

Opinion Paper

International law and government responsibilities in relation to the activities of Veolia Corporation in the occupied Palestinian Territories

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1. Introduction

Our first position in this opinion paper is that Veolia's activities in occupied Palestinian territories, and in particular a light rail line on occupied and annexed Palestinian land in East Jerusalem is illegal. The light rail follows mainly the Green Line. Land was confiscated in Shuafat. Additional land was confiscated in Shuafat to make way for a station and car parking. Of greatest concern is that the line connects illegal settlements with West Jerusalem, facilitating Israel's illegal settlements. Palestinians who nonviolently resist the theft of their land are met with further violations, including arbitrary arrest, detention without trial and even torture by the Israeli occupation forces. Our second, related position is that Veolia's involvement in these illegal activities trigger legal obligations in other countries that Veolia operates, including the country of Finland, and particularly in relation to criminal liability and public tendering.

The land on which the light rail is constructed includes East Jerusalem, part of the West Bank, which Israel occupied in 1967.¹ For more than four decades, Israel has been confiscating Palestinian land not for military purposes, effectively annexing West Bank land to expand its territory. This is a serious and direct violation of international humanitarian law. There are now more than 450,000 Israeli settlers in the West Bank, also a serious and direct violation of international humanitarian law, which forbids an occupier from transferring its civilian population to the territory it occupies.

Israel has also committed serious and direct breaches of international humanitarian law by substantially altering the nature of the occupied territory in a way that does not benefit the local (occupied) population.² The light rail project is part and parcel of this, as it is clearly infrastructure designed to benefit the illegal settlements that have been built on stolen Palestinian land.

Veolia has claimed, erroneously, that the light rail is accessible to both Jews and Arabs. However, the Jewish-only settlements and neighborhoods of West Jerusalem where the light rail is built are effectively off-limits for the vast majority of Palestinians. Just as the

1 This section partly draws on: Handmaker, J., 'Dutch bank must disinvest from rights abuse', *The Electronic Intifada*, 18 September 2008.

2 Hague Regulations IV (1907), articles 43 and 55 and Geneva Conventions, Common Article 1.

case with the bypass roads built for the exclusive use of Israeli settlers to the detriment of Palestinians, the light rail was designed to serve Jewish settlers in occupied East Jerusalem and Jewish neighborhoods in West Jerusalem.

In its 2004 Advisory Opinion concerning Israel's construction of a wall on Occupied Palestinian Territory, including East Jerusalem, the International Court of Justice confirmed key existing obligations in international law, including that the Israeli settlements breach international law; the Geneva Conventions (international humanitarian law) are fully binding on Israel, and must govern all Israeli actions in the occupied Palestinian territories; and that Israel's occupation practices violate not only the Geneva Conventions, but also international human rights law.

The Court further declared that all states are obligated "not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction." That same legal reasoning applies to the light rail project.

Accordingly, the Dutch ASN Bank decided in 2006 to exclude Veolia Corporation from its investment portfolio because of Veolia's involvement in the light rail project.³ The bank acknowledged that construction of the light rail was in violation of international law, including United Nations Security Council resolutions that call on Israel to withdraw from the Occupied Palestinian Territories. ASN Bank also determined that the business activities of Veolia were not consistent with the bank's investment standards, which include ethical criteria that are based on well-established international guidelines. The light rail project is inextricably linked with Israel's wide array of human rights abuses. In its efforts to annex Palestinian land, Israel has destroyed Palestinian homes and property and has imposed severe movement restrictions on Palestinians for the benefit of Israel's illegal settler population in the West Bank. These restrictions are particularly dire for Palestinians living on land that falls between Israel's illegally-built wall and the internationally-recognized armistice line separating the West Bank from Israel.⁴

The question of what the legal consequences are for individuals and companies that do business with parties involved in an armed conflict, or what the consequences may be, is, unfortunately, still very much a current one. In the Netherlands this question was most keenly apparent during the Van Anraat case.⁵ But in the Riwal case too it emerged that a Dutch company had strayed too far.⁶

3 ASN Bank, "Verscherping Mensenrechtencriteria", *Spaarmotief*, May 2007; "ASN stoot aandelen Veolia af om werkzaamheden in Israël", *Trouw*, 4 December 2006, available at: <http://www.trouw.nl/tr/nl/4324/Nieuws/archief/article/detail/1694438/2006/12/04/ASN-stoot-aandelen-Veolia-af-om-werkzaamheden-in-Israel.dhtml>.

4 United Nations, "The Humanitarian Impact of the West Bank Barrier on Palestinian Communities: East Jerusalem," Office for the Coordination of Humanitarian Affairs, June 2007, Update No. 7.

5 Frans van Anraat supplied chemicals to Saddam Hussein, who – as we know – used them to murder tens of thousands of Kurds in Northern Iraq. He was given a lengthy prison sentence for complicity and involvement in war crimes.

6 Riwal (Crane hire firm) narrowly escaped prosecution in the Netherlands for its involvement in the construction of the Israeli Wall. In a press statement the Public Prosecutor explained its decision not

The fact that the law, in particular international law, and more specifically still, humanitarian law and human rights, is relevant to everyday business decisions has been confirmed by a growing number of European corporations. On 10 December 2013 Dutch Water Company Vitens announced its withdrawal from a partnership with Israeli water company Mekorot. The partnership was focused on joint marketing of services and international know how. Mekorot plays a key role in plundering Palestinian water resources and providing water services to the settlers in the West Bank. In a press statement Vitens acknowledged that it “[attaches] great importance to integrity and abides by national and international law and legislation”.⁷

We address the complicity of corporations in violations of human rights on the basis of the situation concerning the Israeli settlements in Palestine. Not because this problem would not occur elsewhere⁸ but because the European business community currently has many ties with Israel, and with the Israeli business community.

2. The relevant law

Humanitarian law has been laid down primarily in the Geneva Conventions⁹ and is also set forth in nationally and internationally applicable criminal law. In Europe, there is also the European Convention on Human Rights.

As far as the Israeli occupation of the West Bank including East Jerusalem is concerned, this is an issue on which the Security Council and the United Nations General Assembly, amongst others, have pronounced repeatedly; the consistent meaning of these statements and resolutions being that Israel wrongfully occupied these territories in 1967 and wrongfully continues to occupy them and should leave. Meanwhile, important findings have been reached in this regard by the International Court of Justice in the framework of an *Advisory Opinion* issued by the Court.¹⁰ The Court determined that the Fourth Geneva

to take the matter any further and emphasised: “Dutch companies are required to refrain from any involvement in violations of the International Crimes Act (Wet Internationale Misdrijven) or the Geneva Conventions.”

7 Vitens (2013). *Vitens beëindigt samenwerking Mekorot*. Available on the World Wide Web: <http://www.vitens.nl/overvitens/organisatie/nieuws/Paginas/Vitens-beëindigt-samenwerking-Merokot.aspx>

8 In this context reference is usually made to the occupation by Morocco of the Western Sahara.

9 <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/>

10 *Advisory Opinions* by the International Court of Justice differ from the judgments of the Court since it is not a matter of settling a dispute between two or more states but about answering a question from a body of the United Nations. With such a question other UN bodies can learn from the Court how a specific matter needs to be evaluated properly from a legal perspective. The *Opinion*, in the establishment of which in principle all Member States of the UN are involved, subsequently provides the status of the law in relation to the issue that forms the subject matter of the question. If the Court here has interpreted a Convention this interpretation is therefore just as binding as that Convention itself is for those States that are party to the Convention. The *Opinion* about the Wall, the matter at stake here, moreover clearly illustrates that legally binding character: at the end of the *Opinion* the Court also formulates the specific obligations which arise in this specific case for the Nations concerned from the interpretation of the law issued by the Court.

Convention of 12 August 1949 is applicable to this occupation and that the establishing of settlements in occupied territory shall be deemed to be in direct contravention of this Convention, in particular Article 49, paragraph 6:

“The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”¹¹

For the sake of completeness herewith the text of the relevant provisions:

“Art. 49. – (6) The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

Article 85 (4) of the First Protocol accompanying the Geneva Conventions also states that breach of Article 49 (6) of the Fourth Geneva Convention must be regarded as a ‘grave breach’ of the Protocol and a war crime. Classification as ‘grave breach’ is important because Article 86, paragraph one, imposes the obligation on contracting parties to prosecute for these breaches.

Breach of said Article 49, therefore, also falls within national criminal law as a war crime. States that have ratified the Rome Statute of the International Criminal Court, including Finland, are obliged to bring criminal proceedings against the individual (or company) suspected of such violations. Not only can the alleged perpetrator be pursued but also the person who assists in committing the criminal offence.¹²

The European Union’s “Minister for Foreign Affairs” reaffirmed in 2013 that:

“Settlements are illegal under international law and threaten to make a two-state solution impossible. The EU has repeatedly urged the Government of Israel to immediately end all settlement activities in the West Bank, including in East Jerusalem, (...).”¹³

The EU stance is (formally-speaking) the position also held by most European countries and is frequently reaffirmed. Thus, earlier this year in response to Parliamentary Questions the Dutch Minister for Foreign Affairs affirmed that the Cabinet “[deems] the Israeli settlements as illegal and an obstacle to peace.”¹⁴

11 I.C.J. Reports (2004). *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*. para. 10. <http://www.icj-cij.org/docket/files/131/1671.pdf>

12 For example, the Riwal case.

13 Ashton, C. (2013). High Representative of the European Union for Foreign Affairs and Security Policy. Brussels, 31 May 2013. A 275/13

14 Rijksoverheid (2013a) *Beantwoording Kamervragen over illegale Israëlische nederzettingen*. Available on the World Wide Web: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/01/18/beantwoording-kamervragen-over-illegale-israelische-nederzettingen.html>

Aside from being complicit in violations of humanitarian law, there is also the matter of Veolia's activities breaching the Palestinian people's fundamental human rights, and in particular the right of the Palestinian people to self-determination¹⁵.

3. Legal position of companies who are DIRECTLY involved

Are private companies such as Veolia Corporation liable to uphold these international-judicial standards? The answer to this question is most certainly yes. Moerenhout argues that trade with settlements is in fact prohibited under international law, according to the duty of non-recognition, since the highest rules (peremptory norms) of international law are breached by Israel, the occupying power. This effectively means that states are obliged to withhold from trading with settlements, if such trade primarily benefits the occupying power, which is patently the case concerning Veolia's activities. Accordingly, as Moerenhout argues, states that permit trade with settlements violate their own obligations under international law.¹⁶

Furthermore, the International Red Cross, the initiator and guardian of the Geneva Conventions, says the following on the matter:

“International humanitarian law does not just bind States, organized armed groups and soldiers — it binds all actors whose activities are closely linked to an armed conflict. Consequently, although States and organized armed groups bear the greatest responsibility for implementing international humanitarian law, a business enterprise carrying out activities that are closely linked to an armed conflict must also respect applicable rules of international humanitarian law.”¹⁷

The aforementioned Frans van Anraat is currently serving a lengthy prison sentence, following his sale of chemicals to Saddam Hussain. Accordingly, it is not just about criminal accountability and individual liability but also about liability under civil law. A party that is guilty of breaching humanitarian law or human rights or of assisting in such breaches is acting unlawfully according to civil law vis-à-vis the disadvantaged party. Applied to the Israeli settlements in Palestine: a company involved in perpetuating the (ongoing) existence of these settlements, for example by providing for the public transport needs of settlers, is acting unlawfully under civil law vis-à-vis the disadvantaged parties and, therefore, runs serious risks. The Red Cross has warned:

“business enterprises operating in zones of armed conflict should use extreme caution and be aware that their actions may be considered to be closely linked to

15 This derives from the United Nations Charter as well as articles 1 and 12 of the International Covenant on Civil and Political Rights 1966 (right to self-determination or right to freedom of movement and freedom of establishment).

16 Moerenhout, T. (2013), 'The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories' *Journal of International Humanitarian Legal Studies*, 3(2): 344-385.

17 ICRC (2006). *Business and international humanitarian law*, p. 14. Available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf

the conflict even though they do not take place during fighting or on the battlefield. Likewise, it is not necessary for business enterprises and their managers to intend to support a party to the hostilities for their activities to be considered to be closely linked to the conflict.”¹⁸

Accordingly, it appears very likely that companies such as Vitens and Royal Haskoning DHV had these considerations in mind when they withdrew from settlement-related projects or partners involved in such projects. Royal Haskoning DHV formulated their decision as follows:

“Royal HaskoningDHV has today advised the client it has decided to terminate the contract for the Kidron wastewater treatment plant project. (...) Royal HaskoningDHV carries out its work with the highest regard for integrity and in compliance with international laws and regulations. In the course of the project, and after due consultation with various stakeholders, the company came to understand that future involvement in the project could be in violation of international law.”¹⁹

Many companies go to great lengths in publicly committing to respecting human rights. They do this, for example, by declaring their business activities to be in compliance with the *Guidelines for Multinational Enterprises* of the Organisation for Economic Cooperation and Development (OECD).²⁰ In this connection the so-called Ruggie *principles*, in particular, are also relevant, which specifically state:

“12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”²¹

In the corresponding *commentary* related to Principle 12 it is stipulated that “(...) in situations of armed conflict enterprises should respect the standards of international humanitarian law”, and thus the Geneva Conventions have also been brought under the scope of these *principles*.

Accordingly, the direct involvement of Veolia in violations of international humanitarian law not only violates international humanitarian law, civil law and potentially criminal

18 Ibid.

19 Royal Haskoning DHV (2013). *Royal HaskoningDHV terminates its involvement in the wastewater treatment plant in East Jerusalem*. Available on the World Wide Web: <http://www.royalhaskoningdhv.com/en/news/royal-haskoningdhv-terminates-its-involvement-in-the-wastewater-treatment-plant-in-east-jerusalem/727>

20 Nationaal Contactpunt OESO-richtlijnen (2014). *De richtlijnen in 't kort*. Available on the World Wide Web: <http://www.oesorichtlijnen.nl/oeso-richtlijnen/de-richtlijnen-t-kort>

21 OHCHR (2012). *The corporate responsibility to respect Human Rights: An Interpretive Guide*. Available on the World Wide Web: http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf

law, their activities are also gross violations of the UN Guidelines on transnational corporations and the Ruggie Principles.

4. Legal obligations of governments in relation to tenders by companies violating international humanitarian law elsewhere

Regarding government tenders, according to international law, according to the International Law Commission:

“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”²²

This implies that any publicly funded organ of state – from a national ministry to a municipal office – is obliged to ensure respect for international (humanitarian) law, and thus reject any company involved in violations of international humanitarian law in another country, according to the collective responsibility arising out of the Geneva Conventions.

The duty to refrain from any violations of the kind described above includes not only the duty to refrain from *cooperation* in these violations, but also the duty to do everything possible in order to *bring these violations to an end*.

To be clear, this means that companies complicit in these ongoing violations of international law should not be “rewarded” with public tenders or a joint venture. Based on European rules and by extension most European states’ national rules concerning government tenders, state organs should exclude such companies altogether from the tender procedure on the basis that this would amount to a “serious error”. The violations of law discussed and shared responsibility Veolia for such violations are of such a serious nature that they must be classified as a “serious error” within the meaning of the procurement rules.

Accordingly, Veolia ought also to be excluded from any public tenders as a matter of a state’s international legal obligations.

5. Legal position of companies INDIRECTLY involved (e.g. investors)

The examples of Vitens and Haskoning demonstrate the consequences of *direct involvement* of corporations in maintaining, strengthening and/or expanding settlements in the Occupied Territories. So what would the situation be for corporations that are only

22 Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001).

indirectly involved in these – unlawful - activities? These questions may especially be relevant for the financial sector, including banks, insurance companies and pension funds that are directly or indirectly financing these activities and aim for financial profits as a result.

Clearly the Ruggie *Principles* deal with such situations. The starting point is that if it is established that there are serious adverse human rights impacts due to a company's activities, the corporation (bank, insurance company, pension fund or other investor) should either try to use its influence to end the violations or withdraw from financing them if this would turn out not to be possible.²³

The Ruggie Principles do not differentiate between the position of institutions that are holding either a majority- or a minority-shareholders position in the corporation that is closer to the human rights violations than this particular financial institution. This seems to be only logical since from the perspective of responsibility there would not be a principled difference between one institution holding a smaller part of the shares as opposed to the other being a majority shareholder. This same position has been confirmed by, among others, the Dutch *National Contact Point for the OECD Guidelines for Multinational Enterprises* of the Dutch Ministry of Foreign Affairs.²⁴

The UN *Special Rapporteur on the situation of human rights in the Palestinian territories* provides further legal analysis in his Report of 10 September 2013.²⁵ Financing criminal activities certainly falls within the definition of criminal complicity as long as it is established that the financier was (or should have been) aware of the crimes that are being (or will be) committed. If the indirect activities are considered to constitute complicity under international criminal law, then civil liability for these activities may come into play as well. It is apparently from this perspective that one of the largest Dutch pension funds, PGGM, recently announced that it would withdraw all its investments in five Israeli banks given 'their involvement in financing Israeli settlements in the occupied Palestinian territories'. PGGM added that '[t]his was a concern, as the settlements in the Palestinian territories are considered illegal under international humanitarian law'.²⁶ Clearly PGGM is not the first financial institution to draw these conclusions. As mentioned earlier, already in 2006 the Dutch ASN Bank withdrew its investments from Veolia for similar reasons. In his Report, the UN Special Rapporteur, Prof. Richard Falk, provided a list of Funds that preceded the PGGM decision:

23 Ibid.

24 "Final Statement", September 2013, Section 3.4.
<http://www.oesorichtlijnen.nl/sites/dev.oesorichtlijnen.nl/files/final-statement-somo-bothends-apg-abp2.pdf>

25 Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Report to sixty-eighth session of General Assembly, A/68/376, 10 September 2013, para 41
<http://unispal.un.org/UNISPAL.NSF/0/296CF21249B48B5B85257C0D00684C44>

26 PGGM – Statement regarding exclusion of Israeli banks, 8 January 2014,
<https://www.pggm.nl/english/what-we-do/Documents/Statement%20PGGM%20exclusion%20Israeli%20banks.pdf> In its Statement PGGM explicitly referred to the Advisory Opinion of the International Court of Justice with respect to The Wall.

“In relation to civil liability, certain financial entities have demonstrated an increasing awareness of corporate social responsibility and the potential legal ramifications relating to Israeli settlements. The Norwegian Government Pension Fund Global excluded the construction company Shikun & Binui because of its involvement in the construction of settlements. The Ethical Council of four of the largest pension funds in Sweden excluded Elbit Systems because of its involvement in the construction and maintenance of the wall. The New Zealand Government Superannuation Fund divested from Elbit Systems, Africa-Israel Investments Limited and its subsidiary Danya Cebus, and Shikun & Binui because of their participation in either the construction of settlements or the wall.”²⁷

6. Illegality and Investor Risk Analysis

A final point we wish to underline concerns the consequences of participating in illegality, from an investor’s business-risk analysis point of view.²⁸

As mentioned above, the Dutch pension fund PGGM announced their reasons for divesting in five Israeli banks as being related to “their involvement in financing Israeli settlements in the occupied Palestinian territories. This was a concern, as the settlements in these occupied territories are considered illegal under international humanitarian law.”

It is notable that, in the case of PGGM, Vitens and Royal Haskoning, all these Dutch companies pointed to international law as justification for their decision to suspend their business activities, which were clearly also perceived as an economic risk. Once again, the Dutch ASN bank had earlier set a precedent by divesting from Veolia corporation on the grounds that the activities of that company violated United Nations Security Council resolutions.

Investments in illegal activities enable these violations of international law to continue, as confirmed by the 2004 advisory opinion of the ICJ mentioned earlier. Most importantly, the Court concluded that states must not only refuse to directly contribute to these violations, but must “consider further actions” to try and bring about an end to this illegal situation. Politicians, social advocates and prominent legal commentators such as John Dugard and John Reynolds have described these violations, taking place in a situation of belligerent occupation as amounting to the international crime of apartheid.²⁹

As a consequence of investing in the illegal activities of Israeli banks, G4S, Veolia and other companies complicit in Israel’s violations of international law, ABP is taking a

27 *Ibid*, para. 46

28 This section partly draws on: Handmaker, J., Arts, K and Van Staveren, K., ‘Dutch firm’s settlement investments violate the law and must end’, *The Electronic Intifada*, 18 February 2014, a version of which was also published in the Dutch *Fincancieele Dagblad*.

29 Dugard, J. and Reynolds, J. (2013). ‘Apartheid, International Law, and the Occupied Palestinian Territory’. *European Journal of International Law*. 24, 867-913.

major economic risk. More specifically, the economic consequences of investing in an illegal situation directly contributes to a situation of social and political instability, which could ultimately result in confiscation of assets and/or forced divestment as the result of an eventual political settlement, or as the outcome of a global boycott.

We recall a similar situation in South Africa. In 1986, companies such as Hewlett-Packard, Barclays Bank and General Motors were forced to suspend their activities and withdraw their investments in South Africa. These actions followed a citizen-led campaign to boycott banks and corporations' complicity with the South African apartheid regime and numerous violations of human rights in that country.

Convinced of this growing economic risk, an increasing number of European investors, including PGGM and ASN Bank as well as Danske Bank, the government pension fund of Norway and others have withdrawn their investments that relate to Israel's business activities in the occupied Palestinian territories.

Finally, the Dutch Association of Investors for Sustainable Development (VBDO), in a 2014 report, has noted that many pension funds and investors "fail to adequately apply guidelines on international law and human rights" with respect to investments linked to the occupied Palestinian territories ("Dutch Institutional Investors and Investments related to the Occupation of the Palestinian Territories," February 2014.³⁰

7. Concluding statement

On the basis of the aforementioned arguments, we conclude that the activities of Veolia Corporation in settlement activities in the occupied territory of the West Bank are illegal, incurring possible criminal charges, civil liability and compulsory exclusion from public tendering. They are also very risky investments. Especially in the current, global economic climate, investors should not be taking such business risks.

30 Report VBDO (2014), available at:
<http://www.vbdo.nl/files/download/1318/VBDO%20Dutch%20Institutional%20Investors%2007.pdf>