians' of the Geneva Conventions and champions of IHL education and compliance around the world.[114] The ICRC states that 'a business enterprise carrying out activities that are closely linked to an armed conflict must also respect applicable rules of international humanitarian law'.[115]

Adherence to IHL is also at the heart of responsible business practices in conflict-affected areas, according to the UNGP, as well as other leading global governance instruments and initiatives (such as the Voluntary Principles on Security and Human Rights Initiative and the OECD *Guidelines on Multinational Enterprises*).[116]

While the particular dynamics of the legal applicability of IHL to corporate actors warrants further scholarly inquiry, it is clear that the UN and ICRC understand it to be relevant and fundamental to their expectations of corporate conduct in conflict-affected areas, including areas under occupation. This is also the position in the existing scholarly literature on the subject.[117]

Moreover, from a practical risk-management perspective, corporate sustainability reporting frameworks, such as the Global Reporting Initiative, advise companies to pay heed to IHL when doing business in conflict-affected areas, as companies face material risks for failing to do so, including exposure to the risk of legal liability.[118] In fact, corporate participation in serious violations of IHL have led to criminal prosecutions in international and domestic courts.[119] Aside from fines and other sanctions against the company itself, individuals within corporate entities can be held personally liable for their role in

[113] Jonathan Kolieb, 'Don't Forget the Geneva Conventions: Achieving Responsible Business Conduct in Conflict-Affected Areas through Adherence to International Humanitarian Law' (2020) 26 *Australian Journal of Human Rights* 142.

[114] eg, Yves Sandoz, 'The International Committee of the Red Cross as Guardian of International Humanitarian Law', ICRC, 31 December 1998, https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm.

[115] ICRC, 'Business and IHL: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law', 30 November 2006, 14, https://www.icrc.org/en/doc/assets/files/other/icrc_002_0882.pdf.

[116] UNGP (n 2) Principle 12, commentary; Pachoud and Milatović (n 69); Jonathan Kolieb and Fauve Kurnadi (eds), 'Doing Responsible Business in Armed Conflict: Risks, Rights and Responsibilities', *Australian Red Cross and RMIT University*, 2020, https://www.redcross.org.au/globalassets/cms-assets/documents/ihl--no-ihl/doing-responsible-business-in-armed-conflict-final-publication-web.pdf; OECD (n 61).

[117] eg, Thompson and Ramasastry (n 4); Azarova (n 5), Farah (n 75).

[118] Global Reporting Initiative, 'Consolidated Set of the GRI Standards', 2022, 174, https://gccbdi.org/sites/default/files/2023-01/Consolidated_Set_of_the_GRI_.pdf; Global Reporting Initiative, 'GRI 14: Mining Sector 2024' Standard, 2024, 70, https://www.globalreporting.org/search/?query=GRI+14.

[119] Joanna Kyriakakis, *Corporations, Accountability and International Criminal Law: Industry and Atrocity* (Edward Elgar 2021).

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corporate involvement or complicity in grave violations of IHL.[120] Indeed, as discussed below, some businesspeople have been sanctioned in this manner.[121]

3.3.1. Business complicity in war crimes

Companies can participate in violations of the law of occupation directly through their own corporate activities, and by aiding and abetting others (including the occupying power).[122] A for-profit company that deliberately exploits the natural resources of an occupied territory for use outside those territories may be directly violating the rule of usufruct and the prohibition of pillage. Indeed, such legal claims have been made against companies operating in the OPT (Heidelberg Cement, for example) and in other occupied territories, such as western agricultural companies purchasing phosphate from Western Sahara (occupied by Morocco).[123]

However, a far more common allegation that a business may find levelled against it is *accessorial* liability for complicity in IHL violations and war crimes. As a result, this in turn may expose its company, or its leadership, to legal liability. This was the argument levelled against B&J and formed the basis of its decision to withdraw from the OPT: namely, through the sale of its ice cream products in Israeli settlements, it is *facilitating* and *supporting* the perpetuation of the illegal Israeli settlement enterprise, and is thus complicit in a war crime.[124]

Accessorial liability – or complicity in a crime – is a well-accepted element of domestic and international criminal law the world over. It was included in

[120] Anita Ramasastry and Robert Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries, Executive Summary* (Fafo 2006), https://www.biicl.org/files/4364_536.pdf; International Commission of Jurists, *Corporate Complicity and Legal Accountability: Volume 1 Facing the Facts and Charting a Legal Path. Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes* (International Commission of Jurists 2008), https://icj2.wpenginepowered.com/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol1-publication-2009-eng.pdf.

[121] eg, *United States of America v Carl Krauch and Others*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 Case 6, Vol VII 100; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. X (1949), 130–59; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v Nahimana*, ICTR-99-52, Trial Chamber I, Judgment, 3 December 2003 (*Media Case*); ICTR, *Prosecutor v Musema*, ICTR-96-13-A, Trial Chamber I, Judgment, 27 January 2000 (*Gisovu Tea Factory Case*); ICTR, *Prosecutor v Bagaragaza*, ICTR-05-86, Trial Chamber III, Judgment, 17 November 2009. See generally Kyriakakis (n 119). In 2023, the trial of another businessman for his role in the perpetration of the Rwandan genocide was to take place; however, because of the defendant's age and senility, the trial was permanently stayed: International Residual Mechanism for Criminal Tribunals (IRMCT), *Prosecutor v Félicien Kabuga*, Decision Imposing an Indefinite Stay of Proceedings, MICT-13-38, 8 September 2023.

[122] James Stewart, 'Complicity in Business and Human Rights' (2015) 109 *Proceedings of the ASIL Annual Meeting* 181; Duval and Kassoti (n 5).

[123] Nicoletti and Hearne (n 93); Kanonich (n 93); JJP Smith, 'The Plundering of the Sahara: Corporate Criminal and Civil Liability for the Taking of Natural Resources from Western Sahara', *Association de soutien à un référendum libre et régulier au Sahara Occidental*, https://www.arso.org/PlunderingoftheaharaSmith.pdf. See also *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV 'NM Cherry Blossom' and Others* [2017] ZAECPEHC 31; 2017 (5) SA 105 (ECP); [2018] 1 All SA 593 (ECP), 15 June 2017 (South Africa).

[124] eg, Vermonters for Justice in Palestine, 'Re-directing Mis-Direction', 24 April 2015, https://vtjp.org/icecream/Response_to_B&J_Statement_of_4-10-15.pdf.

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the Charters of the Nuremberg and Tokyo Tribunals at the foundational moment of ICL, and complicity has formed a vital element of many prosecutions in these post-Second World War trials, including trials of industry leaders.[125] Broadly speaking, complicity is a mode of liability which asserts that one who aids and abets the commission of a crime can be held criminally liable for such conduct.[126] It is 'responsibility for helping'.[127] For example, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) asserts that 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime … shall be individually responsible for the crime'.[128]

While sometimes referred to as 'secondary liability' in the international domain, the ICTY pointed out that 'the moral gravity of such [accessorial] participation is often no less – or indeed no different – from that of those actually carrying out the acts in question'.[129]

Despite accessorial liability being well entrenched in domestic and international criminal law, an authoritative understanding of what constitutes complicity for international crimes remains in dispute. Every tribunal recognises that complicity liability (like other crimes) involves the two elements of *actus reus* (an act or omission that aids or abets the commission of a crime) and *mens rea* (the requisite state of mind).[130]

However, there is a 'fragmentation of aiding and abetting standards' across the statutes and jurisprudence of international courts and tribunals (and among scholars).[131] Key differences in the interpretations of the *actus reus* element for what constitutes complicity under ICL involve the extent to which those acts must materially contribute to the commission of that crime. For instance, the statutes and case law of the international tribunals diverge on whether the assistance must have an 'effect' or a 'substantial effect' on the principal crime.[132] It seems clear, though, that the effect need not be a *conditio sine qua non* causal relationship.[133]

[125] Maria Aksenova, *Complicity in International Criminal Law* (Hart 2016) 53–80.

[126] See generally Jérôme de Hemptinne, Robert Roth and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge University Press 2019); Helmut Philipp Aust, 'Complicity in Violations of International Humanitarian Law' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law* (Cambridge University Press 2013) 442.

[127] Stewart (n 122) 182.

[128] UNSC Res 827 (25 May 1993), UN Doc S/RES/827, Statute of the International Criminal Tribunal for the former Yugoslavia.

[129] ICTY, *Prosecutor v Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para 191.

[130] Oona Hathaway and others, 'Aiding and Abetting in International Criminal Law' (2020) 104 *Cornell Law Review* 1593, 1601–16.

[131] ibid; Leila Sadat, 'Can the ICTY Sainovic and Perisic Cases be Reconciled?' (2014) 108 *American Journal of International Law* 475, 478–79.

[132] ICC and Special Court for Sierra Leone (SCSL): 'affect'; ICTR and ICTY: 'substantial affect'. Ines Peterson, 'Open Questions regarding Aiding and Abetting Liability in International Law: A Case of ICTY and ICTR Jurisprudence' (2016) 16 *International Criminal Law Review* 565, 568.

[133] ICTR, *Prosecutor v Nyiramasuhuko*, ICTR-98-42-A, Appeals Chamber, Vol I, Judgment, 14 December 2015, para 2083; ICC, *Prosecutor v Bemba*, Trial Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13, 19 October 2016, para 94.

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On the *mens rea* element, jurisprudence diverges on whether and to what extent the accomplice must know or intend to assist in the commission of the crime, or whether recklessness or negligence may suffice.[134] Diverging from the statutes of the ad hoc tribunals that preceded it, which espoused a 'knowledge' standard, the Rome Statute of the ICC further muddied the waters by adding a heightened 'purpose' standard to the construction of complicity:[135]

> Art. 23: 'A person shall be criminally responsible and liable for punishment for a crime … if that person …
>
> I [f]or the purpose of facilitating the commission of such a crime, aid, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;

Oona Hathaway and co-authors note the 'substantial confusion for scholars and courts' this divergence has caused,[136] and Doudo Thiam refers to the law of complicity as 'a drama of great complexity and intensity'.[137]

3.4. The limits of corporate accessorial liability for involvement in Israeli settlement enterprise

Compounding the imprecision of the ICL conception of complicity, the exact contours of the standard of *corporate* complicity within the ambit of ICL are unresolved.[138] As William Schabas puts it, exactly 'how far can the net be thrown?', which is particularly pertinent to the question of corporate liability for IHL violations in the OPT.[139] While the concerns are the same – namely, defining the requisite levels of contribution to the underlying criminal activity

[134] Hathaway and others (n 130) 1598–99. A useful table of the divergent conceptions of aiding and abetting standards can be found in Hathaway and others, ibid 1609.

[135] Rome statue (n 78) art 23.

[136] Hathaway and others (n 130) 1607.

[137] Doudou Thiam, Special Rapporteur of International Law Commission on Code of Crimes against the Peace and Security of Mankind, Eighth Report on the draft Code of Crimes against the Peace and Security of Mankind (8 March 1990), UN Doc A/CN.4/430, para 38.

[138] Marina Aksenova, 'Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen' (2021) 30 *Washington International Law Journal* 255, 283.

[139] William Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (2001) 83 *International Review of the Red Cross* 439, 451.

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(*actus reus*) and requisite knowledge standard (*mens rea*) – the paucity of cases and literature tackling these issues in the context of corporate complicity contribute to the lack of clarity. Nevertheless, as Kyriakakis notes, the 'very challenges of delimiting the line between criminal and permissible business interaction with atrocity underscores the importance of pursuing cases that do so'.[140]

One of the larger corporate responsibility governance initiatives pertaining to businesses in the OPT was the development of a UN database of companies involved in various business activities supporting the settlements in the OPT.[141] The UN High Commissioner for Human Rights concluded that:[142]

> considering the weight of the international legal consensus concerning the illegal nature of the settlements themselves, and the systemic and pervasive nature of the negative human rights impact caused by them, it is difficult to imagine a scenario in which a company could engage in listed activities in a way that is consistent with the Guiding Principles and international law.

However, to be sure, even this UN database and related reports do not claim that *any* corporate involvement in the OPT is contrary to the UNGP and international law. The 'listed activities' reflect industries or activities that are either directly involved in the physical construction and sustaining of Israeli settlements in the OPT, the curtailment of Palestinian commerce or the exploitation of the natural resources of the OPT.[143]

An objective application of the IHL/ICL liability framework to the selling of ice cream in Israeli settlements in the OPT makes clear that doing so does not rise to the level to establish B&J's accessorial liability in the illegal settlement enterprise. While it can be reasonably assumed that there was requisite knowledge (*mens rea*) of the underlying illegality of the settlements, as evidenced by statements by B&J's independent board, selling ice cream products does not rise to the threshold level of meaningful contribution (*actus reus*) to the establishment or maintenance of Israeli settlements to establish accessorial liability. Furthermore, it is highly improbable that a prosecutor would choose to pursue B&J for complicity in war crimes (before the ICC or a domestic court), let alone do so successfully.

To be sure, some business activities are more likely to be of a type and scale that do indeed amount to aiding and abetting the Israeli settlement enterprise and other Israeli violations of the law of occupation in the OPT. Construction companies, such as Shikun Ubinui, which actually construct the Israeli settlements and transport people and supplies (such as Veolia) to them;[144]

[140] Kyriakakis (n 119) 224.

[141] UN Human Rights Council, Resolution adopted by the Human Rights Council on 20 April 2016, Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan (20 April 2016), UN Doc A/HRC/Res/31/36, para 17.

[142] UN Human Rights Council Database (n 80) para 41.

[143] ibid paras 46–49.

[144] Mary Martin, 'Missing the Train: International Governance Gaps and the Jerusalem Light Railway' (2018) 4 *Global Affairs* 101.

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companies supplying electricity, security, finance and other essential services to settlements (such as G4S and Bank HaPoalim) all have a more credible claim against them for contributing to the violation of the letter and spirit of the law of occupation.[145]

Companies that sell or rent homes on the settlements (such as AirBnB, Re/MAX),[146] or extract natural resources such as stone quarries or Dead Sea minerals from the OPT for profit (such as Heidelberg Cement and Ahava, the cosmetics company),[147] even the owner of a supermarket or an industrial food production business in the Israeli settlements (Carrefour or General Mills) that directly profit from the occupation are almost certainly more culpable than a company that supplies ice cream products to be sold *in* settlement supermarkets.[148] While doing so may well be profitable, it is too tangential and minor a contribution to the Israeli settlement enterprise to satisfy any threshold assessment of criminal liability.

Greater clarity as to where the thresholds of corporate activity lie – in terms both of their impact or contributions to the underlying IHL violation and the requisite state of mind – will be developed only through judicial proceedings and authoritative guidance from institutions like the ICRC or the ICC.

3.5. The (non-)likelihood of prosecution and liability

Critics may point out that the likelihood of international criminal prosecution for corporate involvement in the OPT is also unlikely because of jurisdictional constraints. The ICC has jurisdiction only over natural persons (such as company directors) and not the corporate actor itself.[149] Nevertheless, there are scores of countries that do allow for both individual and corporate criminal liability, including for war crimes.[150] Under the complementary principle,

[145] See, generally, Who Profits? Research Center, 'Who Profits: Database of Complicit Companies', https://www.whoprofits.org/companies/all; Ena Cefo, 'Corporate Human Rights Violations in the Occupied Palestinian Territories: Is There any Recourse' (2016) 47 *Georgetown Journal of International Law* 793.

[146] Richard Falk, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967 (10 September 2013), UN Doc A/68/376.

[147] Heidelberg Cement: Arvind Ganesan and Eric Goldstein, 'Letter to Heidelberg Cement regarding Nahal Raba Quarry Expansion', *Human Rights Watch*, 29 May 2020, https://www.hrw.org/news/2020/05/29/letter-heidelbergcement-regarding-nahal-raba-quarry-expansion. Ahava: Nicoletti and Hearne (n 93).

[148] For information on each see for Carrefour: Ali Abunimah, 'How Carrefour Profits from Israel's War Crimes', *Electronic Intifada*, 10 January 2023, https://electronicintifada.net/content/how-carrefour-profits-israels-war-crimes/36961; General Mills: American Friends Service Committee, 'General Mills Divests from Israel Following Campaign Led by Quaker Organization', 7 June 2022, https://afsc.org/newsroom/general-mills-divests-israel-following-campaign-led-quaker-organization.

[149] Rome Statute (n 78) art 25(1).

[150] Ramasastry and Thompson (n 120) 13–16; International Commission of Jurists, *Corporate Complicity and Legal Accountability: Volume 3 Civil Remedies. Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes* (International Commission of Jurists 2008), https://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol3-publication-2009-eng.pdf.

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national (domestic) prosecutions are 'the preferred vehicle for international criminal justice'.[151] Perhaps a more telling blow to the likelihood of prosecution is simply the dearth of precedents – at either the national or international level.

In fact, since the high-water mark of Nuremberg, only two cases before international criminal tribunals have held individual corporate defendants accountable for their involvement in international crimes (with a third unable to continue at the time of writing because of the defendant's age and ill-health).[152]

All three cases referred to arose from the 1994 Rwandan genocide. Ferdinand Nahimana and Jean-Bosco Barayagwiza were executives with the Radio Television Libre de Mille Collines (RTLM), which was given the moniker 'Radio Machete' for broadcasting propaganda and its role in inciting genocide. Tried with them, in what became known as the *Media Case*, was Hassan Ngeze, owner and editor of the newspaper *Kangura.* All three were found guilty. Félicien Kabuga, the businessman who founded RTLM and an importer of machetes, had evaded arrest for decades and, as of June 2023, succeeded in evading culpability when the Residual Mechanism for the ICTR deemed him unfit to stand trial.[153] In addition, the judgment of the Special Court for Sierra Leone that sentenced former Liberian President, Charles Taylor, to 50 years' imprisonment featured many of Taylor's substantial business relationships with Sierra Leonean militia groups, including his complicity in the conflict diamond trade.[154]

At the International Criminal Court, despite some nascent signs – such as Luis Moreno Ocampo, the ICC's first Prosecutor, promising that attention would be paid to economic crimes, including the financing of armed conflicts across Africa – no prosecutions of economic actors (natural or otherwise) have yet occurred before the ICC.[155] In 2016, the Office of the Prosecutor even released a 'Policy Paper on Case Selection and Prioritization', which indicated an intent to pursue corporate actors implicated in crimes around illegal

[151] Kyriakakis (n 119) 163.

[152] ICTR, *Prosecutor v Nahimana and Others* (n 121); ICTR, *Prosecutor v Musema* (n 121); IRMCT, *Prosecutor v Felicien Kabuga* (n 121) Further Decision on Felicien Kabuga's Fitness to Stand Trial, 6 June 2023.

[153] 'Rwandan Genocide Suspect Kabuga Declared "Unfit" to Stand Trial', *Al Jazeera*, 7 June 2023, https://www.aljazeera.com/news/2023/6/7/rwandan-genocide-suspect-kabuga-declared-unfit-to-stand-trial.

[154] SCSL, *Prosecutor v Charles Taylor*, SCSL-03-01-T, Judgment, 18 May 2012, p 2015.

[155] A Kenyan radio station executive, Joshua Arap Sang, was charged in 2012 for crimes associated with the 2007–08 post-election violence; however, the charges were dropped on the ground of insufficient evidence. See also Luis Moreno-Ocampo, 'Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court', 16 June 2003, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf; 'International Jurisdiction for Corporate Atrocities: An Interview with Luis Moreno Ocampo', *Harvard International Law Journal*, 7 July 2016, https://journals.law.harvard.edu/ilj/2016/07/international-jurisdiction-for-corporate-atrocities-an-interview-with-luis-moreno-ocampo.

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exploitation of natural resources, or the like.[156] According to Schabas, 'there has been little stomach for aggressive pursuit of accomplices precisely because the trail may reach so far into the realm of ordinary and "legitimate" commercial activity'.[157]

Moreover, the ICC is a court of last resort.[158] Under the doctrine of complementarity, the expectation is that domestic courts, in the first instance, would pursue justice against alleged international criminals. Yet war crimes prosecutions of corporate actors before domestic courts are similarly rare.[159] The few notable examples highlight the paucity of cases. After decades of court action, Frans Van Anraat and Guus Kouwenhoven, two Dutch businessmen, were prosecuted and found guilty of complicity in the war crimes committed by third parties (Saddam Hussein's Iraqi regime and Charles Taylor's regime in Liberia, respectively).[160] In 2018, Argentina convicted and jailed two former executives of the Ford Motor Company for complicity in the kidnapping and torture of workers during the country's former military junta.[161]

Perhaps the most prominent corporate prosecution for war crimes in many years started in September 2023 in a Swedish court, with the prosecution of the former CEO and chairman of Lundin Energy for complicity in war crimes committed in (then) southern Sudan in the early 2000s by the Sudanese military and associated militias. Prosecutors are pursuing the two individual executives as well as the company itself, seeking a multi-million dollar fine and forfeiture of the corporate profits gleaned from the alleged crimes.[162]

3.5.1. The risk of civil liability for participation in IHL violations

Accountability for corporate involvement in war crimes, including complicity in alleged war crimes committed in the OPT and other conflict-affected areas, has also been sought through civil litigation, perhaps most famously via creative application of the US Alien Tort Statute to corporate

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[156] ICC, Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation', 15 September 2016, https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf; Nadia Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights (2017) 15 *Journal of International Criminal Justice* 527, 528–29.

[157] Schabas (n 139) 451.

[158] ICC, 'About the Court', https://www.icc-cpi.int/about/the-court.

[159] For greater elaboration see Kyriakakis (n 119); International Bar Association, 'IBA War Crimes Committee Shines a Light on Corporate Liability Cases', 25 November 2022, https://www.ibanet.org/IBA-War-Crimes-Committee-shines-a-light-on-corporate-liability-cases.

[160] Wim Huisman and Elies van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8 *Journal of International Criminal Justice* 803.

[161] 'Argentina Dirty War: Two Former Ford Executives Jailed', *BBC News*, 11 December 2018, https://www.bbc.com/news/world-latin-america-46528478.

[162] Miranda Bryant, 'Sudan War Crime Trial of Former Oil Firm Executives Starts in Sweden', *The Guardian*, 5 September 2023, https://www.theguardian.com/world/2023/sep/05/sudan-war-trial-of-former-oil-firm-executives-starts-in-sweden; Business and Human Rights Resource Centre, 'Lundin Energy Lawsuit (re Complicity in War Crimes, Sudan), 11 November 2021, https://www.business-humanrights.org/en/latest-news/lundin-petroleum-lawsuit-re-complicity-war-crimes-sudan.

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defendants.[163] However, this avenue has been stymied by jurisdictional constraints (such as the doctrine of *forum non conveniens*), evidentiary challenges, and the practical difficulties of launching and sustaining a multi-year litigation campaign against well-resourced corporate defendants.[164]

One of the more high-profile civil lawsuits alleging corporate complicity in war crimes in the OPT was filed in 2005 in a US court against Caterpillar Inc, the US-based bulldozer manufacturer. The claim for compensation was brought under the Alien Tort Statute (and the related Torture Victim Protection Act) on behalf of the family of Rachel Corrie and four other Palestinian families whose family members were killed or injured when the Israeli military used Caterpillar bulldozers to destroy their homes in the OPT. The suit was quickly dismissed for want of jurisdiction. The plaintiffs appealed only for the dismissal to be reaffirmed in 2007.[165]

Another prominent civil lawsuit seeking to hold a company accountable for complicity in the Israeli settlement enterprise was the action taken in 2007 in France against Veolia and Alstom, two French multinational transport and infrastructure companies. The claim alleged the companies' complicity in war crimes for their involvement in the construction and operation of Jerusalem's light-rail project which connects western neighbourhoods of the city with neighbourhoods in the city's eastern and northern extremities – lying within the OPT.[166] A local civil society group and the Palestine Liberation Organisation filed a claim against the two companies alleging violations of IHL and aiding and abetting the commission of war crimes – namely, facilitating Israeli settlements in East Jerusalem.[167] After several hearings and appeals, the suit was eventually dismissed.[168]

However, despite the losses in the courtroom, these lawsuits do bring about some form of corporate accountability – and with it an acknowledgement that complicity in war crimes is no longer appropriate business conduct in the OPT. For instance, after the lawsuit was filed against the two companies, the adverse publicity generated caused reputational damage to both and even the loss of large-scale contracts in the United Kingdom.[169] Veolia withdrew from

[163] Eric Mongelard, 'Corporate Civil Liability for Violations of International Humanitarian Law' (2006) 88 *International Review of the Red Cross* 665. For illustrative cases see, eg, *Sarei v Rio Tinto Plc*, 221 F Supp 2d 1116 (CD Cal 2002); *Presbyterian Church of Sudan v Talisman Energy, Inc*, 244 F Supp 2d 289 (SDNY 2003).

[164] ibid; Cefo (n 145).

[165] *Corrie v Caterpillar Inc.*, 403 F Supp 2d 1019 (WD Wash. 2005). For more information see Center for Constitutional Rights, 'Corrie et al. v. Caterpillar', https://ccrjustice.org/home/what-we-do/our-cases/corrie-et-al-v-caterpillar.

[166] Business and Human Rights Resource Centre, 'Veolia & Alstom Lawsuit (re Jerusalem Rail Project)', https://www.business-humanrights.org/en/latest-news/veolia-alstom-lawsuit-re-jerusalem-rail-project.

[167] Valentina Azarova, 'Backtracking on Responsibility: French Court Absolves Veolia for Unlawful Railway Construction in Occupied Territory', *Rights as Usual*, 1 May 2013, https://rightsasusual.com/?p=414.

[168] *Association France-Palestine Solidarité (AFPS) and Palestine Liberation Organization (PLO) v Société Alstom Transport SA and Others*, Appeal Judgment, No 11/05331, ILDC 2036 (FR 2013), 22 March 2013, France; Île-de-France; Versailles; Administrative Court of Appeal.

[169] Azarova (n 167).

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Jerusalem's light-rail project even while the civil claim was ongoing, and Alstom subsequently dropped its plans to be involved in the planned expansion of the light-rail system.[170]

Moreover, as more corporate human rights litigation winds its way through the courts in various countries and precedents are established, the trendlines point towards greater likelihood of civil lawsuits being filed for corporate complicity in violations of IHL in the OPT and elsewhere, and the greater chances of their success.[171] For instance, the 2019 landmark UK Supreme Court decision in *Vedanta Resources* recognised that parent companies domiciled in the UK can be liable for the human rights abuses of their subsidiaries occurring abroad.[172] This helps to crystallise the risks for companies of non-compliance with IHL standards, and in turn reinforces the UNGP regime, which establishes respect for IHL as an expectation of responsible business.

A wide range of corporate activities in the OPT may well attract legal and ethical scrutiny. Whether a responsible company, abiding by the UNGP, should be doing business at all within the OPT is addressed in the following section. From an international legal standpoint, however, it seems clear that some business activities do likely meet the requisite threshold requirements for the business to be deemed engaged in or complicit in serious violations of IHL, and the possibility of corporate accountability for such activities is possible albeit unlikely. Regardless, the selling of ice cream in Israeli settlements, as B&J did, is not likely to be of the scale or impact to attract the ire of a prosecutor – international or domestic – any time soon.

Nevertheless, the focus on legal liability may be missing a more significant observation on how IHL and the law of occupation is designed to function, including within the UNGP framework for responsible business conduct. As William Schabas observed, 'if those taking business decisions give pause for reflection at the prospect of criminal prosecution, and adjust their actions accordingly, then humanitarian law will have fulfilled its goal of deterrence'.[173] Moreover, a focus on a formalistic legal understanding of corporate liability, complicity and accountability fails to consider the social component of those concepts as they pertain to business responsibilities – something that is more squarely addressed within the UNGP framework, to which the article now turns.

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[170] TOI Staff, 'French Company Drops Tender Bid for Light Rail because It Enters East Jerusalem', *The Times of Israel*, 16 May 2019, https://www.timesofisrael.com/french-company-drops-tender-bid-for-light-rail-over-east-jerusalem-lines.

[171] Ekaterina Aristova and Ugljesa Grusic (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Bloomsbury 2022); International Commission of Jurists (n 150).

[172] *Vedanta Resources Plc and Konkola Coppers Mines Plc v Lungowe and Others* [2019] UKSC 20, Judgment. See also Tara Van Ho, 'Vedanta Resources Plc and Another v. Lungowe and Others' (2020) 114 *American Journal of International Law* 110.

[173] Schabas (n 139) 456.

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4. 'Half-baked': Did Ben & Jerry's comply with the process and policy expectations under the UNGP?

As noted earlier, the UNGP framework for responsible business indicates both the substantive international legal norms that should be respected and the practical means by which a business can do so. The preceding section examined B&J's withdrawal for compliance with IHL, the specific, substantive international legal norms under the UNGP pertinent to the context of the OPTs and referred to by B&J itself in justifying its withdrawal. It was assessed that while some business activities in the OPT may amount to complicity in, or even a direct serious violation of the IHL laws of occupation, selling ice cream in Israeli settlements does not. With that established, this section of the article turns to evaluate whether B&J's conduct aligned with the process-oriented expectations outlined in the UNGP framework for action intended to inform business decision making when upholding its responsibilities under the UNGP.

4.1. Ben & Jerry's knowing, showing and rectifying its IHL impacts

Recall that the UNGP framework has three main 'asks' of a company to demonstrate and implement its respect for human rights, including IHL, in conflict-affected areas.[174] A company should publish a human rights policy commitment, conduct 'heightened human rights due diligence', and finally contribute to remedying the adverse impacts it has caused or to which it has contributed.[175]

Leaving to one side the decision to ultimately withdraw its ice cream products from the OPT, B&J's risk management and decision-making processes can be assessed against the expectations of the UNGP to 'show', 'know' and 'remedy' its adverse human rights and IHL impacts in the OPT.

4.1.1. A B&J human rights policy commitment is a no-show

B&J's social justice mission is an integral part of the company's brand and identity and has been so since its founding in 1978 by Ben Cohen and Jeffrey Greenfield. It is retained to this day, even after the purchase of the company in 2000 by Unilever, through a stipulation in that agreement that B&J would retain an independent board seized solely with protecting B&J's 'brand equity and integrity' but without any operational or financial powers.[176] (It was this board that announced B&J's withdrawal from the OPT.) The company routinely takes a stand on well-known human rights issues, such as launching unique flavours to draw attention (and funds) to specific causes. These include 'Rainforest Crunch' to raise awareness of the deforestation of the Amazon rainforest and

[174] UNGP (n 2) Principles 15–24. Principle 15 lists the three steps a responsible business should undertake. The subsequent Principles 16–24 elaborate on them.

[175] UNGP (n 2) Principle 15.

[176] Ben & Jerry's, 'How We Are Structured', https://www.benjerry.com/about-us/how-were-structured.

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'Fossil Fuel' to encourage climate activism.[177] In 2012, B&J attained B Corp certification, requiring the company to meet high performance standards across a range of environmental and social factors.[178]

Despite this progressive pedigree, B&J does not publish a clear and robust human rights policy. While human rights and dignity are noted as one of the company's three core values on its website, it is one sentence in length, with no reference to authoritative standards, such as the UNGP or the UN Global Compact. It reads:[179]

> We are committed to honoring the rights of all people to live with liberty, security, self-esteem, and freedom of expression and protest, and to have the opportunity to provide for their own needs and contribute to society.

Moreover, B&J does not seem to apply this policy consistently; nor does it have a consistent policy towards selling its products in other conflict-affected areas.[180] The public statement issued to withdraw from the OPT refers only to that specific region and does not suggest a new B&J universal and consistent approach to doing business in occupied territories or other conflict-affected regions.

For its part, B&J's parent company, Unilever, publishes a human rights policy, although this neither refers to conflict-affected areas, nor does it expressly cite IHL among laws that it respects.[181] Unilever continues to sell ice cream products across Russia, including in occupied Crimea, despite persistent calls by human rights groups for western companies to withdraw following Russia's illegal invasion of Ukraine (it is unclear from public or corporate reporting if this includes B&J-branded products).[182] It was also pointed out in the wake of the announcement to withdraw from the OPT that B&J and its parent company had not taken a similar stance on doing business in China, despite its occupation of Tibet.[183] In fact, in recent years, Unilever has invested heavily in China, including a 100 million euro investment in the upgrade of its Chinese ice cream production facilities.[184]

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[177] Ben & Jerry's, 'Ben & Jerry's Flavour Graveyard', https://www.benandjerry.com.au/flavours/flavour-graveyard.

[178] B Corporation, 'Ben and Jerry's – Certified B Corporation', https://www.bcorporation.net/en-us/find-a-b-corp/company/ben-and-jerrys.

[179] Ben and Jerry's (n 29).

[180] eg, Axios on HBO (n 36).

[181] Unilever, 'Human Rights Policy Statement', https://assets.unilever.com/files/92ui5egz/production/b1943aa804e0b9817f826feedfaf1e7179ce51e0.pdf/unilever-human-rights-policy-statement.pdf.

[182] Madeleine Wedesweiler, 'The Maker of Ben & Jerry's Is under Pressure to Leave Russia: Why Companies Are Refusing To Do So?', *SBS News*, 8 July 2023, https://www.sbs.com.au/news/article/ben-jerrys-parent-company-is-under-pressure-to-leave-russia-why-are-companies-refusing-to-go/1a3yptoic.

[183] Unilever, 'Inside Our Markets: Unilever in China', 9 December 2022, https://www.unilever.com/news/news-search/2022/inside-our-markets-unilever-in-china.

[184] Shi Jing, 'Unilever to Upgrade Jiangsu Plant', *China Daily*, 26 June 2020, https://www.chinadailyhk.com/article/134983.

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4.1.2. B&J's not-so-heightened human rights due diligence

As a situation of military occupation exists in the OPT, the strengthened requirements of heightened human rights due diligence are triggered.[185] Following the UNGP, this required B&J to conduct a conflict-risk assessment and assess its human rights and IHL impacts in the OPT, adopt actions to mitigate any adverse impacts it found, track its performance, and communicate its efforts and progress publicly. It is unclear whether B&J, in announcing its withdrawal from Israeli settlements in the OPT, conducted a thorough human rights due diligence process, heightened or otherwise, or a conflict-sensitivity assessment. No detailed written justifications or risk assessments from B&J or Unilever were made public during or since the controversy erupted. In fact, it is primarily through B&J's own court filings in its subsequent lawsuit against Unilever that a sense of the deliberations conducted by the B&J board in its enquiries that led to its decision became apparent.[186]

In its May 2022 filing seeking injunctive relief to restrain Unilever from selling its Israel-based business, B&J declared that it started to receive complaints about the sales of its ice cream products in the OPT as far back as 2013.[187] (This is also the year in which Vermonters for Justice in Palestine launched a boycott campaign until B&J withdrew from 'illegal settlements in the occupied West Bank (Palestine)'.)[188] The board undertook a trip to Israel and the OPT in 2015; it appointed a special committee in 2018 'to investigate the issue thoroughly', and organised a 'fact-finding' trip to the OPT in 2019, meeting with various local stakeholders, which included the Israeli government, Palestinian representatives and human rights organisations.[189] This is broadly in line with UNGP guidance that suggests that a company should consult broadly with external stakeholders and relevant experts when assessing its adverse impacts in conflict-affected areas.[190] However, no report or heightened human rights risk or conflict-sensitivity assessment was released following this trip (or since) that would transparently detail the justification for B&J's withdrawal and its adherence to the UNGP due diligence qualitative expectations.

The board's contemporaneous public statements simply indicate that the motivation for withdrawal was 'the concerns shared with us by our fans and trusted partners'.[191] Indeed, according to B&J's Social and Environmental Assessment Report, the issue came to a head in May 2021. In response to a steep rise in hostilities between Israel and Palestinian groups in the Gaza Strip, B&J received 'a flood of negative commentary … online … which hampered our ability to continue carrying out important social mission work … and prompted us to pause action on social media channels from May 18 to

[185] UN Working Group (n 64) paras 41–49.

[186] *Ben & Jerry's v Conopco* (n 31) paras 39–42.

[187] ibid para 39.

[188] Vermonters for Justice in Palestine, '(Now Ended) Campaign for Ben & Jerry's to Leave Israel and Its Illegal Settlements', https://icecream.vtjp.org.

[189] *Ben & Jerry's v Conopco* (n 31) paras 39–40.

[190] ibid.

[191] Ben & Jerry's (n 10).

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July 19'.[192] On 19 July, the board announced its decision to withdraw from the OPT. Moreover, it is unclear if Unilever conducted a similar assessment of its company's operations in the OPT during or since the controversy erupted in the lead-up to its subsequent decision to sell its Israeli and OPT business.

An argument can be made that because of the prolonged and well-established unlawful status of Israeli settlements in the OPT, and the well-documented contravention of Palestinian human rights abuses associated with them, no additional enquiries were warranted in this case.

On the other hand, these facts do not lead *ipso facto* to an expectation that B&J or any responsible company adhering to the UNGP that is conducting business in or with Israeli settlements must exit from that arrangement. Each circumstance should be evaluated separately and within its own context.[193] As Principle 23 notes, in conflict-affected areas there is an increased 'risk of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example)'.[194] The UNGP go on to state:[195]

> Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility.

Following this guidance, in the circumstances in question, the calculus to determine whether B&J's withdrawal was a 'responsible exit' must include an appreciation of whether B&J's selling of ice cream in Israeli settlements is likely to have reached a threshold level of legal complicity in that IHL violation. If not, it mitigates against withdrawal. As the analysis in the preceding section of this article indicated, there is no blanket international legal prohibition of selling goods in Israeli settlements. Moreover, an objective analysis of the application of IHL to this situation suggests that merely selling goods in settlement supermarkets would not amount to complicity in the underlying IHL violation that would attract legal liability. Moreover, reference to internationally recognised human rights of both Palestinians and Israelis (such as the right to food, the right to life) should be added to any calculus as to the responsible course of action for a company like B&J, based on human rights and humanitarian concerns, in the OPT.

Regardless, the UNGP do not neatly delineate thresholds of human rights impacts beyond which a company must withdraw. Instead, the requirement of heightened human rights due diligence encourages companies to focus on appropriate *process*, not merely outcomes. Importantly, conducting that human rights risk assessment and due diligence, and premising withdrawal

[192] Ben and Jerry's, 'Our 2021 Social and Environmental Assessment Report', 2, https://www.benjerry.com/files/live/sites/us/files/about-us/sear-report/2021/2021-SEAR-Report.pdf.

[193] OHCHR (n 6) 2.

[194] UNGP (n 2) Principle 23, Commentary.

[195] ibid.

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upon it, may usefully shield a company from accusations of political bias and even prove useful in defending any subsequent lawsuits arising from the withdrawal.[196]

As noted earlier, the UNGP adopt an 'involvement framework', which distinguishes between situations in which a business causes, contributes to or is directly linked to adverse human rights impacts (and/or IHL violations, in conflict-affected areas). If a business operating in a conflict-affected area, such as B&J, conducts its due diligence and deems it is either causing or contributing to adverse human rights impacts or IHL violations, 'it is expected to cease or prevent its contribution' and provide for or cooperate in the remediation of such impacts.[197] Cases of 'direct linkage' are more complex and the expectations of the UNGP are more nuanced.[198] The UNGP framework suggests that a company 'mitigate the risk that the abuse continues' and use what leverage the company has in order to do so.[199] Further, it suggests that a company should assess 'how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences'.[200]

This characterisation of the indirect involvement of a company in abuse situations echoes the complicity discussion in Section 3 of this article. However, the UNGP framework embraces a *broader* conception of what it means for a company to be complicit in human rights or IHL abuses. It recognises that complicity has both legal and non-legal interpretations.[201] Characterising complicity that gives rise to legal liability as 'direct', the UNGP also refers to 'beneficial' and 'silent' complicity of companies in human rights abuses, whereby the company may not have contributed to the commission of abuses but rather has derived a benefit (profit) from them, or simply ignored their occurrence.

The UNGP framework suggests that direct complicity in IHL (or human rights) violations should be treated 'as a legal compliance issue'.[202] However, the UNGP make plain that the expectation is in *all* these circumstances of complicity, encompassing the non-legal understanding of the term, regardless of whether companies cause, contribute to or are even just linked to IHL (or human rights) violations through their business relationship, they should be addressed, mitigated and, if possible, avoided. Minimising one's involvement in human rights abuses in *each* of these spheres of corporate activity and influence is required.[203]

[196] UNGP (n 2) Principle 17, Commentary.

[197] ibid Principle 19, Commentary, 22. See also OHCHR (n 6) 7–13.

[198] OHCHR, 'The Corporate Responsibility to Respect: An Interpretive Guide' (2012), UN Doc HR/PUB/12/02, 50–51.

[199] ibid 50. See also UNGP (n 2) Principle 19.

[200] UNGP (n 2) Principle 19, Commentary.

[201] ibid Principle 17

[202] UNGP (n 2) Principle 23

[203] John Ruggie, 'Clarifying the Concepts of "Sphere of Influence" and "Complicity"', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and

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The requisite level of intention on the part of the company to trigger a corporate due diligence response is low, significantly lower than for attracting criminal liability. There is merit in John Stewart's criticism of the undue influence of ICL on our understanding of complicity in the 'business and human rights' (BHR) context, and his arguments for its de-linking.[204] Instead, the 'mental element for complicity in business and human rights should be negligence',[205] He argues that 'while negligence would be too low a standard for criminal responsibility, it seems appropriate in the business and human rights context because it ties responsibility for human rights to a failure to perform the due diligence requirements that businesses should have already carried out'.[206] This is a reasonable and workable proposition that aligns with the UNGP framework and John Ruggie's own understanding of the issue. In short, the relationship between complicity and due diligence is clear and compelling: companies can avoid complicity by employing the due diligence processes described above – which, as noted, apply not only to their own activities but also to the relationships connected with them.[207] In conflict-affected areas such as the OPT, the required action begins with conducting heightened human rights due diligence.

Deploying the UNGP's broader terminology of involvement, in supplying ice cream to Israeli settlements in the OPT, B&J did not, per se, cause or contribute to a violation of IHL in the formal legal sense. However, it is clear from the facts, that B&J's business in the settlements was directly linked to a grave and ongoing IHL violation via its business relationship with its Israeli licensee and its retailers in the settlements. Patently, B&J had little leverage over the Israeli government to influence the continued existence or cessation of the settlement enterprise. Therefore, according to the UNGP, it should 'consider ending the relationship'.[208] The question then becomes whether ending those relationships in the manner in which B&J sought to do so was an appropriate response in the circumstances. This will be considered after briefly addressing the issue of B&J's efforts to remediate its participation in Israeli settlements.

4.1.3. Remediation

The third primary recommendation of the UNGP is for companies, when they have 'caused or contributed to adverse impacts, they should provide for or cooperate in their remediation'.[209] Where a company is merely linked directly to human rights/IHL abuses, while there is no responsibility under the UNGP for the company itself to provide remediation, it may still choose to do so.[210]

Transnational Corporations and other Business Enterprises (15 May 2008), UN Doc A/HRC/8/16, 17–22.

[204] Stewart (n 122) 183–84.

[205] ibid 184.

[206] ibid.

[207] Ruggie (n 63).

[208] UNGP (n 2) Principle 19; see also OHCHR (n 6) 7–13.

[209] UNGP (n 2) Principle 22.

[210] ibid Principle 22, Commentary.

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The UNGP call on companies to provide pathways through which the concerns of victims of these adverse impacts can be addressed. The B&J board was subjected to a decades-long pressure campaign by pro-Palestinian activists in the United States – including BDS campaigners Vermonters for Justice for Palestine. While the pleas of these activists were varied, all called upon B&J to withdraw from Israeli settlements in order to end its corporate involvement and tacit support for the continued Israeli occupation of the OPT. From public news reports and interviews with board members, it is clear that these campaigns influenced the B&J board and the company's co-founders in their decision to withdraw from the OPT.[211] In so far as these groups were voicing concerns on behalf of Palestinians living under occupation in the OPT, an argument could be made that B&J did indeed put the victims of their adverse impacts, and their humanitarian concerns, at the forefront of their decision making.

4.2. Responsible exit: Withdrawal

Regardless of B&J's process in arriving at its decision, the company ultimately decided to withdraw from the OPT by committing to not renew its long-standing licensing agreement with its Israeli licensee.[212] Withdrawal from a situation or territory as a response to adverse human rights impacts is countenanced in the UNGP.[213] However, the UNGP and subsequent UN corporate guidance for conflict-affected areas assiduously avoid offering blanket prescriptive statements on this issue or drawing of red lines. Rather, the UNGP framework focuses on process: encouraging companies to conduct heightened human rights due diligence and suggesting that the circumstances of each company must be assessed in the relevant context.[214] However, ending a relationship or exiting from a situation is viewed as a last resort because 'a hasty exit can be as damaging as one that comes too late'.[215]

Part of the consideration of withdrawing must not only be to stand on principles but also to consider the practical consequences of withdrawal, including risks for the 'full scope of human rights' of the people and communities concerned.[216] A thorough risk assessment should be conducted, which should consider which company may fill the void (and the business opportunity) created by the withdrawal, and any subsequent impact that the company may have on the rights of affected peoples. It is unclear if B&J had considered the consequences of its decision to withdraw from the OPT, either in terms of human rights impacts or possible corporate implications for itself. While some

[211] Solon (n 38); Ben Samuels, 'Ben & Jerry's Co-Founder and Board Chair Speak Out about Freezing Sales to Settlements', *Haaretz*, 17 August 2021, https://www.haaretz.com/us-news/2021-08-17/ty-article/.premium/ben-jerrys-co-founder-board-chair-speak-out-about-freezing-sales-to-settlements/0000017f-e0f4-d38f-a57f-e6f634a50000?lts=1694371449169.

[212] Ben & Jerry's (n 10).

[213] UNGP (n 2) Principle 19.

[214] UN Working Group (n 64) para 41–49.

[215] Pachoud and Milatović (n 69) 55.

[216] OHCHR (n 6) 12–13; see also UNGP (n 2) Principle 19, Commentary.

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blowback from some Jewish and pro-Israel groups may have been expected, the backlash was fierce. Moreover, members of B&J's independent board were surprised by their own parent company's response to the withdrawal announcement. Indeed, they were surprised and angered by Unilever's decision to sell B&J's Israeli operations and allow the sale of B&J ice cream products in the OPT to continue.[217] (Unilever's withdrawal decision is assessed below.)

4.2.1. There is no right to ice cream

The UNGP framework suggests that if there are risks of 'being involved in gross abuses of human rights such as international crimes, [a business] should carefully consider whether and how it can continue to operate with integrity in such circumstances'.[218] Human rights organisations such as Amnesty International have concluded that it is 'all but impossible [for a company] to respect human rights and the standards of IHL while doing business with the [Israeli] settlements'.[219] However, the legal analysis does not sustain such a blanket pronouncement about all corporate activities in the OPT (see Section 3 of this article); nor does UN reporting on such activities, to which Amnesty refers, go so far itself.[220] Corporate activities in Israeli settlements are not homogeneous in their scale, nature or purpose. Their contribution and level of involvement in the settlement enterprise must be part of a responsible business evaluation of the proper course of action – stay or leave. Indeed, the UN database and other UN reports on business activities in the OPT refer to activities focused 'on the establishment, expansion and maintenance' of Israeli settlements in the OPT.[221] The provision of construction, security, transport, and financial services to settlements are all of concern, but notably omitted from the list of activities of concern to the UN is the provision of food products and other consumer goods.[222]

On the other hand, 'the more severe the harms involved, the more justifiable it would be for a business to consider terminating the business relationships involved'.[223] The illegality of the settlements has been reiterated *ad nauseum*, and the enduring and severe human rights impacts they have on

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[217] Solon (n 38); *B&J v Conopco* (n 31).

[218] OHCHR (n 198) 79.

[219] Amnesty (n 75) 25.

[220] UN Human Rights Council Database (n 80).

[221] ibid. See also UN Human Rights Council, Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem (7 February 2013), UN Doc A/HRC/22/63, para 96.

[222] ibid; OHCHR, 'Database of All Business Enterprises Involved in the Activities Detailed in Paragraph 96 of the Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem, Report pursuant to UN Human Rights Council Resolution 31/36 on Israeli Settlements in the Occupied Palestinian Territory (1 February 2018), UN Doc A/HRC/37/39/, para. 47.

[223] OHCHR (n 6) 12.

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the Palestinian population are well documented.[224] Furthermore, while some food items may be considered essential, and thus mitigate against withdrawal in order to uphold the rights of Israelis (to food), ice cream is not, and could not be considered an essential item under any reasonable definition.[225]

B&J could adopt a more systematic approach to how it does business in occupied and conflict-affected areas. B&J has not sought to withdraw its products from other situations of occupation or armed conflict, and the company has not offered a consistent policy approach towards doing so. A more considered corporate approach to these circumstances, imbued with considerations of relevant IHL and human rights standards, is warranted from a UNGP perspective *and* a savvy corporate risk management perspective. Consistent and universal application of IHL and human rights law to its activities would reflect B&J's appreciation of the universality and neutrality of those bodies of law, and more coherently reflect the company's own self-declared social mission. It would also leave it, and its parent company, far less exposed to the criticisms and lawsuits (actual and threatened) that its actions precipitated based on allegations of anti-Israel's bias.[226]

Nevertheless, when considering all the factors involved, B&J's decision to withdraw from the OPT because of its involvement in illegal Israeli settlements is within the realm of reasonable corporate responses to the situation.

4.2.2. B&J is not alone

Indeed, B&J's justification for its withdrawal has been echoed by several other international companies which have withdrawn their activities or investments in the OPT, citing Israel's continued occupation and settlement enterprise. Calls for divestment continue to come from pro-Palestinian groups, such as the BDS Campaign, local human rights organisations such as Al Haq and Diakonia, their global counterparts such as Human Rights Watch, as well as various United Nations entities and rapporteurs.[227] Consequently, some companies have heeded those calls and ended their business dealings with the OPT and/or Israeli companies, frequently citing their desire to be compliant with the UNGP in doing so.

For instance, major European companies have withdrawn from multi-million dollar opportunities. The Dutch-based Royal Haskoning DHV opted to end a contract to construct a wastewater treatment facility after its location

[224] ibid; UN Human Rights Council (n 221).

[225] Olena Uvarova, 'Responsible Business Conduct in Times of War: Implications for Essential Goods and Services Providers in Ukraine', *Danish Institute of Human Rights*, 2022, 29–30.

[226] eg, Eugene Kontorovich, 'Ben & Jerry's Israel Boycott Could Cost Unilever', *Wall Street Journal*, 21 July 2021, https://www.wsj.com/articles/ben-jerrys-boycott-unilever-israel-palestine-11626895917; Governor of Florida, 'Florida Places Ben & Jerry's Parent Company Unilever on Its List of Scrutinized Companies that Boycott Israel', 3 August 2021, https://www.flgov.com/2021/08/03/florida-places-ben-jerrys-parent-company-unilever-on-its-list-of-scrutinized-companies-that-boycott-israel.

[227] eg, 'Business and Human Rights in Palestine', *Al Haq*, 7 December 2016, https://www.alhaq.org/publications/8063.html; 'The Unsettling Business of Settlement Business', *Diakonia*, May 2015, https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/07/the-unsettling-business-of-settlememt-business.pdf; Human Rights Watch (n 75); Falk (n 146).

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in East Jerusalem (part of the OPT) was made known.[228] As mentioned above, following a pressure campaign involving litigation in French courts, Alstom and other French transport companies withdrew from their planned involvement in the expansion and operation of the Jerusalem light-rail project, which extended its routes further into East Jerusalem suburbs (part of the OPT), including on appropriated private Palestinian-owned land.[229] Norwegian pension funds and several other prominent European investment funds have also divested from Israeli banks and companies because of their involvement in constructing and financing Israeli settlements in the OPT.[230]

At around the same time as B&J made its decision to divest from the OPT, other firms and investors did so too. In 2021, the New Zealand Government Pension Fund divested from five Israeli banks, citing their continued supply of 'project finance for the construction of unlawful Israeli settlements in the OPT'.[231] In 2022, General Mills, a US-based food company (and owner of Haagen-Dazs ice-cream – a direct competitor with Unilever's B&J brand), opted to divest its majority share in a joint venture that produced food products for the Israeli and Palestinian markets on an Israeli settlement in the OPT.[232]

Some may suggest that B&J could have retained its ice cream products in the OPT while contributing to efforts to protect and promote the rights of Palestinians. Indeed, based on the preceding analysis, this too seems to fall within the bounds of UNGP expectations.

For instance, facing similar criticism of its business activities in Israeli settlements, AirBnB initially announced that it would no longer list homes in Israeli settlements; it then backtracked and remained but committed to donate all proceeds from settlement rentals to humanitarian organisations.[233] Nevertheless, the UNGP note that such positive conduct 'does not offset a failure to respect human rights throughout operations'.[234]

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[228] Barak Ravid, 'Dutch Engineering Giant Cancels East Jerusalem Project', *Haaretz*, 6 September 2013, https://www.haaretz.com/2013-09-06/ty-article/.premium/dutch-firm-nixes-east-jerusalem-project/0000017f-f7eb-d47e-a37f-ffff0eeb0000.

[229] International Federation for Human Rights, 'Alstom's Withdrawal from Jerusalem Light Rail Project: A Victory for Law and Mobilisation of Civil Society', press release, 17 May 2019, https://www.fidh.org/en/region/north-africa-middle-east/israel-palestine/alstom-s-withdrawal-from-jerusalem-light-rail-project-a-victory-for.

[230] eg, Noah Browning, 'Major Dutch Pension Firm Divests from Israeli Banks over Settlements', *Reuters*, 9 January 2014, https://www.reuters.com/article/netherlands-israel-divestment-idUKL6N0KI1N220140108; Norwegian Government Pension Fund, Council on Ethics, 'Recommendation from 2009 and 2013 concerning the Companies Africa Israel Investments Ltd and Danya Cebus Ltd', https://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/recommendations-on-serious-violations-of/recommendation-of-november-16th-2009-on-/id612813.

[231] New Zealand Super Fund, 'Guardians Exclude Five Banks on Responsible Investment Grounds', 2 March 2021, https://nzsuperfund.nz/news-and-media/israeli-bank-exclusions.

[232] Andy Coyne, 'General Mills Pulls out of Israeli Joint Venture', *Just Food*, 6 June 2022, https://www.just-food.com/news/general-mills-pulls-out-of-israeli-joint-venture.

[233] 'Airbnb Reverses Ban on West Bank Settlement Listings', *BBC News*, 10 April 2019, https://www.bbc.com/news/world-middle-east-47881163.

[234] UNGP (n 2) Principle 11.

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4.2.3. Ice cream and football: The UNGP are changing the game

Another counterpoint to the saga of B&J's withdrawal from the OPT can be drawn from the controversy surrounding the responsibility of the International Federation of Association Football (FIFA), the Swiss body that oversees football globally, in intervening and ending the playing of Israeli soccer games on Israeli settlements. The issue had been simmering for several years at FIFA and came to a head in 2016 after FIFA formally embraced the UNGP.[235] In the same year, Human Rights Watch (HRW) launched a report which suggested that FIFA was allowing the Israel Football Association (IFA) to hold FIFA-sanctioned football games in 'unlawful settlements' in the OPT, and allowing clubs to be headquartered in those settlements.[236] In doing so, HRW claimed that FIFA 'props up a system that exists through serious human rights violations' and that is 'unlawful under IHL'.[237] Football games, HRW alleges, are played on land unlawfully seized from Palestinians and are 'contributing to the further transfer of Israeli civilians into the West Bank'.[238] 'By holding games on stolen land, FIFA is tarnishing the beautiful game', claimed Sari Bashi, Israel-Palestine country director of HRW.[239] For its part, the Palestine Football Association (PFA) wanted FIFA to sanction the IFA for its behaviour and compel it to support football only in pre-1967 borders of Israel.[240]

After commissioning a review of the situation and presented with several options, in 2017 FIFA opted 'in the best interests of the game' to accept the status quo and continue to allow IFA soccer games to be held on Israeli settlements. In doing so, FIFA acknowledged:[241]

> The current situation is, for reasons that have nothing to do with football, characterised by an exceptional complexity and sensitivity and by certain de facto circumstances that can neither be ignored nor changed unilaterally by non-governmental organisations, such as FIFA … [FIFA] must remain neutral with regard to political matters.

A subsequent challenge brought before the Court of Arbitration for Sport by the PFA failed, as the decision was deemed within the reasonable scope of the Council's discretion.[242]

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[235] FIFA Statutes, 'Regulations Governing the Application of the Statutes', May 2022, art 3, https://digitalhub.fifa.com/m/3815fa68bd9f4ad8/original/FIFA_Statutes_2022-EN.pdf. Article 3 of the FIFA Statutes as amended reads: 'FIFA is committed to respecting all internationally recognized human rights and shall strive to promote the protection of these rights'.

[236] Human Rights Watch, 'Israel/Palestine: FIFA Sponsoring Games on Seized Land', 25 September 2016, www.hrw.org/news/2016/09/25/israel/palestine-fifa-sponsoring-gamesseized-land.

[237] ibid.

[238] ibid.

[239] ibid.

[240] 'Palestinians Denounce FIFA "Neutrality" Decision on Israeli Settlement Teams', *WAFA: Palestine News and Info Agency*, 30 October 2017, https://english.wafa.ps/Pages/Details/91342.

[241] FIFA Council, 'FIFA Council Statement on the Final Report by the FIFA Monitoring Committee Israel-Palestine', press release, 27 October 2017, https://www.fifa.com/about-fifa/organisation/fifa-council/media-releases/fifa-council-statement-on-the-final-report-by-the-fifa-monitoring-comm-2917741.

[242] Antoine Duval, 'Offside? Challenging the Transnational Legality of Israeli Football Activities in the Occupied Palestinian Territories' in Duval and Kassoti (n 5) 212, 230–31.

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Reflecting on the controversies surrounding B&J and FIFA, as well as other civil society efforts to encourage businesses to disengage from the OPT, they demonstrate how the UNGP have 'shifted the game played around the OPT'. At the same time, they also serve as cautionary tales of the application of the UNGP to business activities in the OPT.[243] While the UNGP framework provided a new opportunity and governance lever 'outside the shadow of law' for civil society organisations to use in advocating an end to business complicity in the OPTs, it has its functional limits.[244] In the face of concerns raised by human rights groups and other civil society actors, some companies and other organisations have opted to withdraw from the OPT – B&J being a prime example – but many others, like FIFA, remain.

Duval theorises that success in withdrawal campaigns depends on 'the degree of sensitivity of the company concerned to public outrage, and the intensity of the negative reaction of the public concerned to the behaviour of that company'.[245] Reflecting on the B&J case study, additional contextual factors that may contribute to a successful withdrawal campaign are the degree to which the company in question has internalised respect for human rights and IHL (be it for ethical or pragmatic reputational reasons), and the relationship between the business in question and the campaigners: is the relationship antagonistic or built on shared interests/values? Finally, the impact on the company's overall performance of the business activities in question seems also to be a factor.

4.3. Responsible exit – take two? Unilever's response

While this article has focused on interrogating B&J's conduct in withdrawing from the OPT under the relevant international governance frameworks of IHL and the UNGP, it is worth briefly contemplating Unilever's response to the saga precipitated by its subsidiary decision to withdraw from the OPT. Indeed, the aftermath of B&J's decision to withdraw also holds lessons for the utility of the UNGP to guide corporate behaviour in such situations. While B&J's decision to withdraw may have been in accord with UNGP expectations of a responsible business, its impact on the ground was short-lived.

Immediately upon B&J announcing its decision to withdraw from the OPT by not renewing its licensing contract with its Israeli licensee, Unilever, B&J's parent company, which was not consulted on the decision, amended the withdrawal announcement on B&J's website to include: 'We will stay in Israel through a different arrangement. We will share an update on this as soon as we're ready',[246] What followed was an acrimonious confrontation between B&J and Unilever over the extent of the powers of B&J's independent board (charged with maintaining the brand's integrity, including its social mission) and Unilever's authority to override such decisions and control its

[243] ibid 232.
[244] ibid 231.
[245] ibid.
[246] Ben & Jerry's (n 10); Lazaroff (n 44).

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subsidiary's business activities. This was compounded by the intense scrutiny each company faced over the withdrawal decision in the highly politically charged context of the intractable Israeli–Palestinian conflict. Eventually, the internal corporate power struggle spilled out into the public domain through media interviews and litigation between the two companies. The controversy led to substantial reputational damage to both B&J and Unilever, a measurable decline in Unilever's share price, and risked alienating many consumers and politicians alike, in the US, Israel and elsewhere.[247] For example, after the withdrawal decision was made public, the Simon Wiesenthal Center began an advertising campaign in major US newspapers declaring: 'Ben & Jerry's is Boycotting Israel. Tell Your Local Grocery Store to Stop Selling Anti-Semitic Ice Cream'.[248]

When confronted with a thorny, sensitive situation, Unilever opted literally to divest itself of the problem and remove itself from the situation. In June 2022, Unilever sold B&J's Israel business to Blue & White Ice Cream Ltd, a company owned by Avi Zinger, the current Israeli licensee, for an undisclosed sum.[249] The sale was part of a settlement agreement in a lawsuit filed by Zinger in New York.[250] The agreement included the right not only to sell ice cream products across Israel and the OPT, but all rights to the Hebrew and Arabic versions of the B&J trade marks in Israel and the OPT.[251]

The sale of B&J's Israel business was in place of a mere licence extension, which would have kept Unilever in a business relationship with Zinger's firm. The effect of the sale was essentially to sever Unilever (and its wholly owned subsidiary B&J) from the business which sells its branded ice cream in Israel and the OPT. From public statements and court filings it can be ascertained that Zinger's company is now able exclusively to manufacture and sell B&J ice cream (with the same recipes) under the Hebrew and Arabic B&J names in Israel and across the OPT.[252] B&J and Unilever no longer derive any licensing

[247] Lydia Moynihan, 'Activist Investor Says Ben & Jerry's Israel Boycott Is Harming Unilever Shares', *New York Post*, 11 November 2021, https://nypost.com/2021/11/11/investor-ben-jerrys-israel-boycott-is-harming-unilever-shares.

[248] JC Reporter (n 45).

[249] Unilever, 'Unilever Reaches New Business Arrangement for Ben & Jerry's in Israel', press release, 29 June 2022, https://www.unilever.com/news/press-and-media/press-releases/2022/unilever-reaches-new-business-arrangement-for-ben-jerrys-in-israel.

[250] Louis D. Brandeis Center, 'Major Victory Against BDS: Avi Zinger's Legal Team Prevents Ben & Jerry's Boycott of Israel, Ben & Jerry's Will Continue to be Sold in Israel', press release, 29 June 2022, https://brandeiscenter.com/wp-content/uploads/2022/06/LDB-Ben-and-Jerrys-agreement-FINAL.pdf.

[251] ibid.

[252] *B&J v Conopco* (n 31) paras 44–46. Also B&J has updated the list of places where it sells ice cream on its website. It no longer includes Israel, and has the following statement at the bottom of the page: 'Unilever has sold trademark rights to the Hebrew and Arabic language versions of the Ben & Jerry's name to Blue & White Ice-Cream Ltd. No English language trademark of the Ben & Jerry's Homemade Inc. has been transferred to Blue & White Ice-Cream Ltd. Blue & White Ice-Cream Ltd is a completely separate and distinct entity from Ben & Jerry's Homemade Inc. Ben & Jerry's has no ownership of or economic interest in Blue & White Ice-Cream Ltd': Ben & Jerry's, 'Where in the World are We', https://www.benjerry.com/about-us/where-we-do-business.

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fees from those sales. In fact, B&J ice cream products never even left supermarket shelves in the OPT and the recipes and flavours remain indistinguishable from the B&J products enjoyed by the rest of the world, save for the English-language brand name on the tubs.

No official statement was publicly released to explain the reasoning behind Unilever's divestment, but there seems little doubt that its decision was intended to rid itself of a prickly political controversy that was attracting unwanted attention and scrutiny from lawmakers (primarily in the United States and Israel) and activists on both sides of the Israeli–Palestinian conflict.[253] While the OPT garner media attention, they are far from the only territories deemed occupied under IHL, or situations in which IHL violations are occurring. Crimea, Northern Cyprus, Nagorno-Karabakh, and Western Sahara are but some of the other territories around the world recognised as being under occupation (by Russia, Turkey, and Morocco, respectively). That neither B&J nor Unilever has adopted a general policy for non-involvement in these occupied territories has also exposed them to criticism and accusations of an anti-Israel bias, even anti-Semitism.[254] Several US states promised retaliatory action against Unilever, including investigations into whether it had violated anti-BDS laws if it did not reverse B&J's decision.[255]

The continued political and reputational backlash that Unilever was enduring as a result of B&J's withdrawal decision risked alienating elements of its consumer base and was disproportionate to the value of a relatively small component of its business. Unilever's divestment did not stem from the conducting of any human rights impact assessment or an evaluation of its social responsibilities or IHL obligations, but was a commercially expeditious path forward to side-step the controversy. Notably, Unilever has not sought to remove its other products from Israeli settlements. Indeed, even in the ice cream sector, Unilever's majority-owned Strauss Ice Cream business continues to sell its products in supermarkets across the OPT, including in Israeli settlements.[256] This suggests that Unilever does not assess there to be an ethical or legal risk in continuing to sell products in the OPT. Instead, it simply wanted to end the public fracas with B&J's independent board that was damaging both brands. This is a disappointing outcome from a UNGP-governance perspective.

[253] eg, Siddharth Cavale, 'Unilever Rejects Boycott Movement, CEO Tells US-based Jewish Groups', *Reuters*, 28 July 2021, https://www.reuters.com/business/sustainable-business/unilever-rejects-boycott-movement-ceo-tells-us-based-jewish-groups-2021-07-28; Devin Leonard and Dasha Afanasieva, 'How Ben & Jerry's Ended Up at War with Itself', *Bloomberg News*, 14 February 2023, https://www.bloomberg.com/news/features/2023-02-14/ben-jerry-s-israel-controversy-set-off-unilever-battle.

[254] eg, Brett Bachman, 'Ben & Jerry's in Middle of Firestorm Following Boycott of Israel's "Occupied Palestinian Territory"', *Salon*, 22 July 2021, https://www.salon.com/2021/07/22/ben-and-jerrys-in-middle-of-firestorm-following-boycott-of-israels-occupied-palestinian-territory.

[255] Gina Gambetta, 'US States with BDS Bans Respond to Unilever's Sale of Ben & Jerry's Israel', *Responsible Investor*, 30 June 2022, https://www.responsible-investor.com/us-states-with-bds-bans-respond-to-unilevers-sale-of-ben-jerrys-israel.

[256] Aaron Priel, 'Unilever Takes Control of Strauss Ice Cream', *Just Food*, 25 June 2001, https://www.just-food.com/news/israel-unilever-takes-control-of-strauss-ice-cream.

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4.3.1. Damned if you do, damned if you don't? Managing the consequences of withdrawal

As Unilever discovered, withdrawing – even if a human rights and conflict risk assessment is conducted – may not shield a company from further opprobrium and legal action, or be compliant with UNGP-based expectations. An example to further illustrate this point can be drawn from an entirely different conflict-affected area: Myanmar.

In mid-2021, around the same time as B&J decided to withdraw from the OPT, Telenor, a Norway-based global telecommunications company, decided to withdraw from Myanmar after the military conducted a coup and reasserted control over the country in February of that year. A few months later, Telenor explained that because of 'increasingly challenging [circumstances] for Telenor, for people security, regulatory and compliance reasons' it opted to exit from the country entirely, selling its subsidiary.[257] Myanmar was experiencing increasing government oppression of the civilian population after the coup, and Telenor was facing increasing coercion by the military to use its equipment for surveillance of the population, including demands to install powerful intercepting and monitoring spyware to assist the military in suppressing its opponents and maintaining tight control over the country.[258]

Telenor opted to sell the entirety of its Myanmar-based subsidiary to a joint venture of M1 Group, a Lebanese-based investment firm with a chequered history of involvement in human rights abuses, and a company with strong links to the Myanmarese military, Shwe Byain Phu, for US$105 million.[259] Telenor claimed that divestment was the 'least detrimental solution' as the 'conflict between local and international law and human rights principles makes continued presence in Myanmar impossible for Telenor Group'.[260] Further, the company claimed that it sought to comply with the UNGP and, indeed, it was this desire to comply with the UNGP that led to its withdrawal. Telenor conducted a risk assessment, including human rights impact and sustainability assessments, consulted with stakeholders, and publicly shared 'lessons learned'

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[257] Telenor, 'Telenor Group Sells Telenor Myanmar to M1 Group', press release, 8 July 2021, https://www.telenor.com/media/newsroom/telenor-group-sells-telenor-myanmar-to-m1-group.

[258] James Barton, 'Myanmar Junta Ordered Operators to Install Spyware Ahead of Coup', *Developing Telecoms*, 20 May 2021, https://developingtelecoms.com/telecom-business/telecom-regulation/11180-myanmar-junta-ordered-operators-to-install-spyware-ahead-of-coup.html.

[259] Victoria Klesty, 'Telenor Quits Myanmar with $105 Million Sale to Lebanon's M1 Group', *Reuters*, 8 July 2021, https://www.reuters.com/business/media-telecom/telenor-sells-myanmar-operations-m1-group-105-mln-2021-07-08. See also Justice for Myanmar, 'Telenor Myanmar's Buyers Have Financed Atrocities and Cosied up to Dictators', 9 July 2021, https://www.justiceformyanmar.org/stories/telenor-myanmars-buyers-have-financed-atrocities-and-cosied-up-to-dictators; Felicity Gerry and Daye Gang, 'Memorandum on Potential International Law Issues Arising from the Sale of Telenor Myanmar', *SOMO*, 2 March 2022, https://www.somo.nl/wp-content/uploads/2022/03/Telenor-Memo-ACIJ-SOMO-FRGQC-DG-MAR-2022.pdf.

[260] Telenor, 'Continued Presence in Myanmar Not Possible for Telenor', 15 September 2021, https://www.telenor.com/media/newsroom/continued-presence-in-myanmar-not-possible-for-telenor. See also Civi Yap, 'Telenor Explains Myanmar Exit,' *Project Finance*, 17 September 2021.

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from this process on its website and in BHR fora.[261] Despite all this, a European non-governmental organisation, SOMO, lodged a formal complaint against Telenor on behalf of hundreds of anonymous Myanmarese civil society organisations with the Norwegian OECD National Contact Point. The basis of the complaint was precisely the withdrawal and selling of its Myanmar-based assets and operations to less scrupulous firms, with the suggestion that it was highly foreseeable that, as a result of this sale, those assets would then contribute to and facilitate gross human rights abuses against the Myanmarese citizenry.[262]

Of course, this scenario differs in some respects from the Unilever sale of B&J's Israel business to Avi Zinger's Blue & White Ice Cream Ltd. After all, Zinger had been in a decades-long business relationship with B&J. Yet, in another respect it does resonate, as it was known to Unilever, at the time of the sale, that Zinger would continue to sell B&J ice cream in Israeli settlements in the OPT, maintaining that business involvement with a grave IHL violation. Unilever was criticised for doing so in some quarters. B&J actually launched legal action in the US courts against its own parent company, seeking an injunction to prevent the sale from proceeding, but eventually settled the suit without successfully halting the divestment of its Israel business at all and effectively losing any control it once enjoyed over how its ice cream products are manufactured and sold in Israel and the OPT.[263]

What is evident from the B&J, FIFA, Telenor and other sagas of business withdrawal decisions from conflict-affected areas is that making the decision to withdraw, or to remain, is but part of the expectations of a responsible business and that following the *process* outlined by the UNGP framework is vital: this involves conducting heightened human rights due diligence, including an assessment of its compliance with relevant human rights and IHL standards, and consult widely with relevant stakeholders.[264] Even when a corporate exit is considered an appropriate response to a challenging operating context, such as a conflict or occupation, managing the consequences of that withdrawal is also part and parcel of the responsibilities of a company envisaged by the UNGP framework. This includes evaluating whether the arrangements post-departure are not more detrimental to the human rights of affected communities and what safeguards

[261] Telenor (n 260); OHCHR, '11th UN Forum on Business and Human Rights', 28–30 November 2022, https://www.ohchr.org/en/events/forums/2022/11th-un-forum-business-and-human-rights.

[262] 'SOMO on behalf of 474 CSOs in Myanmar vs. Telenor ASA', *National Contact Point for Responsible Business Norway*, 27 July 2021, https://www.responsiblebusiness.no/somo-on-behalf-of-474-csos-in-myanmar-vs-telenor-asa. See also Telenor (n 257); Telenor, 'Telenor in Myanmar', https://www.telenor.com/sustainability/responsible-business/human-rights/human-rights-in-myanmar/myanmar. For a BHR perspective on Telenor's exit from Myanmar see Joseph Wilde-Ramsing, Katharine Booth and Audrey Gaughran, 'Telenor's Exit from Myanmar – A Cautionary Tale for the Just Transition', *Institute for Human Rights and Business*, 26 September 2021, https://www.ihrb.org/focus-areas/just-transitions/telenor-exit-from-myanmar-a-cautionary-tale-for-the-just-transition.

[263] *Ben & Jerry's v Conopco* (n 31). For news coverage see Reuters, 'Ben & Jerry's Sues Parent Company over Israeli Deal "To Protect Social Integrity"', *The Guardian*, 5 July 2022, https://www.theguardian.com/business/2022/jul/05/ben-jerrys-sues-unilever-israeli-deal; Saabira Chaudhuri, 'Ben & Jerry's Independent Directors Lose Request for Injunction over Israel Business', *Wall Street Journal*, 22 August 2022, https://www.wsj.com/articles/ben-jerrys-independent-directors-lose-request-for-injunction-over-israel-business-11661192942.

[264] OHCHR (n 6) 15–16.

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or alternatives could the company employ to mitigate or prevent that from occurring.[265] For instance, the UN OHCHR recommends assessing the human rights record of potential purchasers, and a company complying with the UNGP should 'guide the sale to more responsible entrants'.[266]

Moreover, while withdrawal may end a company's involvement in a complex situation and remove itself from participating in ongoing human rights abuses, it does not absolve a company from its so-called 'Pillar 3' responsibilities under the Ruggie/UNGP BHR framework.[267] That is, even after a company exits from a particular situation, responsibility remains for remediation (or contributing to remediation) of adverse human rights impacts it historically caused or contributed to prior to its withdrawal.[268]

5. Conclusion: 'Imagine Whirled Peace' – drawing lines on doing responsible business in occupation

Understandings of the responsibilities of companies in occupied and conflict-affected areas are evolving, informed most critically by the advent of the UNGP framework. The UNGP declare that companies should respect IHL and human rights norms in such situations, and also lay out a framework of policies and processes to which companies should adhere in order to operationalise their commitment to respect those standards.

The controversy surrounding B&J's decision to exit from Israeli settlements illuminates many vexed questions around what constitutes responsible business practices in occupied territories (and conflict-affected areas more generally). The fact is that B&J is highly unlikely to be held legally liable for complicity in war crimes or serious violations of IHL merely by supplying ice cream to Israeli settlers in the OPT. Whether doing so constitutes responsible business conduct, however, is far less clear.

By referring to IHL considerations – namely, the occupation and the illegality of Israeli settlements – in explaining its decision to withdraw from the OPT, B&J has usefully shone a light on the relevance of IHL for companies doing business in conflict-affected areas. IHL establishes fundamental standards of *humane* behaviour in such contexts to which all actors and entities should adhere, whether one wears a military uniform or a business suit. This stance is reiterated by the UNGP – the leading global governance framework for business human rights responsibilities. In such areas, it is insufficient for a responsible business to merely respect human rights; respecting IHL norms must also be expected. While complying with IHL may be a niche issue for many businesses, it is a salient one which can evolve into material risks to the company.[269]

[265] ibid 16–17.

[266] ibid.

[267] ibid; UNGP (n 2) Principle 22.

[268] OHCHR (n 6) 16–17.

[269] The materiality of IHL risks for companies has been recognised by leading corporate sustainability reporting frameworks, such as the Global Reporting Initiative: eg, 'GRI 14: Mining Sector 2024' Standard (n 118) 72–73.

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Yet, how a company should implement IHL standards must be considered on a case-by-case basis within the framework of action espoused by the UNGP. This situation also highlights the gap between the soft law UNGP recommendations for business entities and the hard law requirements that arise from the underlying international treaties and custom traditionally directed towards states. Greater consideration – by academics, civil society, and business professionals – is needed to clarify the applicability of IHL to businesses, and on elaborating the means for the practical implementation of IHL by businesses in conflict-affected areas within the UNGP framework.

Pillar 1 of the UNGP framework calls on states to be engaged proactively with businesses operating in conflict-affected areas. They should provide companies with assistance to help to 'assess and address the heightened risks of abuses' in such areas and ensure 'their policies, legislation, regulations and enforcement measures effectively address this heightened risk'.[270] Furthermore, state parties to the Geneva and Hague Conventions have responsibilities under those treaties to disseminate knowledge of IHL 'so that the principles thereof may become known to the entire population'.[271] While many states – including Israel, as well as the home countries of B&J and Unilever (The Netherlands, United Kingdom and United States) – embed the 'study [of IHL] in their programmes of military', in compliance with Article 144 of Fourth Geneva Convention, little is done in terms of 'civil instruction' in those countries or elsewhere.

Greater corporate respect for IHL, and an understanding of how to responsibly manage situations such as business activities in occupied territories in line with the UNGP, require government support and encouragement. Governments should embed IHL education into BHR national action plans; they should also expand the audience of IHL education beyond military ranks to include corporate managers, especially those overseeing operations in fragile or conflict-affected areas, as well as the legal and risk-management professionals who advise them.[272]

Enforcement of IHL through legal proceedings is a rare occurrence, especially against corporate actors.[273] The jurisprudence is unclear and the probability of prosecution or civil action before domestic courts is low, and before the ICC is even lower – although neither is zero. Regardless, companies should focus less on avoiding liability and more on meeting social expectations and responsibilities – including respect for IHL norms. Indeed, IHL is better conceived of as a preventative tool: an authoritative set of guidelines to adhere to and uphold when doing business in conflict-affected areas – doing so, not out of fear of being prosecuted, but because it is the responsible thing to do.

[270] UNGP (n 2) Principle 7 and Commentary.

[271] GC IV (n 77) art 144.

[272] For examples of IHL education tools designed specifically for a corporate audience see Australian Red Cross and RMIT University, 'War, Law and Business: An Online Learning IHL Module for Future Business Leaders', 2021, https://ihl.redcross.org.au; and RMIT University and Australian Red Cross, 'International Humanitarian Law for Business', *Future Learn*, 2023, https://www.futurelearn.com/courses/international-humanitarian-law-for-business/1.

[273] See generally Kyriakakis (n 119).

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Moreover, as Stewart observes, 'the tendency to conceive of corporate responsibility for international law violations as coterminous with complicity … is a mischaracterisation of the full scope of potential liability'.[274] While liability through criminal prosecution may well be an unlikely prospect, as we see through the B&J case study, there are alternative forms of corporate accountability for involvement in IHL violations and war crimes that can befall a business. Reputational damage, investors divesting, shareholder dissatisfaction, share price decline, consumer boycotts, and civil litigation are all real-world adverse effects for companies that fail to live up to their social responsibilities in this respect. These accountability mechanisms may be deployed to encourage a company to withdraw, as occurred with the consumer pressure campaign that was a driver for B&J's withdrawal decision. Conversely, those self-same tactics may also be deployed by different stakeholder groups to encourage a company to remain – as Unilever experienced.

Faced with the threat of litigation and calls for boycotts of its products if it allowed B&J to follow through on its withdrawal decision, ultimately while Unilever opted to divest itself of B&J's Israel business entirely, it did so in a way that ensured that B&J's ice cream would continue to be sold across Israel and the OPT, without pause or penalty. In this way, the B&J saga also usefully highlights the challenging and often contested nature of withdrawal decisions from the OPT or other complex operating environments, and that making the decision to exit (or not) is not the end of a firm's responsibilities under the UNGP.

To sum up the story of B&J's decision to withdraw from the OPT in plain vanilla terms, B&J's selling of ice cream products in supermarket freezers across the OPT, including in Israeli settlements, hardly has an impact on the human rights of Palestinians or Israelis; nor can it be said to be tantamount to complicity in the illegal settlement enterprise or other IHL violations. At the same time, though, for B&J to withdraw its business from Israeli settlements and refuse to be associated with a grave and ongoing IHL violation is a reasonable decision for a socially responsible business to make, and one that is within the scope of behaviour envisaged by the UNGP framework.

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[274] Stewart (n 122) 181.

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