



Response to the United Nations Human Rights Council's (HRC) Database (blacklist)

A Legal Perspective

This introductory document is a summary of facts and legal challenges relating to the UN Human Rights Council (HRC) blacklist which should be known and fully considered by relevant parties.

The full legal analysis can be supplied upon request.

Background:

On 12 February 2020, the UN Office of the High Commissioner for Human rights, the bureaucratic arm of the HRC, published a database on companies purportedly operating in Judea, Samaria, and east Jerusalem ("the **disputed territories**"). The database lists 112 companies ostensibly involved in certain defined economic activities in the disputed territories. These include **companies that do not actively "operate" in the disputed territories**; rather, their goods and services are also sold there. The only way, therefore, for them to avoid being blacklisted would be to end operations in Israel altogether. As such, the database is essentially aimed at a full-scale boycott of Israel.

1. The HRC actions are *ultra vires*

The database is punitive in nature, with the express purpose of pressuring businesses to cut economic ties with the disputed territories and to thus put pressure on Israel¹. 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 sanctions mechanism against Israel.

2. The HRC is engaged in selective prosecution

The HRC, well-known for its long-standing anti-Israel bias, has engaged in an act of selective prosecution against Israel. The desire to establish a database only with respect to business activity in Israeli-Jewish communities confirms the HRC's well-known politically oriented hostility towards Israel.

3. The HRC's harmful interference in the international economy

Given that the HRC has no jurisdiction, mandate, or precedent to advance politically and discriminatory agendas, especially by naming and shaming companies. The database sets a dangerous precedent of international organizations setting up obstacles implementing damaging economic policies.

¹ Human Rights Watch, "UN Settlement Business Data can stem abuse", <https://www.hrw.org/news/2017/11/28/israel/palestine-un-settlement-business-data-can-stem-abuse>

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; Therefore, 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 or with Israeli entities in the future.

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

4. The database was not composed with any accepted and objective standards

The HRC database was not compiled using any objective standards or criteria, often relying heavily on BDS NGOs². 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 appeals mechanism, nor were safeguards implemented for confidential business information.

5. Companies operating in the disputed territories do so legally

Businesses operating in the disputed territories, under Israeli jurisdiction in accordance with existing Israel-Palestinian agreements, are entirely lawful under Israeli law, international agreements and the domestic laws of the businesses' home countries. Recent court decisions in the UK³, France⁴ and the US⁵ affirm that that international law does not prohibit economic activity in disputed territory.

6. Business activity in disputed territory worldwide is ubiquitous

The Kohelet Policy Forum has assembled two reports on the economic practices of companies in territories under occupation⁶. The report concluded that every situation of prolonged belligerent occupation in the world involved widespread "settlement" activity⁷, in each case, business enterprises play a large economic role. The world's largest industrial, financial services, transport and other major companies operate, for example, in Moroccan-occupied Western Sahara and Turkish-occupied Northern Cyprus.

7. Complying with the blacklist may violate anti-discrimination and anti-boycott laws

Companies that may be threatened to preemptively cut or limit ties to Israel should be advised that they may violate various anti-discrimination and anti-boycott laws. Boycotting Israeli goods

² 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/>

³ Richardson v. Director of Public Prosecutions, [2014] UKSC 8 (Eng.)

⁴ Cour d'Appel [CA] [regional court of appeal] Versailles, Mar. 22, 2013, No. 11/05331 (Fr.)

⁵ U.S. District Court (2005): Corrie v. Caterpillar, Inc., 403 F.Supp.2d 1019

⁶ *Who Else Profits: The Scope of European and Multinational Business in the Occupied Territories*.

Kohelet Policy Forum, First Report, June 2017, accessed at

https://www.whoelseprofits.org/documents/WhoElseProfits_online.pdf

Who Else Profits: The Scope of European and Multinational Business in the Occupied Territories. Kohelet

Policy Forum, Second Report, November 2018, accessed at

<https://www.whoelseprofits.org/documents/WhoElseProfits-e-version.pdf>

⁷ Eugene Kontorovich, *Unsettled: A Global Study of Settlements in Occupied Territories*, Northwestern

Public Law Research Paper No. 16-20, September 7, 2016, <https://ssrn.com/abstract=2835908> or

<http://dx.doi.org/10.2139/ssrn.2835908>

is impermissible discrimination as it targets people and business solely due to national origin. Laws protecting against such discrimination can be found in most Western judicial systems.

8. The Case of Airbnb

In November 2018, as a preemptive measure before the foreseeable release date of the blacklist in early 2019 (the release date was pushed), Airbnb announced that it would no longer list properties in Jewish communities in the disputed territories. As a result, the company faced numerous lawsuits in Israel and the United States, including a class action based on discrimination and claims based on the violation of the Fair Housing Act, Title VIII of the Civil Rights Act. Subsequently, Airbnb reached a settlement with all plaintiffs.