RESPONSE TO THE UNHRC BLACKLIST
A Legal Perspective
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A legal perspective

The undersigned are a coalition of international legal experts, specializing in international public and humanitarian law, international commercial law and the Israeli-Arab conflict.

This brief aims to provide legal guidance in relation to the HRC’s database on companies operating in Judea, Samaria, the Golan Heights and East Jerusalem ("disputed territories") with the intention of aiding targeted businesses and their investors to understand their full legal rights and risks. This brief will advise on the following points:

A. The HRC’s lack of mandate; as well as issues of inherent bias, selective prosecution;
B. Dangerous interference in the international economy and the financial markets;
C. Methodology lacking in accepted and objective standards;
D. Comparison of the situation in the disputed territories with business practices in other territories considered occupied or disputed;
E. National cases on legality of economic activity in disputed territories;
F. Legal analysis of state anti-discrimination and anti-boycott laws implicated;
G. Public procurement policy; and
H. The case study of Airbnb.

Introduction

On 12 February 2020 the UN Office of the High Commissioner for Human Rights ("OHCHR"), the bureaucratic arm of the UN Human Rights Council ("HRC") published its database1 on companies operating in Judea, Samaria, and East Jerusalem. The database lists 112 companies involved in certain defined economic activities in the disputed territories.

This database was compiled pursuant to Human Rights Council’s resolution 31/36,2 adopted on 24 March 2016 and entitled “Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan”. Operative Paragraph 17 ("OP17") of the Resolution requests the Office of the High Commissioner on Human Rights to “produce a database of all business enterprises” involved in certain activities in Israel settlement communities. The resolution refers to economic activity defined 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.3 These include companies that do not actively "operate" in the disputed territories; but may have their goods and

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2 https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/Data-baseHRC3136.aspx
services sold there. The list also includes parent companies (ie. investors). The only way, therefore, to avoid being blacklisted would be to cease operations in Israel altogether or to divest from Israeli subsidiaries. As such, the database is the first step towards a full-scale boycott of Israel. Included as well are companies that provide essential services, such as water, oil and gas to the Palestinian residents of the disputed territories, in accordance with Israel-Palestinian bilateral agreements.

A. The HRC actions are *ultra vires*, invalid, and constitute selective prosecution

The HRC was created in March 2006 by the United Nations General Assembly by resolution 60/251. The HRC is "responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a *fair and equal manner*." It is tasked with investigating *state* protection of human rights, and complaints can only be brought against states.

1. *Ultra vires*

As is known, corporations are governed by the jurisdiction where they are incorporated and where they are registered to do business. Thus, the relevant jurisdictions are responsible for ensuring the legal compliance of businesses. Businesses operating in Israel, including the Golan Heights and East Jerusalem, are subject to Israeli legislation, such as the Israel Companies Law and Companies Ordinance. Companies operating in Judea and Samaria are subject to the laws in force prior to Israeli control in 1967, such as the Jordanian Company Law, as well as the Orders issued by the Israeli Civil Administration. Businesses operate in the disputed territories in full compliance with Israeli, and international law, as well as domestic law in businesses' home countries if they operate as foreign companies.

While the political and security issues involving the disputed territories are exceedingly complex, they do not present a legal barrier to economic activity there. The HRC and OHCHR are bodies mandated to promote *state protection* of human rights and they have absolutely no authority over private businesses. The HRC and the OHCHR have assumed that a private company is an extension of the state. This has no basis in fact or law. The HRC has no authority to override corporate law and certainly no jurisdiction over private companies operating in Israel or anywhere else in the world.

As businesses operating in the disputed territories do so legally, the OHCHRC is engaging in politically driven discrimination against law-abiding business enterprises. Companies and investors are therefore not bound to cooperate with or engage with the HRC. Indeed, the HRC's database has absolutely no validity or meaning under both national and international law.

The database is punitive in nature, with the purpose of both pressuring businesses to cease operations and for investors to exclude or divest from those businesses. The aim is to apply

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5 "Frequently asked questions: against whom can a complaint be brought” https://www.ohchr.org/en/hrbodies/hrc/complaintprocedure/pages/faq.aspx
pressure on Israel\textsuperscript{6}, and damage the economy as a whole. This goal is recommended by Paragraph 117 of the UN Report on Settlements which is expressly referenced in resolution 31/36. However, under Article 41 of the UN Charter, only the Security Council has the authority to impose sanctions on a UN member state. Therefore, the HRC has acted beyond its authority by publishing a de facto sanctions framework against Israel.

Selective prosecution

The HRC, well-known for its long-standing anti-Israel bias, has engaged in an act of selective prosecution against Israel, a stance further discredited by also acting (through its proxy, the OHCHR) as judge and jury.

The HRC’s blacklist is an unprecedented move against Israel., As this brief will show, private economic activity in territories considered to be occupied or annexed is quite ubiquitous\textsuperscript{7}. The desire to establish a database only with respect to business activity in Israeli-Jewish communities while ignoring the many regimes with notoriously atrocious human rights records, confirms the HRC’s well-known anti-Israel bias.

B. Harmful interference in the international economy

As the blacklisted companies are operating legally (as will be detailed below), the purpose of the database is harming these companies commercially, reputationally, and legally. It also risks harming investors, as well as those connected to the companies, such as suppliers and employees.

The database sets a dangerous precedent of international organizations establishing obstacles to harm Western economies.

Numerous major Western corporations operate in and trade with the State of Israel, and Israeli businesses are major partners and of value to joint business ventures, innovation and trade. There is a danger of crippling such a valuable business cooperation, not only with the current listed companies, but also by creating a chilling effect on countless other companies that might be deterred from doing business in, with, or investing in Israeli entities in the future.

The potential financial loss, therefore, is vast and impossible to predict.

Moreover, leading national courts have repeatedly rejected the notion that private businesses are subject to international public law.\textsuperscript{8} Therefore, and while human rights concerns are dear to us, these standards must be applied fairly and evenly across the board.

Given the important position in which many companies hold human rights in today’s business environment and the seriousness that we accord to human rights, it is essential to prevent the


abuse of CSR policies by an international body with no jurisdiction, mandate, or precedent to advance politically and discriminatory agendas. In doing so, the HRC undermines valid CSR concerns.

C. Lack of objective and professional standards and methodology

The HRC database was not compiled using any objective standards or criteria, often relying heavily in politically biased NGOs\(^9\). The HRC does not provide any evidence in its report, nor distinguish between different levels of business involvement in the disputed territories. The HRC’s process did not include any due process or appeal mechanism, and neither did it include safeguards for confidential business information.

According to the HRC’s published report, the HRC contacted companies "between September 2017 and October 2018". The HRC then "re-screened all business enterprises prior to the submission of this report to confirm that the activity for which they were included in the database met the applicable standard of proof, during the relevant temporal period.” However, many companies contacted by NGO Monitor have reported that they did not receive any additional follow-up contact by the HRC\(^10\). The HRC admits that in many cases, “OHCHR relied on desk research to assess the information received from Member States and stakeholders.” This does not suggest rigorous or professional research. Indeed, the list suggests heavy reliance on lists already compiled by anti-Israel groups.

Reliance on this list by investment intermediaries (such as fund managers) as the basis for exclusion or divestment is likely to significantly increase the risk to them of personal liability. Unlike independent financial research, this list is highly problematic, even if the investment manager has a CSR investment policy. Where an investment manager knowingly relies on a list produced or sponsored by an organization with a political bias, such that the “research” is not truly independent, it is at risk of breaching its duty and facing personal liability. The international status of the OHCRC or HRC does not insulate the manager from this risk. The duty of the investment intermediary is more extensive than assessing reliability. The manager is not permitted to fetter its discretion. If acting on the list means that the manager adopts a predetermined course of action - excluding if the stock is not yet acquired and divesting where the stock is already in the portfolio - it is potentially breaching its duty by excluding alternative courses of action. These might include engaging with the target companies or undertaking further analysis. The subject-matter of this list means that investment managers must consider not only general principles but also specific legislation. In the United States, for example, there is anti-boycott legislation (discussed below) aimed at prohibiting state funds from being used to support efforts to harm Israel through boycotts and discriminatory economic agendas. In practice, this legislation has a wide reach. Investment intermediaries must understand that the database does not have legal weight as would formal sanctions.

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9 NGO Monitor, "Which NGOs are involved in the creation of the blacklist", https://www.ngo-monitor.org/key-issues/un-bds-blacklist/which-ngos-are-involved-in-the-creation-of-the-blacklist/

D. Comparison with other Disputed and Occupied Territories

The Kohelet Policy Forum has assembled two reports on the economic practices of companies in territories under occupation. The report concluded that every situation of prolonged belligerent occupation in the world involved widespread "settlement" activity, meaning the migration of civilians from the occupying power into the territory. In each case, business enterprises play a large economic role. Such business involves the world’s largest industrial, financial services, transport and other major companies. The report analyzes forty-four companies operating in occupied territories: Western Sahara, Nagorno-Karabakh, Northern Cyprus and Crimea. Such companies include Siemens, Crédit Agricole, BNP Paribas, Santander, Vodafone, Renault, Veolia, Trelleborg, Wärtsilä, and Turkish Airlines. It has never been suggested by the United Nations or by state attorney generals that these leading companies are violating international law by operating in these territories. This gives lie to the HRC’s assertion that private business activity in Judea and Samaria is illegal.

For example, Western Sahara has been under Moroccan occupation since 1974. The International Court of Justice concluded in an advisory opinion that Morocco has no legal claims to sovereignty over the territory and that the native Sahrawi people have a right to self-determination. Nevertheless, the European Union has signed controversial free trade agreements with Morocco that cover Western Sahara. Western Sahara is rich in natural resources, such as phosphate mining, oil and fish. Companies such as Orange SA, Credit Agricole SA, Siemens and Viola have extensive business contracts in the region.

Similarly, Turkish troops invaded Cyprus in 1974, seizing control of the island’s northern territory. Greek Cypriots fled south while Turkish Cypriots resettled in the north. In 1975, the Turkish government unilaterally deemed the northern portion of the island a "Federated Turkish state" and eight years later recognized the independence of the Turkish Republic of Northern Cyprus (TRNC). The TRNC has not received international recognition. The UN Security Council has adopted a resolution demanding an end to the Turkish occupation of Northern Cyprus. The European Court of Human Rights has found the Turkish occupation of Northern Cyprus to violate the human rights of Greek Cypriots, especially by denying access to property in the north. Nevertheless, major companies such as Renault, Vodafone, and Adidas operate widely in the territory.

It should also be noted that the UN’s Guiding Principles on Business and Human Rights do not require businesses to cease doing business with Israeli settlements, or in other conflict areas. The Guiding Principles are a voluntary set of recommendations relating to human rights due diligence. The Guiding Principles allow businesses to “consider” withdrawing from conflict areas should the business determine it is not able to protect human rights. Even then, businesses

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must examine the “adverse human rights impact” of withdrawing before making a decision. If so, the Guiding Principles, nor any other business and human rights standards, certainly do not require businesses to withdraw from the disputed territories.\textsuperscript{13}

E. National Cases on Legality of Economic Activity in Disputed Territories

Although much ink has been spilled by legal experts discussing the legal consequences of Israeli settlement in the disputed territories, until recent years there has been no case law examining the issue. Recent court decisions in the UK, France and the US affirm that that international humanitarian law does not prohibit economic activity in disputed territory. These national court decisions clarify the legal status of economic activity “occupied” or disputed territory and may serve as evidence of customary international law. These three cases unambiguously state that private economic activities originating in the disputed territories is legal and that international humanitarian law does not apply to private corporations or individuals. No national courts have decided otherwise. Additionally, the Quebec Superior Court affirmed the Israel court system’s impartial nature and held that Israel is the appropriate forum for disagreements arising in the disputed territories. The HRC’s database seeks to create a false impression of illegality, while case law has repeatedly rejected such a contention.

1. UK Supreme Court Case: Richardson v. Director of Public Prosecutions

The British Supreme Court upheld the conviction of two protestors, Richardson and Wilkinson, for aggravated trespass.\textsuperscript{14} The appellants, anti-Israel activists, objected to the fact that the Ahava company sold goods produced by an Israeli company located in Judea and Samaria. They entered a shop in Covent Garden, London and locked arms inside a concrete tube on the floor, with the intention of preventing trade. The appellants were subsequently convicted of aggravated trespass on the grounds that they had trespassed in the shop and obstructed its lawful trading activity.

The appellants contented that the sale of the Ahava Dead Sea products was not lawful due to their business activity in the disputed territories.

The Supreme Court unanimously rejected the appeal. On the issue of Ahava’s alleged unlawful acts, the Court found the selling of the products to be legal.

2. French Cases: France-Palestine Solidarité v. Alstom

In France-Palestine Solidarité v. Alstom, the Court d'Appel de Versailles dismissed a suit brought by the PLO and French pro-Palestinian organizations against Alstom and Veolia, French companies that had worked on the Jerusalem light rail project, situated beyond the 1949 Armistice

\textsuperscript{13} Anne Herzberg, Finding IHL: Corporate Due Diligence in Situations of Armed Conflict (forthcoming March 2020)

\textsuperscript{14} Richardson v. Director of Public Prosecutions, [2014] UKSC 8 (Eng.)
Lines (disputed territories). The plaintiffs argued that the defendants violated several international treaties, including the Geneva and Hague conventions. The court found that the defendants' business activity did not violate any international treaties. On the contrary, "The Occupying Power may, and is even obliged to reestablish normal public activity in the occupied country and to carry out all of the administrative measures regarding activities generally carried out by state authorities."16

The Court found that the public international law conventions did not apply to private companies and thus did not prohibit foreign economic activity in the territory. Moreover, even if the relevant laws of occupation did constitute jus cogens, they do not bind private entities and did not give aggrieved party any right to claims in domestic court.

3. **US: The Caterpillar Cases**

In 2005, the family of Rachel Corrie, an anti-Israel activist who was accidentally killed while protesting IDF demolition of a Palestinian home, brought a suit against Caterpillar Inc before a Washington District Court. Caterpillar Inc. was the company that supplied the bulldozers to the Israeli army. The plaintiffs argued *inter alia* that Caterpillar had committed war crimes because it knew that its bulldozers would be used for home violation, a practice that the plaintiffs charge violates the Geneva Convention.

The Court dismissed the suit, noting *inter alia* that "the Geneva Convention is not "self-executing," that is, it does not expressly or impliedly create a private claim for relief." It also noted that only individuals acting under official capacity could potentially violate international law. The suit was determined to be an inherently political question, relating to the foreign relations of the United States, and as such was beyond the jurisdiction of the Court. This analysis was upheld by the 9th Circuit's Court of Appeal.18

4. **Canada: The Bil'in Case**

The heirs of a Palestinian landowner and the council of the Palestinian town of Bil'in sued two Canadian construction companies in Quebec active in the disputed territories, charging them with complicity in Israeli war crimes. The Superior court scrutinized three prior decisions by the Israel High Court of Justice ("HCJ") between the same parties regarding the same individual settlement and upheld the HCJ's prior ruling as fair and valid. The court agreed with the HCJ that the question of the legality of Israel's settlement policy in general is non justiciable due to its predominantly political nature. Finally, the court dismissed the suit, ruling that Quebec was a *forum non conveniens* and referred the parties to the Israeli court. The court deferred to the HCJ, recognizing that independence of the Israeli judiciary and that Israel is a state that abides by the rule of law.

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15 Cour d'Appel [CA] [regional court of appeal] Versailles, Mar. 22, 2013, No. 11/05331 (Fr.)

16 Page 19


18 U.S. Court of Appeals (2007): Corrie et al v. Caterpillar Inc., 503 F.3d975 (9th Cir. 2007)

19 Bil'in (Village Council) v. Green Park International Ltd., 2009 QCCS 4151

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F. Anti-Discrimination Laws and anti-boycott laws

To date, 28 American states have passed laws against the Boycott, Sanctions, Divestment ("BDS") movement\(^\text{20}\). While the laws differ in various jurisdictions, they prohibit companies engaging in the boycott of Israel from contracting with the state government or receiving government funding. Compliance with anti-Israel boycotts can result in the loss of tax benefits and business opportunities. These laws apply not only to companies incorporated in these jurisdictions, but also foreign companies operating in them. Thus far companies that were included, or were in the process of examination in the State lists of boycotters have suffered, or stood to suffer, major economic lose, in some cases, the estimated loss amounted to hundreds of millions of dollars.

On March 2\(^\text{nd}\), the US State Department issued a statement condemning the database\(^\text{21}\). The US committed itself to taking steps to counter efforts related to the list and called on UN member states in repudiating the database. The Department of State urged American companies targeted with intimidation or harassment on the basis of including in the database to contact the Bureau of Economic and Business Affairs, Office of Commercial and Business Affairs.

As shown above, national courts have repeatedly ruled that companies carrying out economic activity in the disputed territories are acting within their legal rights. Furthermore, economic activity in territories considered to be under occupation is a widespread international practice. In contrast, the HRC's blacklist uniquely singles out Israel to damage the legitimacy of law-abiding companies and to cause them reputational and economic damage. Companies that may be threatened to preemptively cut or limit ties to Israeli communities in the disputed territories should remember that this may violate local anti-discrimination law.

Companies operating in Israel need to comply with Israeli law prohibiting discrimination based on geographical location. Therefore, if goods and services are provided in Israel, it is legally, but also practically impossible to limit its geographical scope within the country.

In addition to Israeli law, boycotting Israeli goods is impermissible discrimination, in most jurisdictions, because it targets people and business solely due to national origin - due to who they are, not due to specific conduct or good quality. Many countries have laws against discrimination in the provision of goods and services based on certain grounds, such as ethnic, religious, national criteria.

It is unlawful to discriminate based upon national origin. However, there is a further serious


element of discrimination, indeed racism, in boycotting Israel without boycotting the many
other countries whose policies can be criticized with as much, or far more justification.

For example, in the Willem case, the European Court of Human Rights (ECHR) ruled that the
call to boycott Israel was not protected as political expression but was rather incitement to
commit a discriminatory act. The decision involves the case of a French mayor who an-
nounced his intention to boycott Israeli goods in his municipality. As a mayor acting in his of-
cial capacity, the call cannot be considered to fall within the realm of protected free speech.

As previously mentioned, reports by the Kohelet Policy Forum demonstrate that major inter-
national corporations operate in territories considered to be occupied, such as the Western
Sahara, Nagorno-Karabakh, Northern Cyprus and Crimea. Restricting or banning Israelis
goods, while ignoring goods and services originating in a similar conflict zone, is therefore unlawful
discrimination.

France has the most extensive anti-discrimination laws covering calls to boycott. France’s high-
est court has found promoters of anti-Israel boycott guilty of inciting hatred and discrimination.
In 2009 and 2010, several individuals distributed flyers calling for the boycott of Israel goods at
a supermarket in Mulhouse. The court imposed a collective fine of $14,500 for the boycott
promoters. The Court of Cassation, France’s highest court, rejected their appeal based on free
speech, citing the Freedom of the Press law, which prescribes imprisonment or a fine of up to
$50,000 for parties that “provoke discrimination, hatred or violence toward a person or group of
people on grounds of their origin, their belonging or their not belonging to an ethnic group,
a nation, a race or a certain religion.” In 2003, France passed the Lelouche law which ex-
tended anti-racism laws to prohibit discrimination based on national origins. Several boycott
activists have been prosecuted based on the Lelouche law as well.

According to ACOM (Action and Commitment on the Middle East), their legal initiatives have
led to the reversal or annulment of over 60 boycott resolutions in Spanish public bodies. In
these cases, the Spanish courts ruled that the boycott resolutions violate principles of equality
and non-discrimination in the Spanish constitution. The courts also noted that the prerogative
to impose boycotts on foreign states was outside of the jurisdiction of local councils. In Sep-
tember 2019, the Contentious Administrative Court in Pamplona ruled against an anti-Israel
boycott approved by the Pamplona city hall. The Court ruled that the boycott “violates the
principles of neutrality and objectivity that must govern the management of the public interest,
Article 103 of the Constitution and Article 6 of the Local Government Law... it being clear that

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22 Willem v. France, no. 10883/05, ECHR, 2009
23 "French High Court: BDS Activists Guilty of Discrimination" http://www.timesofisrael.com/french-
high-court-bds-activists-guilty-of-discrimination/
24 "French courts treat BDS as hate crime", https://brandeiscenter.com/french-courts-treat-bds-as-a-
hate-crime/
25 "ACOM: Action and Communication on Middle East" https://a-com.es/en/new-legal-blow-to-bds-
elai-ruling-against-the-city-hall-of-sabinanigo/
said declaration creates an unjustified discrimination against the State of Israel and the Israelis; a discrimination that violates the right to equality expressed in Article 14 of the Spanish Constitution.”

The Lawfare Project has a record in Spain of 67 interim injunctions, judgments, and appellate decisions in anti-boycott proceedings where courts have ruled that boycott decisions passed by local authorities against Israeli businesses, artists, academics, or athletes, or against companies that trade or invest in Israel or companies chartered or operating in this state fetter and breach essential constitutional freedoms, are blatantly discriminatory, chill the exercise of free speech by individuals who engage in public tenders, and lie beyond the authority of city, provincial, and regional councils. Courts have also rejected any binding effect to the resolutions of the resolutions of the United Nations Human Rights Council, and refused the notion that local government authorities agencies might enjoy free speech rights that might support boycotts.

It is important to note that the adoption of CSR policies do not justify or allow discriminatory boycotts. In 2017, Danske Bank, Denmark’s largest bank, published a list of companies that it would not invest in due to conflicts between Danske’s CSR program and the activities of the listed companies. Danske acknowledged that its exclusion of Elbit, an Israeli security technology company, stemmed from political calculations, namely opposition to the company’s work on Israel’s security wall

No other company was included in Danske's Exclusion List on the basis of supplying electronic equipment used in border defense, despite the existence of at least 65 national border walls. Danske's exclusion of Elbit followed heavy BDS campaigning against investment in the company.

In 2017, the State of Colorado Public Employee Retirement Association notified Danske that its policy violated Colorado's anti-boycott laws and it would thus be subject to divestment. Danske acknowledged that it boycotts two Israel companies, Elbit and Aryt Industries Ltd. Clearly, CSR programs do not justify discriminatory business practices.

G. **Public Procurement Policy**

1. **Government procurement and transnational companies.**

Government procurement is subject in most Western jurisdictions to the Agreement on Government Procurement (1994) (GPA) signed in Marrakesh on 15 April 1994 — at the same time as the Agreement Establishing the World Trade Organization. The Agreement, ratified by European Union, the United States, and Israel, applies to tenders above certain thresholds to procuring entities — central, sub-central and local entities as well as other entities listed in Annexes

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1 to 3 (in the EU, bodies governed by public law)— independently of the place of the contract performance.

A fundamental principle WTO Agreement on Government Procurement is non-discrimination. Procurement covered by the agreement must receive a treatment “no less favourable” than the treatment given by the awarding authority to its domestic products, services and suppliers (Article III:1(a)). Moreover, parties may not discriminate among goods, services and suppliers of other parties (Article III:1(b)). In addition, each Party is required to ensure that its entities do not treat domestic suppliers differently on the basis of a greater or lesser degree of foreign affiliation or ownership as well as to ensure that its entities do not discriminate against domestic suppliers because their good or service is produced in the territory of another party (Article III:2).

There is an exception in the Agreement that allows parties to impose measures necessary to protect public morals (Article XXIII:2). However the protection to protect the public morals in the territory of the awarding authority ought to be necessary, is narrowly interpreted by courts, and should not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

Not only the application of this exception is not meant for Human Rights or international law concerns, it implies both danger of protectionist abuse, and of selective application as similar concerns could be opposed to almost every major trade partner. In addition, the application of an exception base on public morality cannot be extended to tenderers for the engagement of trade with or in Israel, as private sector entities or person do not bear any international legal responsibility for investing or engaging in trade with companies operating in territories under the jurisdiction of Israel nor for ensuring that Israel complies with its obligations under international law.


Member States of the European Union and the European Economic Area (EEA) conduct tenders under harmonized public procurement rules where the principles non-discrimination\(^{31}\) and equal treatment\(^{32}\) are paramount, while the procedures bind contracting authorities to a treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union to those outside the EU or EEA.

Considerations based on international or Human Rights law cannot be introduced on EU or EEA public procurement, nor can the HRC list of transnational corporatations that are allegedly in breach of International Law serve as grounds for exclusion from any tender.

A good case study is the number of city councils in Spain that were persuaded to attempt the introduction of international law and Human Rights concerns in public tenders making an inappropriate use of the provisions of the social considerations allowed in the Directive 2014/24/EU.

Social criteria and fair trade considerations in EU public procurement must both related to the subject matter of the contract, not to the behavior of the company outside the legal grounds for exclusion from tenders, and be of an economic nature related to the specific process of production, provision or trading of the works, supplies or services procured.

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\(^{32}\) Vid Recitals 1, 37, 45, 90, and Articles 56.3, and 76.1 ibid.
Every time those municipal decisions were challenged in court, they faced annulment for breaching principles of non-discrimination principles and equality before the law. Further if possible the breaches of core constitutional principles, even in the hypothesis posed by the boycott campaign of Human Rights compliance by private actors being a valid criteria for excluding economic operators from public tenders, it would request a general and not a selective application limited to Israeli operators or those who trade with them\textsuperscript{33}.

In addition, attempts to introduce International Law, Human Rights considerations, or Corporate Social Responsibility (CSR) standards are foreign to the rules of EU public procurement. The three EU Directives on public procurement set a closed list of exclusion grounds for tenderers\textsuperscript{34}, while requiring for any technical specifications\textsuperscript{35}, selection criteria for economic operators\textsuperscript{36}, awarding criteria\textsuperscript{37}, and special conditions relating to the performance of a contract\textsuperscript{38} that they must linked to the subject-matter of the contract, that is, they must concern to the works, supplies or services to be provided under that contract, and not be related to the conduct of the tenderer if it falls outside the prescribed grounds of exclusion\textsuperscript{39}.

Thus outside, the GATT and WTO Agreements, international law can only allow contracting authorities in EU and EEA Member States to exclude economic operators from participation in a procurement procedure when they fall within the situations allowed by the EU Directives where requirements concerning International Law are the International Labour Organisation (ILO)\textsuperscript{40}.

Corporate social responsibility (CSR) policies if not characterizing the specific process of production or provision of the purchased works, supplies or services are of no consequence in EU public procurement. Contracting authorities are not allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place. Perhaps, the most relevant judgment of the European Court of Justice is one of May 12, 2012 of the Third Chamber in the case C-368/10, European Commission v Kingdom of the Netherlands\textsuperscript{41} (105 to 112) which has served as the basis on this matter for the Directive 2014/24/EU (particularly, Recital 97). The judgment declared that the ‘criteria of sustainable purchasing and socially responsible business’ is not connected to the closed lists the factors on the basis of which the contracting

\textsuperscript{35}Vid Article 42 ibid.
\textsuperscript{36}Vid Article 58 ibid.
\textsuperscript{37}Vid Article 67 ibid.
\textsuperscript{38}Vid Article 70 ibid.
\textsuperscript{39}Ground of exclusion from EU tenders according to Article 57 Directive 2014/24/EU, are participation in a criminal organization, corruption, fraud, terrorist offences or offences linked to terrorist activities, money laundering or terrorist financing, child labour and other forms of trafficking in human beings, breach of the obligations relating to the payment of taxes or social security contributions, bankruptcy, insolvency or winding-up proceedings, grave professional misconduct, entering into agreement distorting competition; conflict of interest, significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, serious misrepresentation, and unduly influence the decision-making process of the contracting authority.
\textsuperscript{40}Vid Recital 98 ibid.
\textsuperscript{41}http://curia.europa.eu/juris/document/document.jsf?text=&docid=122644&pageIndex=0&doctype=en&mode=lst&dir=&occ=first&part=1&cid=8270862
authority may evaluate and assess the technical and professional abilities of the tenderers, nor it complies with the principle of transparency.

H. The Case of Airbnb

The case of Airbnb illustrates the legal challenges facing companies tempted to divest from disputed territories. In November 2018, Airbnb announced that it would no longer list properties in Israeli communities in Judea and Samaria. This was ostensibly part of a larger policy regarding listings in disputed territories although no other territories besides Judea and Samaria were delisted.

Airbnb’s decision to boycott Jewish communities in Judea and Samaria came after years of coordinated pressure by anti-Israel groups. A coalition of pro-Palestinian groups called Stolen Homes Coalition, including extremist groups such as Codepink, American Muslims for Palestine, US Campaign for Palestinian Rights and Jewish Voice for Peace, lead a sustained campaign against Airbnb. The day before Airbnb announced its new policy, Human Rights Watch (“HRW”) released a publication entitled “Bed and Breakfast on Stolen Land”, accusing Airbnb of profiting of Israel’s occupation and calling for the company to delist Jewish communities in Judea and Samaria.

As mentioned above, 28 American states to date have passed local anti-boycott laws, with 17 states explicitly incorporating boycotts of Judea and Samaria in the definition of BDS activities.

Upon Airbnb’s announcement of its new boycott policy, several legal measures were taken against the company. These included efforts to hold Airbnb accountable for its violation of state anti-BDS laws. Moreover, the company faced numerous lawsuits in Israel and the United States. A class action suit was filed against Airbnb in the Jerusalem District Court on behalf of home owners in Judea and Samaria denied use of Airbnb’s services. The Israeli suit was based on the Law against Discrimination in Products, Services, Places of Entertainment and Public Places - 2000. The law forbids discrimination based on place of residence and ensures that any company wishing to do business in Israel must provide service to residents of the disputed territories.

Another suit was filed against Airbnb by aggrieved Israeli-American citizens in Delaware, where the company is incorporated. The aggrieved parties claimed that Airbnb’s policy violated the provisions of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968. According to the complaint, “Airbnb’s decision to remove listings “in Israeli settlements in the occupied West Bank” discriminates against Jews and/or Israelis on its face and in effect on the basis of race, religion and national origin,” while allowing non-Jewish residents of Judea and Samaria to list their properties.

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42 https://news.airbnb.com/listings-in-disputed-regions/
43 https://jewishvoiceforpeace.org/airbnb-victory/
bank-settlements
46 https://www.nevo.co.il/law_html/Law01/018m1k1_001.htm
47 https://ccrjustice.org/sites/default/files/attach/2019/03/6_12-21-18_Amended%20Com-
plaint%20Silber%20v%20AirBnB%20web.pdf
Additionally, Airbnb faced a third lawsuit in California, similarly based on the discrimination against Jewish citizens of Judea and Samaria. The lawsuit alleged that Airbnb’s policy violated the federal Fair Housing Act, California’s Fair Employment and Housing Act, California’s Unruh Civil Rights Act and California’s unfair competition law. The suit noted that “the anti-Jewish Discriminatory Policy adopted by Airbnb contravenes federal and state law, and is repugnant to the core values and mores of the United States and the State of California. This is especially true now, when anti-Semitism is resurgent throughout the United States and the world. ... Accordingly, this action seeks declaratory relief that the Airbnb Discriminatory Policy violates applicable federal and state law and injunctive relief prohibiting Airbnb from enforcing its newly enacted Discriminatory Policy.”48

Airbnb also faced arbitration claims brought by the International Legal Forum and the Zionist Advocacy Center in New York State, under New York’s anti-discrimination laws.

Subsequently, Airbnb reached a settlement in all lawsuit and arbitration claims49 and reversed its discriminatory policy50.

Airbnb, despite acknowledging the legality of its business activities in Judea and Samaria, capitulated to the anti-Israel campaign. Quickly, Airbnb faced numerous legal challenges, and eventually rescinded its policy.

Conclusion

Companies operating in the disputed territories do so legally. This has been repeatedly upheld by various legislatures, judiciaries and international forums. The HRC seeks to target and de-fame private businesses acting within the law and to harm their economic interests and to encourage others to do so by acting in reliance on the database. The HRC has no legal mandate to interfere in the private economy and companies are under no obligation to cooperate with the HRC. Economic activity in territories considered occupied is a widespread international practice and has long been recognized as legal. The HRC has never considered targeting companies operating in other areas of belligerent occupation around the world. As such, companies that seek to divest of economic ties with Israeli communities in the disputed territories may run afoul of national anti-discrimination laws. The case of Airbnb shows the steep legal price that companies discriminating against Jewish residents of the disputed territories may pay. Those who act on the database are at risk of adverse legal, regulatory and reputational consequences.

49 https://www.jta.org/quick-reads/embargoed-airbnb-will-cancel-its-ban-on-west-bank-settlement-listings
50 https://news.airbnb.com/update-listings-disputed-regions/
We, the undersigned,

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