

Boycotts, Funds, and Class Actions: Democratic Imperative Mechanisms against Corporate Complicity in Human Rights Violations

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*You climb a peak, you think you're at the top – and then you notice there is a bigger peak right beyond it, and you've got to climb that one. That's what popular struggle is like. And that's lacking. Our quick-gratification culture is not conducive to that kind of commitment.*¹

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¹ NOAM CHOMSKY, POWER SYSTEMS: CONVERSATIONS WITH DAVID BARSAMIAN ON GLOBAL DEMOCRATIC UPRISINGS AND THE NEW CHALLENGES TO US EMPIRE 31 (2013).

I. Introduction

Popular struggle, as Chomsky reminds us, is a long arduous journey with many ups and downs. Just as one success appears, another eludes us in the distance, dampening any sense of achievement. One of the longest and hardest popular struggles is the Palestinian people's right to recognition and protection of fundamental human rights, including the right to an independent state. Palestine's accession to the Rome Statute of the International Criminal Court (ICC) and the granting of observer status in the United Nations (UN) General Assembly are welcomed and long overdue developments towards eventual universal recognition.

Yet Israeli repressive and violent practices continue and, in one form or another, are facilitated by corporations. Corporations concerned about shareholder profit maximization are becoming increasingly aware of stakeholder rights. Each and every one of us, as a consumer of goods and services, has the potential to bring pressure on corporations to change their behavior. Corporations are under pressure to prevent reputational damage and loss of profits through exposure of business dealings and consumer boycotts of goods and services. Closer public scrutiny also leads to ethical investment of public funds and may lead to legal action against corporations engaged in unethical practices.

Chomsky's lament about "weekend protestors" belies the daily news of protests around the world, suggesting commitment to protest exists but is now being used more strategically. Information technologies enable efficient cross-border communication between individuals and groups creating networks for mobilization of protest, which we can refer to as 'protest networks'. The common theme of public participation in protest networks can be referred to generally as 'the democratic imperative'. This paper argues that the democratic imperative is evident in three specific mechanisms aimed at changing corporate behavior: the Palestinian Boycott, Divestment and Sanctions Movement (BDS); the Norwegian Government Pension Fund Global (the Fund); and consumer class actions. It analyses the extent to which these mechanisms have achieved corporate compliance to prevent complicity in human rights violations, and considers whether they represent agents for change.

II. Understanding the Nature of Corporate Complicity

Problems exist under international law in relation to establishing liability of corporate entities for human rights violations and crimes against humanity in both determining whether they face criminal or tortious liability and whether lack of enforcement by an international judicial body. National laws vary with many jurisdictions recognizing only individual corporate official liability and a few recognizing corporate criminal liability of entities.

Corporations providing goods or services (*e.g.* technological know-how, computing software, military and non-military equipment, telecommunications networks) may be implicated in subsequent harm caused from their use. By entering business dealings with governments using such goods or services to cause violations of fundamental human rights, corporations risk being held liable for complicity in international crimes, if the violations are serious to constitute war crimes or crimes against humanity. However, this is very much on the basis of individual criminal responsibility. Complicity occurs when a person knowingly helps another commit a crime. Under international criminal law, a person will be held criminally responsible for aiding and abetting where, for the purpose of facilitating the commission of a crime, he aids, abets or otherwise assists in its commission or attempted commission,

including providing the means for its commission.² Practical assistance, encouragement or moral support, which has a ‘substantial effect’ on perpetration of the crime is required.³ The form of facilitation need not cause or be a basis for commission of the crime (it does not need to be in the same location as the principal crime) and, crucially, can occur before, during or after the principal crime has been committed.⁴ What amounts to ‘substantial effect’ is determined by the facts of each case and contributing resources has been considered as ‘practical assistance’ with a substantial effect on the commission of crimes.⁵ Thus, corporations can be providing goods or services to a government in one country that uses these to commit crimes in another.

Corporations can find themselves in many different scenarios where they are not the cause of the principal perpetrator’s crime, but the facilitator for its continuation. There are different ways of identifying such complicity or facilitation role. Generally, a corporation ‘facilitates’ when its conduct makes it easier to carry out adverse impacts, or changes the way adverse impacts are carried out (including methods used, the timing or their efficiency).⁶ The South African Truth and Reconciliation Commission (STRC) concluded that businesses played a crucial role in sustaining the apartheid regime through three levels of involvement: “first-order involvement” companies actively designed and implemented apartheid policies (*e.g.* mining industry implementing migrant labor system);⁷ “second-order involvement” companies knew the state would use their products or services for repressive purposes (*e.g.* banking provision of credit for repressive security operations and armaments industry supply of equipment used for human rights abuses);⁸ and “third-level involvement” companies engaged in ordinary business activities indirectly benefitting from the apartheid structure.⁹

Dugard and Reynolds argue for a crime of apartheid approach to understand legal and political consequences of Israeli human rights violations and crimes against humanity against Palestinians.¹⁰ This is a useful paradigm as it avoids the subjectivity in interpretation and application of international humanitarian law, and connects to a historical injustice in the form of the apartheid regime in South Africa that caused widespread condemnation among states and the global public. Apartheid is an internationally wrongful act that incurs state responsibility to cease and make reparations. It is also an international crime whose perpetrators can be prosecuted in national and international courts, with the wider ramification of galvanizing public outrage to bring about change in state policies and corporate

² Rome Statute of the International Criminal Court art. 25(2)(c), July 17, 1998, 2187 U.N.T.S. 3 [*hereinafter* Rome Statute]. See also Statute of the International Criminal Tribunal for the former Yugoslavia art. 7(1), U.N. Doc. S/25704 (May 3, 1993); Statute of the International Criminal Tribunal for Rwanda art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the Special Court for Sierra Leone art. 6(1), U.N. Doc. S/2002/246 (Jan. 16, 2002).

³ See, *e.g.*, Zyklon B Case, 1 L. Rep. Trials War Crim. 92-102 (Brit. Mil. Ct., Hamburg 1946); Roehling Case, 14 Nuremberg Trials War Crim. 1085-1089 (1946-1949); Public Prosecutor v. Van Anraat, LJN AX6406, District Ct. The Hague Dec. 23, 2005 (Neth.).

⁴ Prosecutor v. Blaškić, Case No. IT-94-14, Judgment (Appeals Chamber), ¶ 48 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

⁵ Blagojević & Jokić, Case No. IT-02-60, Judgment (Appeals Chamber), ¶ 134 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007).

⁶ International Commission of Jurists, *Corporate Complicity and Legal Accountability Vol. I: Facing the Facts and Charting a Legal Path, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (Jan. 1, 2008), at 12-13, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>.

⁷ Report of the Truth and Reconciliation Commission of South Africa Report (Vol. 4) (Oct. 29, 1998).

⁸ *Id.*, 25-26 & 36-37.

⁹ *Id.*, 26-28.

¹⁰ John Dugard & John Reynolds, *Apartheid, International Law and the Occupied Palestinian Territory*, 24 EUR. J. INT’L L. 867 (2013). See also John Dugard, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007).

behavior. As Dugard and Reynolds note, “the significance of apartheid lies not just in the strength of its legal prohibition, but in the political purchase that it carries”.¹¹ None of the soft law instruments regulating business, human rights, and investment specifically identify the crime of apartheid, which on the face of it appears problematic for risk identification and assessment of divestment decisions.¹² However, it is now established law and practice that apartheid constitutes a crime against humanity, is abhorrent to human conscience and contrary to fundamental human rights. Thus, it falls within the category of fundamental ethical norms used by the Norwegian Government Pension Fund Global to assess whether certain companies should be part of its investment portfolio.

Precedent for corporate complicity in international crimes dates back to the post-World War 2 Nuremberg Tribunals with the prosecution and conviction of German businessmen assisting Nazi Germany.¹³ In 2004, a Dutch export broker involved in delivering thiodiglycol (a substance used for creating mustard gas) to Iraq was convicted of being an accomplice to war crimes.¹⁴ These cases show how corporations involved in manufacturing, financial services and telecommunications can provide governments with industrial and financial support in committing war crimes and crimes against humanity. But they are limited to establishing individual criminal responsibility of corporate officials rather than corporate criminal liability. The national criminal laws of certain states allow for prosecution of corporations as legal entities, but not all jurisdictions recognize the concept of corporate criminal liability. Post-Nuremberg international criminal tribunals have focused on individual criminal responsibility, although this may change with renewed commitment by the ICC Prosecutor to investigate business institutions responsible for contributing to international crimes.¹⁵

Arguably, liability should not focus on individual corporate officials or even senior officials, who sign or negotiate contracts, but on the corporate entity for ‘organizational failure’. To make corporations act responsibly and remain accountable for their business dealings, international criminal law could develop corporate criminal liability based on ‘organizational failure’ (*i.e.* corporate culture and practices facilitating commission or participation in crimes)¹⁶ or strict vicarious liability (*i.e.* assumption of corporate liability for failings, whether committed by individual employees or not, leading to commission or participation in crimes).¹⁷ This would highlight the importance of international crimes and avoid opaque corporate practices scattering responsibility so widely and loosely that it becomes elusive or nonexistent.¹⁸ It would also avoid difficulties in applying the doctrine of identification used

¹¹ Dugard & Reynolds, *id.*, 913.

¹² See, e.g., UN Global Compact, *Ten Principles* (2000), <https://www.unglobalcompact.org/what-is-gc/mission/principles>; International Working Group of Sovereign Wealth Funds, *Generally Accepted Principles and Practices (GAPP) — Santiago Principles* (Oct. 2008) [*hereinafter* GAPP]; UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (2011); OECD, *Guidelines for Multinational Enterprises* (2011).

¹³ U.S. v. Krupp, 8 L. Rep. Trials War Crim. (1948); U.S. v. Carl Krauch, 8 L. Rep. Trials War Crim. (1948); U.S. v. Friedrich Flick, L. Rep. Trials War Crim. (1947). See also Zyklon B Case, *supra* n3.

¹⁴ Public Prosecutor v Van Anraat, *supra* n3.

¹⁵ ICC Prosecutor reaffirms commitment to investigating the link between business and international crimes at the Paris Conference on international corporate liability in conflict zones, GLOBAL DILIGENCE (Mar. 21, 2013), <http://www.globaldiligence.com/icc-prosecutor-reaffirms-commitment-to-investigating-the-link-between-business-and-international-crimes-at-the-paris-conference-on-international-corporate-liability-in-conflict-zones-21-march-2013/>. See also Joanna Kyriakakis, *Developments in international criminal law and the case of business involvement in international crimes*, 94 INT. REV. RED CROSS 981 (2012).

¹⁶ See Corporate Manslaughter and Corporate Homicide Act, 2007, 19 (U.K.); Criminal Code Act, 1995, No. 12 (Austl.), liability based on corporate culture actively encouraging or tolerating noncompliance, or failing to promote compliance.

¹⁷ See e.g., the federal laws of the US regulating the conduct of corporations; Health and Safety at Work Act, 1974, 37 (U.K.).

¹⁸ See, generally, CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2001).

in some jurisdictions to identify a person or persons of the company with the ‘directing mind and will’ to commit crimes.¹⁹ It may even incentivize a rebalancing of corporate due diligence to avoid potentially harmful business dealings instead of profit maximization and after-the-event damage limitation

These international and national legal deficiencies cannot tackle the imbalance between multinational corporations exerting economic and political power over states, and the democratic imperative that elected representatives act in the wider public interest. Yet, in this legally uncertain terrain, the democratic imperative is being pushed to the forefront by a combination of non-legal and legal mechanisms aimed at corporate compliance. The more evidence that emerges on corporate complicity in human rights violations, the greater the call will be for accountability and action. The longer matters remain unresolved and unchanged, the more likely people will become disaffected and indifferent to formal decision-making processes and seek alternative ones.

III. Protest Networks and the Democratic Imperative

‘Protest networks’ are individuals and groups, enabled by cross-border communication, creating networks for mobilization of protest. Referred to as “an alternative network of relations”,²⁰ “the networked revolution”²¹ and “transnational advocacy networks”,²² they represent alternative decision-making processes which can place corporations under greater public scrutiny to bring about change in corporate behavior. Not dependent on elected representatives and operating parallel to formal decision-making processes, protest networks depend on voluntary public participation that we can refer to as ‘the democratic imperative’. The democratic imperative is about elected representatives acting on behalf of the public and in the public interest when dealing with corporations and, if this fails, alternative methods of public scrutiny and action against corporations. Consumer boycott campaigns, sovereign wealth fund investments and class actions against corporations all represent the democratic imperative in action with varying degrees of protest network involvement. Some have argued that human rights protest networks occupy a highly political space in transnational civil society and should be subject to the same principles of democratic governance as states (*e.g.* democratic participation).²³ In theory, this seems logical and uncontroversial, except in that it seeks to assess the success of protest networks through the same prism as formal structures and processes – which is the antithesis of the reason for their creation in the first place. Part of the appeal of protest networks is its spontaneity and voluntary basis of public participation, which are undermined if state-centric norms and principles are transplanted as measures of success. What is needed is something more grounded in public conscience and morality to connect to values and taking action. In this sense, we can refer to ‘the responsible consumer’ and ‘the responsible investor’.

A. The Responsible Consumer and Tainted Goods and Services

The responsible consumer is informed about the provenance of products and services and mindful not to use purchasing power to consume from corporations complicit in human rights violations and

¹⁹ See, in UK law, *R v ICR Haulage Ltd* [1944] KB 551, C.C.C. A. (U.K.).

²⁰ ANDRE GORZ, *FAREWELL TO THE WORKING CLASS* 63 (1983).

²¹ PAUL MASON, *WHY IT’S KICKING OFF EVERYWHERE: THE NEW GLOBAL REVOLUTIONS* 79-85 (2012).

²² MARGERET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 2-4 & 8 (1998).

²³ Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Society*, 14 AM. UNIV. INT’L L. REV. 1335 (1999); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

crimes against humanity. In the context of boycott campaigns, purchase decisions are localized to individuals so that consumer spending is aligned with ethical choices not to cause or contribute to a particular social harm. Deliberate decisions are taken not to purchase or to avoid or substitute 'tainted products or services'. It may also be a conscious act to disassociate from a particular company in order to punish it for its unethical practices, in what has been referred to as "expressive boycotts".²⁴ This has been seen in the anti-apartheid campaigns and boycotts of South Africa,²⁵ and brand-specific boycotts, such as of Nestlé for its marketing of infant formula in developing countries.²⁶

In their study on consumer motivation to participate in social or ethical boycotts, Albrecht, Campbell, Heinrich and Lammel conclude that the more a "consumer's involvement" (*i.e.* a psychological state of motivation evoked by a boycott topic based on a person's inherent needs, values and interests) with an issue rises, the stronger their willingness to act in its support. Consumer involvement is the most important factor determining whether individuals will participate in boycotts.²⁷ Those who had a positive attitude towards a particular boycott topic showed a much stronger willingness to participate in corresponding boycott campaigns than consumers who showed a lack of interest in the boycott topic. Alignment of boycott issues with personal values and interests shows the powerful connection between public conscience and morality and taking action as a responsible consumer.

The Albrecht study also showed that a consumer's brand commitment negatively influences their intention to participate in a boycott. The authors concede that boycotts are "a pervading and effective instrument to express consumer discontent with a company and its business practices",²⁸ advising company brand managers to counter boycotts by "invest[ing] in brand image campaigns that make consumers feel passionate about their brands. Boycotts, it would seem, are best countered with a strong offense".²⁹ The suggestion is that branding can be used to create personal values and interests aligned with the product or service, which will, in turn, lead to motivation to support rather than oppose the company. Yet, no matter how much marketing is deployed to engineer public perception and influence personal choice, such strategies fail to address the organic nature of protest networks that can trigger boycotts at unexpected times and circumstances. Brand commitment begins to erode when protest networks disseminate information about a company's dealings or activities and engage and inform public debate. Also, the closer the individual is affected by unethical practices of the company, the more likely brand commitment will diminish and lead to becoming a responsible consumer.³⁰

The 1989 Hillsborough football disaster in the UK is a case in point. Ninety-six Liverpool FC football spectators were crushed to death due to football ground staff and police negligence. The Sun newspaper, in an article dated 19 April 1989 entitled "The Truth", alleged that Liverpool football fans

²⁴ MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 12 (1999).

²⁵ See The Gleneagles Agreement on Sporting Contacts with South Africa, which called for an urgent duty on signatories "to combat the evil of apartheid by withholding any form of support for, and by taking every practical step to discourage contact or competition by their nationals with sporting organizations, teams or sportsmen from South Africa". On anti-apartheid consumer boycotts, see, generally PATRICIA O'TOOLE, MONEY AND MORALS IN AMERICA (1998).

²⁶ See Friedman, *supra*, n24, at 176-177; Kathryn Sikkink, *Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code*, 40 INT'L ORG. 815 (1986); James E. Post, *Assessing the Nestle boycott: Corporate accountability and human rights*, 27 CAL. MGMT. REV. 113 (1985).

²⁷ Carmen-Maria Albrecht et. al, *Exploring why consumers engage in boycotts: toward a unified model*, 13 J. PUB. AFF. 180, 181-182 & 187 (2013).

²⁸ *Id.*, 180.

²⁹ *Id.*, 188.

³⁰ See Carmen Valor et. al, *Why One Becomes a Responsible Consumer: The Creation and Maintenance of Responsible Consumption as a Self-Determined Personal Project*, 19 HUM. ECOLOGY REV. 159 (2012).

had pickpocketed the dead, urinated on police, and caused the disaster.³¹ Bereaved families and survivors wrote letters of complaint to the newspaper challenging the veracity of its claims. The managing editor sent a general letter to bereaved families offering no apology for the article's content or substantiation of allegations. He concluded that "if the price of a free press is a boycott of our newspaper, then it is a price we will have to pay".³² Residents of Merseyside began boycotting the newspaper with campaign groups, such as the Hillsborough Justice Campaign, calling for a nationwide boycott.³³ Sales of the newspaper in Merseyside fell by almost 40% at an estimated cost of £10 million per year.³⁴ Despite apologies made in 2004 and 2012, bereaved families, campaigners, and Merseyside residents continue to boycott the paper.³⁵ An independent public inquiry concluded that, apart from isolated examples of anger, frustration and inappropriate behavior, serious allegations against football fans were unsubstantiated and relied on hearsay.³⁶

B. The Responsible Investor

Who or what is the responsible investor? In a general sense, it relates to ownership of purchase and investment decisions aimed at preventing social harms or not contributing to their aggravation. Purchase or investment decisions are made to actively support good practice in prevention of social harms, or not support bad practices that contribute to social harms. The 2006 UN Principles for Responsible Investment (UNPRI) define "responsible investment" as: "an approach to investment that explicitly acknowledges the relevance to the investor of environmental, social and governance factors, and of the long-term health and stability of the market as a whole". Further, "[i]t recognizes that the generation of long-term sustainable returns is dependent on stable, well-functioning and well governed social, environmental and economic systems."³⁷ The emphasis is on long-term investment returns and societal benefits and studies have shown that companies taking this approach outperform others in terms of stock market and accounting performance.³⁸

Sovereign wealth funds (SWF) are not obvious vehicles of change for corporate behavior but increasingly significant in terms of their global financial position and the fact that public funds are

³¹ See Hillsborough: The Report of the Hillsborough Independent Panel (September 2012) (*hereinafter* Hillsborough Report), at 24-26, http://hillsborough.independent.gov.uk/repository/report/HIP_report.pdf. The chief police officer at the time has since admitted causing the disaster by failing to close a tunnel leading to already overcrowded terraces; see Helen Carter, *Hillsborough Inquiry: Chief police officer David Duckenfield admits he caused disaster*, INDEPENDENT (Mar. 17, 2015), <http://www.independent.co.uk/news/uk/crime/hillsborough-inquiry-chief-police-officer-david-duckenfield-admits-he-caused-disaster-10114692.html>.

³² Hillsborough Report, *id.*, at 2.12.35.

³³ *Liverpool's 23-year boycott of The Sun newspaper*, BBC NEWS (Feb. 24, 2012), <http://www.bbc.co.uk/news/uk-england-merseyside-17113382>.

³⁴ See JOHN PILGER, HIDDEN AGENDAS 448 (1998). Sales figures across Merseyside are reportedly down from 55,000 per day to 12,000. See also George Eaton, *The Sun apologises for Hillsborough but it won't be forgiven*, NEW STATESMAN (Sep. 13, 2012), <http://www.newstatesman.com/blogs/staggers/2012/09/sun-apologises-hillsborough-it-wont-be-forgiven>.

³⁵ Nationwide support for the boycott was reported in 2014 and Royal Mail postal workers in Merseyside refused to deliver a free World Cup edition; see Adam Withnall, *Sun Hillsborough boycott: Residents across the country refuse to accept free 'World Cup Pride' edition of Sun newspaper*, INDEPENDENT (June 12, 2014), <http://www.independent.co.uk/news/uk/home-news/sun-hillsborough-boycott-residents-across-the-country-refuse-to-accept-free-world-cup-pride-edition-of-sun-newspaper-9531999.html>.

³⁶ Hillsborough Report, *supra* n31, at 2.12.73.

³⁷ UN Principles for Responsible Investment, *Briefing Note: What is Responsible Investment?* <http://unpri.org/wp-content/uploads/1.WhatIsResponsibleInvestment.pdf>.

³⁸ See, e.g., Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance*, Harvard Business School, Working Paper 12-035 (Nov. 25, 2011), <https://www.triodos.nl/downloads/private-banking/impact-corporate-culture-of-sustainability.pdf>.

involved.³⁹ The International Working Group on Sovereign Wealth Funds (IWG), originally composed of 25 countries, agreed to the 2008 Santiago Principles – non-legally binding self-regulatory rules governing SWF.⁴⁰ In 2009, the International Forum of Sovereign Wealth Funds (IFSWF) was established by the IWG to act as a voluntary group of SWFs “which will meet, exchange views on issues of common interest, and facilitate an understanding of the Santiago Principles and SWF activities”.⁴¹ It is composed of 28 member states, including Palestine. The Santiago Principles define SWF as: “special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets”.⁴² This definition does not include investment for ethical purposes and has as its primary aim investment for “macroeconomic purposes”. Principle 19 requires that SWF investment decisions should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy, and based on economic and financial grounds.⁴³ However, sub-principle 19.1 recognizes that some SWFs have investment policies which take account of non-economic factors, such as implementation of legally binding international sanctions, social and ethical considerations.⁴⁴ So long as they are publicly disclosed, these are legitimate investment decisions.

IV. The Palestinian Boycott, Divestment and Sanctions Movement (BDS): Consumer Boycotts and Investor Divestment from Israeli Corporations

BDS is one of the most successful non-legal mechanisms to emerge in terms of effect on corporate compliance. In July 2005 a coalition of Palestinian civil society groups called upon:

...international civil society organizations and people of conscience all over the world to impose broad boycotts and implement divestment initiatives against Israel similar to those applied to South Africa in the apartheid era...to pressure your respective states to impose embargoes and sanctions against Israel...[which] should be maintained until Israel meets its obligation to recognize the Palestinian people’s inalienable right to self-determination and fully complies with the precepts of international law by:

- 1. Ending its occupation and colonization of all Arab lands and dismantling the Wall;*
- 2. Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and*
- 3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.*⁴⁵

Consumers worldwide are informed about corporations operating in and around the occupied Palestinian territories (oPt) considered complicit in Israeli human rights violations and crimes against humanity against Palestinians. Campaigns, such as BDS, expose errant corporations and seek to engage ethical consumer purchasing power by boycotting the corporation’s products or services. Since 2005, there have been a number of successful boycotts: corporations pulling out of the oPt (e.g. Israeli

³⁹ On SWF investment influence and potential for societal benefit, *see generally* George Gilligan, Justin O Justo & Megan Bowman, *Sovereign Wealth Funds*, 36 COMPANY LAW. 33, 35-40 (2015)

⁴⁰ GAPP, *supra* n12.

⁴¹ International Forum of Sovereign Wealth Funds, <http://www.ifswf.org/>.

⁴² GAPP, *supra* n12, 3.

⁴³ *Id.*, 8.

⁴⁴ *Id.*

⁴⁵ *Palestinian Civil Society Call for BDS*, BDS Movement (July 9, 2005), <http://www.bdsmovement.net/call>.

company SodaStream announcing closure of factory in illegal settlement);⁴⁶ governments not renewing contracts with corporations (e.g. Portuguese and Argentinian governments not renewing contracts with Israeli energy and water companies);⁴⁷ corporations not renewing contracts with government bodies (e.g. UK security firm G4S not its renewing contract with the Israeli Prison Service);⁴⁸ investor funds divesting from companies (e.g. Dutch pension fund ABP divesting from two Israeli military companies);⁴⁹ and corporate sponsors of public events under closer scrutiny (e.g. French multinational, Veolia, ending sponsorship of the UK Wildlife Photographer of the Year exhibition after exposure of its provision of infrastructure to illegal Israeli settlements).⁵⁰ Modeled on the apartheid South Africa boycotts and sanctions, BDS operates as a modern-day example of how the democratic imperative can fill a legal void through consumer choice and direct action impacting on corporate profits and image to bring about change in corporate behavior.

A. Boycott – What Does it Mean?

The term ‘boycott’ was first used against Charles Cunningham Boycott, a nineteenth-century English land agent, who mistreated Irish tenant farmers. Initially refusing to work for reduced wages, the farmers were persuaded to return to work by Boycott’s wife only to be summarily evicted. They then persuaded Boycott’s servants, drivers and animal herders to leave him and his family, so that his social and economic marginalization was referred to as ‘boycott’.⁵¹ The Oxford English Dictionary defines boycotting as to “refuse to have social or commercial relations with (a person, country, etc.)”. Although not providing reasons for the boycott this is a sufficiently broad definition to encapsulate boycotting of corporations.

A legal dictionary provides a rather less satisfactory definition as

The system under which the life of a man is made unendurable and impossible by an organised refusal to have any dealings with him. Theoretically boycotting is the spontaneous outcome of the feelings of the individuals concerned in applying it to any particular person; but in practice it is often the effect of a fear that anyone refusing

⁴⁶ *SodaStream to close illegal settlement factory in response growing boycott campaign*, BDS MOVEMENT (Oct. 30, 2014), <http://www.bdsmovement.net/2014/sodastream-closes-illegal-settlement-factory-in-response-growing-boycott-campaign-12782>; Ian Black, *SodaStream to move factory out of West Bank Israeli settlement*, GUARDIAN (Oct. 29, 2014), <http://www.theguardian.com/business/2014/oct/29/sodastream-move-factory-west-bank-israel-slash-forecast>.

⁴⁷ *Israeli state water company loses Portugal deal and faces global protests*, BDS MOVEMENT (Apr. 21, 2014), <http://www.bdsmovement.net/2014/mekorot-loses-portugal-deal-11985>; *\$170m Argentina loss for Israeli water firm Mekorot as BDS spreads southward*, BDS MOVEMENT (Mar. 14, 2014), <http://www.bdsmovement.net/2014/170m-argentina-loss-for-mekorot-11875>.

⁴⁸ *BDS pressure forces G4S to distance itself from Israelinciples.pdf" lt*, BDS MOVEMENT (June 17, 2014), <http://www.bdsmovement.net/2014/bds-pressure-forces-g4s-distance-itself-prison-system-12166>; Gill Plimmer, *G4S to end Israeli jail contracts within three years*, FIN. TIMES (June 5, 2014), <http://www.ft.com/cms/s/0/06e06252-ecc9-11e3-8963-00144feabdc0.html#axzz3ZqvlW6kf>.

⁴⁹ *Dutch pension fund ABP divests from two Israeli arms companies*, MEMO MIDDLE EAST MONITOR (July 4, 2014), <https://www.middleeastmonitor.com/news/europe/12548-dutch-pension-fund-abp-divests-from-two-israeli-arms-companies>.

⁵⁰ *Veolia to end sponsorship of major UK photography exhibition*, BDS MOVEMENT (Dec. 11, 2012), <http://www.bdsmovement.net/2012/veolia-london-museu-10147>. Veolia was specifically identify by the UN Special Rapporteur as being complicit in Israeli breaches of international humanitarian law; see *UN independent expert calls for boycott of businesses profiting from Israeli settlements*, UN NEWS CENTRE (Oct. 25, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43376&Cr=palestin&Cr1#.VVDt1pOFc6N>.

⁵¹ Friedman, *supra* n24, 5-8.

*to take part in the boycott will himself be boycotted or suffer injury to his person or property. The system originated in County Mayo in the west of Ireland in 1880, the first victim being a land agent named Boycott.*⁵²

Clearly not identifying the essentially neutral point about refusing to have dealings with a person, state or corporation, it judges those doing the refusing. The wrongdoer becomes the victim of suffering as opposed to actual victims he has wronged. This echoes modern-day criticisms of neo-liberals ‘victim-blaming’ to avoid responsibility for their actions; perhaps even shame for being identified as a wrongdoer. A more neutral legal definition is: “a deliberate refusal to have any dealings with another person (or state), named after Captain Boycott in Ireland”⁵³.

B. Boycott – What is its Impact?

The above definitions go some way in explaining boycotts but, as Friedman points out, fail to capture the nature of consumer boycotts – that they are essentially acts of economic disengagement rather than acts of social isolation and these two rarely act at the same time. Friedman’s specific definition of consumer boycotts is: “an attempt by one or more parties to achieve certain objectives by urging individual consumers to refrain from making selected purchases in the marketplace.”⁵⁴ This focuses on individual consumers’ use of the marketplace to secure market-based (*e.g.* lower prices) and non-market-based (*e.g.* stopping corporate complicity in human rights violations) goals. Others, such as Tyran and Engleman, distinguish “demand withholding” (*i.e.* an individual’s refusal to buy) from a “boycott” (*i.e.* a collective refusal to buy).⁵⁵ In their experimental study on actual consumer behavior in economic consumer boycott (*i.e.* collective refusal to buy in response to unfair marketing practices), they conclude: the ability to organize and enforce boycotts affects their success in the marketplace; consumers use boycotts for expressive reasons (*i.e.* to punish the seller for unfair price practices); and that boycotts cause persistent losses in profits and market efficiency.⁵⁶

V. The Norwegian Government Pension Fund Global: Ethical and Responsible Investment

Established in 1990, the Fund is the world’s largest SWF valued at NOK 6,616 billion (approximately USD 849 billion) in 2014.⁵⁷ It holds approximately 1.3% of the world’s listed equities.⁵⁸ Its main objective is to ensure growth of North Sea oil revenues in order to protect future generations of Norwegians’ public sector pensions. As one of the original signatories to the UNPRI, the Fund exemplifies a responsible investor by implementing Santiago sub-principle 19.1 to include social and ethical considerations in its investment strategy. Human rights, international humanitarian law, weapons and the environment are key social and ethical considerations for the Fund. An independent body, the Council on Ethics, applies the 2004 Ethical Guidelines to make recommendations to the

⁵² Jowitt’s Dictionary of English Law (3rd ed., 2009).

⁵³ Osborn’s Concise Law Dictionary (12th ed., 2013).

⁵⁴ Monroe Friedman, *Consumer boycotts in the United States, 1970-1980: Contemporary events in historical perspective*, 12 J. CONSUMER AFF. 96, 97-98 (1985).

⁵⁵ Jean-Robert Tyran & Dirk Engelmann, *To Buy or Not to Buy? An Experimental Study of Consumer Boycotts in Retail Markets*, Discussion Paper no. 2002-13, Department of Economics, University of St. Gallen (May 2002), at 5.

⁵⁶ *Id.*, 7-9, 19 & 24.

⁵⁷ NORWEGIAN GOVERNMENT PENSION FUND, MARKET VALUE (updated Oct. 13, 2014), <https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/market-value-of-the-government-pension-f/id699635/>. As of 19 August 2015, the Fund is broken down into 62.8% equities, 34.5% fixed income, 2.7% real estate; see NORGIS BANK, INVESTMENTS, <http://www.nbim.no/en/investments/>.

⁵⁸ See NORGIS BANK, HOLDINGS, <http://www.nbim.no/en/the-fund/holdings/>.

Norwegian Ministry of Finance on which companies to exclude from investment and which companies to place under observation during investment. The Guidelines set two main objectives: 1) to use the Fund as an instrument for ensuring that a reasonable portion of the country's petroleum wealth benefits future generations, with financial wealth managed so as to generate a sound return in the long term, which is contingent on sustainable development in the economic, environmental and social sense; and 2) not to make investments which constitute an unacceptable risk that the Fund may contribute to unethical acts or omissions, such as violations of fundamental humanitarian principles, serious violations of human rights, gross corruption or severe environmental damages.⁵⁹ Whereas treaty supervisory bodies, the International Court of Justice (ICJ), and ICC make quasi-legal and legal determinations respectively on violations of international human rights law and humanitarian law, the Council is not concerned with and has no authority to make such determinations against states. It can only make ethical, not civil or criminal liability, determinations against companies based on an assessment of their conduct.⁶⁰ The Council assesses whether an act or omission is attributable to the company and contributes to violations of human rights, humanitarian principles, or other ethical norms.⁶¹

A. Assessing Complicity

The Fund is a means to fulfill government pension fund investment objectives rather than a blunt instrument used to change other state conduct or Norwegian foreign policy. However, because the investment objectives are related to ethical norms and international human rights and humanitarian law, the Council is inevitably involved in making determinations on whether companies breach such norms and laws, thus operating as a foreign policy exposure-pressure mechanism.⁶² In the Council's practice, "complicity" in human rights violations or breaches of ethical norms has been interpreted as "contribution". First, the Council must protect against the Fund contributing to unethical actions through owning shares in companies that are responsible for unethical acts or omissions. Second, it must assess whether there is an "unacceptable risk" of the company contributing to "present or future" unethical acts or omissions, thereby implicating the Fund. This means it is not necessary to prove that a "contribution" will take place; the presence of an "unacceptable risk" is sufficient for a recommendation to exclude the company.

The Council has set criteria for establishing complicity: (i) existence of some kind of linkage between the company's operations and the existing breaches of the Guidelines, which must be visible to the Fund; (ii) breaches must have been carried out with a view to serving the company's interests or to facilitate conditions for the company; (iii) the company must either have contributed actively to the breaches, or had knowledge of the breaches, but without seeking to prevent them; and (iv) breaches

⁵⁹ Norwegian Government Pension Fund Global, Council on Ethics, Ethics Guidelines (Dec. 22, 2005), sections 1 & 4.4, <https://www.reprisk.com/downloads/080613%20Ethical%20Guidelines.pdf> (*hereinafter* Ethics Guidelines).

⁶⁰ Gro Nystuen, *Disinvestment on the basis of corporate contribution to human rights violations: the case of the Norwegian Government Pension Fund*, in HUMAN RIGHTS, CORPORATE COMPLICITY AND DISINVESTMENT 29-30 (Gro Nystuen, Andreas Føllesdal & Ola Mestad eds., 2011).

⁶¹ For a full list of areas of concern, see Ethics Guidelines, *supra* n59, section 4.4.

⁶² See The Advisory Council on Ethics for the Government Petroleum Fund, Recommendation of 14 November 2005, <http://etikkradet.no/files/2014/12/Total-ENG.pdf>. In section 3, the Council confines its mandate to assessing ethical compliance of the Funds: the case of the Norwegian Government Pension Fund Global policy. An OECD report raised concerns about SWFs being used as political vehicles; see OECD, *Sovereign Wealth Funds and Recipient Country Policies* (Apr. 4, 2008), at 4, <http://www.oecd.org/investment/investment-policy/40408735.pdf>. A 2009 study concluded these concerns were unfounded; see Rolando Avendaño & Javier Santiso, *Are Sovereign Wealth Funds' Investments Politically Biased? A Comparison with Mutual Funds*, OECD Development Centre, Working Paper No. 283 (Dec. 2009), <http://www.oecd.org/dev/44301172.pdf>.

must either be ongoing, or there must exist an unacceptable risk that norm breaches will occur in the future. Earlier norm breaches might indicate future patterns of conduct.⁶³ Past acts or omissions are not in themselves a basis for exclusion of companies, but they may indicate future conduct and so will be relevant in the assessment of future risk of complicity in violations.⁶⁴

From the Fund's perspective, the Council's prospective assessment operates as a preventative mechanism against complicity, although its impact on company conduct is less certain. In the Total recommendation, there were concerns about Total's complicity in human rights violations in Burma between 1995 and 1998 through the construction of a gas pipeline. By the time the Council made its assessment, the pipeline had already been completed. The Council recommended not excluding Total because "in future construction projects Total is hardly likely to put itself in a situation in which it is associated with the use of forced labor. Any financial gain accruing to Total thanks to forced labor is assumed to be far outweighed by the negative light in which the accusations have placed the company."⁶⁵ From the victims' perspective, this assumes the company will reach a similar assessment of risks, preventing it from being complicit in future violations. It also fails to establish corporate responsibility for past violations. But the Council's remit is prospective assessment of unethical conduct based on the company's sphere of control, thus the process acts as a shield rather than a sword.⁶⁶ In contrast, in the Wal-Mart recommendation, due to ongoing serious and systematic violations of labor rights in the company's supply chain, and the company not responding to requests for information or providing that it would prevent future violations, the Council concluded there was "an unacceptable risk that the Fund...may be complicit in serious or systematic violations of human rights" and recommended exclusion.⁶⁷

B. Categories of Exclusion

The Fund will not invest in companies which (either through themselves or through entities they control) produce weapons that: violate fundamental humanitarian principles through their normal use; produce tobacco; or sell weapons or military materiel to states that are subject to fund investment restrictions on government bonds.⁶⁸ Exclusions and observations fall under the following specific categories where there is an "unacceptable risk that the company contributes to or is responsible for": a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labor and the worst forms of child labor; b) serious violations of the rights of individuals in situations of war or conflict; c) severe environmental damage; d) gross corruption; and e) other particularly serious violations of fundamental ethical norms.⁶⁹ To date 64 companies are excluded⁷⁰ and 1 remains under observation.⁷¹ Three Israeli companies (Africa Israel Investments, Danya Cebus, Shikun & Binui Ltd) are excluded under category b), and one (Elbit Systems Ltd) under category e).

⁶³ Recommendation of 14 November 2005, *id.*, section 3.3.

⁶⁴ *Id.*, 9.

⁶⁵ Recommendation of 14 November 2005, *supra* n62, section 4.1.3.

⁶⁶ See Ethics Guidelines, *supra* n59, section 3.1. On different investor/victim perspectives of corporate responsibility, see Ola Mestad, *Attribution of responsibility to listed companies*, in HUMAN RIGHTS, CORPORATE COMPLICITY AND DISINVESTMENT (Gro Nystuen, Andreas Føllesdal & Ola Mestad eds., 2011).

⁶⁷ Norwegian Government Pension Fund Global, Council on Ethics, Recommendation of 15 November 2005, sections 6 & 7, [http://etikkradet.no/files/2014/12/Tilrådning-WM-ENG.pdf](http://etikkradet.no/files/2014/12/Tilr%C3%A5dning-WM-ENG.pdf),

⁶⁸ Norwegian Ministry of Finance, *Guidelines for observation and exclusion from the Government Pension Fund Global: Responsible investments*, section 2 (Dec. 18, 2014), <https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/responsible-investments/guidelines-for-observation-and-exclusion/id594254/>.

⁶⁹ *Id.*, section 3.

⁷⁰ As of 17 August 2015.

⁷¹ Alstom SA was placed under observation in 2011.

1. Serious Violations of the Rights of Individuals in Situations of War or Conflict: Exclusion of Israeli Companies

In November 2013, the Council recommended exclusion of Africa Israel Investments (AII) and Danya Cebus (DC) due to their contribution to serious violations of individual rights in war or conflict through the construction of settlements in East Jerusalem.⁷² The Norwegian Ministry of Finance decided to follow the Council's recommendation. These companies were previously excluded from August 2010 to August 2013 on the basis of similar activities and, after receiving assurances that there were no plans to construct settlements in the West Bank, the Council recommended removal from exclusion in August 2013. But information revealed DC, a subsidiary of AII which owns 82% of it, was the general contractor for the "C-Jerusalem" settlement project in East Jerusalem, and was confirmed by AII.

The Council determined that the settlements were illegal under international law. Article 49 of the 1949 Geneva Convention on the Protection of Civilians, to which Israel is a party, prohibits an occupying power from deporting or transferring its civilian population into the occupied territory. Reference was also made to the UN Secretary General's 2011 statement that "settlement activity in the West Bank, including East Jerusalem, is contrary to international law".⁷³ The 2004 ICJ Advisory Opinion,⁷⁴ UN Security Council Resolution 465 (1980) and a 2001 ICRC statement all establish that the settlements breach the Geneva Convention.

Using the International Commission of Jurists' definition of complicity through facilitation, building settlements does make it easier to carry out adverse impacts or changes in the oPt because it represents an encroachment on Palestinian lands and an illegitimate assertion of sovereignty. But the STRC's "first-order involvement" category seems more appropriate here because AII and DC were actively involved in the design and implementation of the Israeli state's settlement policy, similar to South African mining companies implementing the migrant labor system for the apartheid regime. In fact, in correspondence with the Council, AII stated that it regarded East Jerusalem as part of Israel and that its construction activity there could not be equated with construction of settlements in the rest of the West Bank.⁷⁵ However, Israel's annexation of East Jerusalem is illegal under international law, as established by the UN Security Council Resolution 478 (1980). Thus, by DC constructing settlements and AII holding a controlling interest in DC, both companies were excluded due to "an unacceptable risk of the companies contributing to serious violations of the rights of individuals in situations of war or conflict".⁷⁶

Shikun & Binui Ltd was also involved in the building of Israeli settlements in East Jerusalem and the remainder of the West Bank. The Fund owned shares in the company worth NOK 13.8 million.

⁷² Norwegian Government Pension Fund Global, Council on Ethics, Recommendation to exclude the companies Africa Israel Investments Ltd. and Danya Cebus Ltd. from the investment universe of the Government Pension Fund Global (Nov. 1, 2013),

https://www.regjeringen.no/contentassets/310d42b99ce242ad9f2cb5a2f7ec70db/africa_israel_eng_nov_2013.pdf;

Norwegian Ministry of Finance, New decisions about the Government Pension Fund Global (Jan. 30, 2014),

<https://www.regjeringen.no/en/aktuelt/new-decisions-about-the-government-pensi/id750091/>.

⁷³ UN Secretary General, *Secretary-General Disappointed by Israel's Decision on New Settlement Construction in West Bank, Reiterates Settlement Activity Contravenes International Law*, Statement (Aug. 6, 2011),

<http://unispal.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/c4bb7721a06a99dc852578e6004a5728?OpenDocument>.

⁷⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 120 (July 9) [*hereinafter* ICJ Wall Advisory Opinion].

⁷⁵ Recommendation 1 November 2013, *supra* n72, section 4.

⁷⁶ *Id.*, section 6.

Despite the company not responding to the Council's request for information, the Council relied on publicly available information relating to company activities, and the 2004 ICJ advisory opinion and numerous UN Security Council resolutions establishing the illegality of Israeli settlements in the Occupied Territories. It considered that Shikun & Binui Ltd. contributed to violations of the Fourth Geneva Convention by building an Israeli settlement in East Jerusalem and recommended exclusion on the basis that "there is an unacceptable risk that the company will participate in future violations of ethical norms by undertaking the construction of Israeli settlements there...[and]...this risk will remain as long as such activities are permitted or until the company makes it clear that such activity has ceased".⁷⁷

2. Other Particularly Serious Violations of Fundamental Ethical Norms: Exclusion of Israeli Companies

This category of exclusion is a general one relating to "fundamental ethical norms". These are not defined but the original committee which drafted the Ethical Guidelines refers to international standards on human rights, labor standards and the environment.⁷⁸ These are reflected in the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises, 2000 UN Global Compact Ten Principles, 2011 UN Guiding Principles on Business and Human Rights and the 2011 OECD Guidelines for Multinational Enterprises.

In 2009, when the Israeli government was building the wall in the West Bank, the Council recommended exclusion of Elbit Systems Ltd because it supplied a surveillance system as part of the wall. At the time, the Fund's equity investments in Elbit Systems Ltd had a market value equivalent to NOK 35.8 million. Following on from the ICJ's 2004 advisory opinion on the illegality of the wall,⁷⁹ the Council noted that:

*...construction of parts of the barrier may be considered to constitute violations of international law, and Elbit, through its supply contract, is thus helping to sustain these violations. The Council on Ethics considers the Fund's investment in Elbit to constitute an unacceptable risk of complicity in serious violations of fundamental ethical norms.*⁸⁰

What was important for the Council to consider was the extent of the company's contribution to ongoing Israeli breaches of international law.

The Council faced the dilemma of dealing with a company commissioned by its own state to commit illegal acts. In addition, there was the question of whether all companies supplying products or services to Israeli authorities on the construction of the wall would be considered complicit. On the latter point, the Council decided not all types of contribution to the construction of the wall provide grounds for excluding companies from the Fund.⁸¹ For this reason, the Council preferred to make its assessment on a case-by-case basis considering the "significance of a company's role in the violations" without explaining what could amount to a "significant role". In an earlier case relating to Caterpillar Inc. supplying the Israeli army with bulldozers and spare parts, the Council determined these were dual use

⁷⁷ Norwegian Government Pension Fund Global, Council on Ethics, Recommendation for exclusion of Shikun & Binui Ltd. from the Government Pension Fund Global (Dec. 21, 2011), section 6, http://etikkradet.no/files/2014/12/Tilr_Shikun_Binui_publ_eng.pdf.

⁷⁸ Norwegian Ministry of Finance, The Report from the Graver Committee (Nov. 7, 2003), sections 4.1 & 4.2, <https://www.regjeringen.no/en/dokumenter/Report-on-ethical-guidelines/id420232/>.

⁷⁹ ICJ Wall Advisory Opinion, *supra* n74.

⁸⁰ Norwegian Government Pension Fund Global, Council on Ethics, Recommendation (May 15, 2009) at 2, at <https://www.regjeringen.no/contentassets/160311fd03347bca414b1fdd7aefc35/tilradning-elbit-engelsk.pdf>.

⁸¹ *Id.*, section 4, 9.

products (i.e. used for legitimate or illegitimate purposes)⁸² not within the Guidelines. Unless it could be shown that there was a “strong element of complicity” by Caterpillar in any possible violations, it could not be held accountable for any illegal uses of the products it supplied and, therefore, could not be excluded from the Fund.⁸³ Again, there is no definition of what constitutes “strong element of complicity” and the Council’s reasoning could be criticized for stretching the actual purpose of dual use products. If the supplier company is made aware or should be aware that dual purpose products are actually being used for illegitimate purposes, then surely this requires, at a minimum, undertaking substantial risk assessment of the viability for future supplies? The 2011 OECD Guidelines for Multinational Enterprises require corporations to prevent or mitigate an adverse impact which is directly linked to their products or services by a business relationship.⁸⁴ Specifically in relation to human rights, corporations are required to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.⁸⁵ Corporations are required to undertake general risk-based due diligence to identify, prevent and mitigate actual and potential adverse impacts,⁸⁶ and a specific human rights due diligence where there are risks of adverse human rights impacts.⁸⁷

Elbit Systems Ltd produces electronic systems primarily for the defence industry. The surveillance system developed and delivered by Elbit did not in itself appear to be unethical, but its contribution to the wall needed to be considered to determine whether it constituted a serious violation of ethical norms. The Council identified a number of significant factors: the surveillance system was one of the main components of the wall and its associated control regime; Elbit was the end supplier of this system; the system was especially designed for the wall and had no alternative areas of application; and Elbit was aware of where and how the system was intended to be used.⁸⁸ These factors meant the surveillance system was a “functionally integral part” of the wall being built by the Israeli government, which is considered a violation of international law,⁸⁹ and Elbit’s contract makes it an “important contributor to this activity”. Thus, continuing to invest in Elbit would expose the Fund to an “unacceptable risk of complicity in particularly serious violations of ethical norms”.

3. Ongoing Review of Israeli Companies

In 2008, the Council assessed whether to continue investing in Israel Electric Corporation (IEC), a company 99.9% owned by the Israeli state, due its role in the reduction of electricity supply to Gaza. The Fund held bonds issued by IEC. Several Palestinian and Norwegian NGOs requested exclusion of IEC on the basis that reduction of electricity supply constituted collective punishment of Palestinians.⁹⁰ The UN Office for the Coordination of Humanitarian Affairs (OCHA) confirmed that IEC was instructed by the Israeli Ministry of Defense to reduce electricity in response to firing of

⁸² Companies producing dual use components for nuclear weapons are considered outside the Guidelines and not subject to exclusion. See Norwegian Government Petroleum Fund, The Advisory Council on Ethics, Recommendation for Exclusion (Sep. 19, 2005), <https://www.regjeringen.no/en/dokumenter/Recommendation-on-exclusion/id419589/>.

⁸³ Norwegian Government Pension Fund Global, Letter from the Council on Ethics to the Ministry of Finance regarding investments related to the Middle East (May 15, 2006), <http://etikkradet.no/files/2015/01/Letter-15-May-2006.pdf>.

⁸⁴ OECD, *Guidelines for Multinational Enterprises* (25 May 2011), ch. II, ¶ A.11 [*hereinafter* OECD Guidelines].

⁸⁵ *Id.*, ch. IV, ¶ 3.

⁸⁶ *Id.*, ch. II, ¶ A.10.

⁸⁷ *Id.*, ch. IV, ¶ 5.

⁸⁸ Recommendation 15 May 2009, *supra* n80, section 4, 8-9.

⁸⁹ ICJ Wall Advisory Opinion, *supra* n74, ¶ 137.

⁹⁰ Norwegian Government Pension Fund Global, Council on Ethics’ assessment on investments in Israel Electric Corporation (Apr. 18, 2008), <https://www.regjeringen.no/en/dokumenter/council-on-ethics-assessment-on-investme/id518420/>.

rockets from Gaza into Israel.⁹¹ The UN OCHA concluded that such power cuts contributed to the humanitarian crisis in Gaza “impacting water and sanitation infrastructure, disrupting healthcare delivery and adding misery to the lives of civilians, as Gazans will continue to bear the brunt of the reduction of power”.⁹² In *Jaber Al-Bassiouni Ahmed et al. v Prime Minister and Minister of Defence*, the Israeli Supreme Court rejected a petition by Israeli and Palestinian human rights groups claiming reduction of supply would violate international humanitarian law because it would cause certain, serious and irreversible damage to the essential humanitarian needs of the Gaza Strip, its hospitals, the water and sewage system, and the entire civilian population.⁹³ The Court concluded there was no violation because Israel fulfilled its obligation to supply electricity for essential humanitarian needs of the civilian population, and supplies could be controlled within Gaza to prevent any adverse impact on essential humanitarian needs (a matter disputed by the petitioners).⁹⁴

The Council makes its own assessments of risks relating to breaches of ethical norms and it does not have to follow court decisions from countries where companies operate. It specifically stated that the Israeli Supreme Court ruling had no direct bearing on its own assessment of whether electricity supplies could be controlled within Gaza to support essential humanitarian needs. It concluded that whilst the matter was highly technical requiring extensive insight into the construction and operations of the electrical distribution system in Gaza, “in practice, it is probably difficult to distribute the power according to humanitarian needs”.⁹⁵ Regarding whether to exclude IEC from its investment portfolio, the Council decided that the power cuts were not ongoing so it did not recommend exclusion. However, the Council reserved its right to review “if future reductions in the electricity supply to Gaza, causing unacceptable humanitarian conditions for the civilian population, are introduced by IEC, the Council may renew its assessment of the Fund’s investment in IEC”.⁹⁶

VI. Litigation: Class Action against Breaches of Corporate Social Responsibility Agendas

By publicly representing business values and ethical practices in the form of corporate social responsibility, corporations leave themselves open to scrutiny and challenge regarding practical implementation. Judicial cases and media coverage of corporate misconduct reveal corporate impunity, alerting the public to expect more and inquire further. Often there are no legal mechanisms to pursue human rights claims *per se* against corporations so that claims relate to specific corporate practices that may indirectly relate to complicity in human rights violations.

Consumer class actions are a legal mechanism with potential to indirectly hold corporations accountable for complicity in human rights violations. Groups of individuals, consumer bodies, NGOs, or even the state can bring contractual or tortious claims in the wider public interest (*e.g.* using corporate social responsibility codes to claim non-fulfillment of a legitimate expectation that business practices prevent, avoid or mitigate adverse human rights impacts). Some common and civil law

⁹¹ UN OCHA, *Situation Report: Electricity Shortages in the Gaza Strip* (Feb. 8, 2008), http://www.ochaopt.org/documents/gaza%20feb_08_2008.pdf.

⁹² *Id.*, 1.

⁹³ HCJ 9132/07 Jaber Al-Bassiouni Ahmed et al v. Prime Minister and Minister of Defense [Jan. 27, 2008] (Isr.), ¶ 5.

⁹⁴ *Id.*, ¶ 11, 18-19, 22.

⁹⁵ *Supra* n90.

⁹⁶ *Id.*

jurisdictions recognize general class actions and others restrict them to certain areas of law.⁹⁷ Others restrict actions to certain areas of law or provide indirect routes to a class action.⁹⁸

Examples of indirect litigation of corporate complicity through class actions include: corporate misrepresentation for non-compliance with corporate social responsibility codes;⁹⁹ invoking company law provisions on stakeholder rights to information about corporate impact on climate change;¹⁰⁰ consumer right to information on fuel economy and CO2 emissions of new cars;¹⁰¹ corporate fraudulent misrepresentation for private gain;¹⁰² corporate conspiracy to misdirect scientific information on an important issue for private gain;¹⁰³ and breach of advertising standards.¹⁰⁴

OECD National Contact Point complaints may also be made under the OECD Guidelines for disclosure against corporations not providing accurate non-financial information in relation to their business activities.¹⁰⁵ In *Amnesty International and Friends of the Earth v. Royal Dutch Shell*¹⁰⁶ it was alleged that Shell was making incorrect, misleading and unsubstantiated statements about sabotage being the cause of oil spills. These had a negative effect on the communities in the Niger Delta because spills classified as the result of sabotage meant no liability or responsibility for Shell to compensate victims. It also was alleged that Shell was using such statements to deflect attention from legitimate criticism of its own environmental and human rights impact in the Niger Delta, misleading key stakeholders including consumers of Shell's products and investors in the company.¹⁰⁷ The Dutch National Contact Point decided that Shell's statements were based on flawed investigations and disputed evidence, and that its general communication with stakeholders was flawed.¹⁰⁸ The National Contact Point did not conclude these constituted breaches of the Guidelines but recommended Shell take account of evidence that may dispute earlier published data and related communications, and be prudent in general communications to stakeholders about oil spill figures when discrepancies exist with regard to their causes or amounts.¹⁰⁹

The most generous standalone provision for class actions in a domestic jurisdiction is Federal Rule 23 in the United States (US), which allows representative parties, whose claims are similar to a numerous class of persons, to sue on behalf of the class where there are questions of law or fact common to the

⁹⁷ See, e.g., in Australia: Pt 4A *Supreme Court Act 1986* pt. 4A (Vic) (Austl.); Ontario Class Proceedings Act, R.S.O. 1992, C-6 (Can.); Act in Group Proceedings, 2009 (Journal of Laws no. 7, item 44) (Pol.).

⁹⁸ Egypt does not recognize class actions but any person with a direct interest in an existing public or private law case may be joined as a party. In Indonesia, Article 91 Law 32/2009 allows communities to file a class action for losses suffered from environmental pollution or damage. In the UK class actions are not recognized but can run under Group Litigation Orders under CPR part 19, or under directions in an ordinary multiparty action.

⁹⁹ For Nigeria, see Engobo Emeseh & Ondotimi Songi, *CSR, human rights abuse and sustainability report accountability*, 56 INT'L J. L. MGMT. 136 (2014).

¹⁰⁰ For Germany, see Hans-Joachim Koch, Michael Lührs. & Roda Verheyen, *Germany*, in CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE 416 (Richard Lord et al. eds., 2012).

¹⁰¹ See Council Directive 1999/94/EC, 2000 O.J. 16 (L 12) (EC), amended by Commission Directive 2003/73/EC, 2003 O.J. 34 (L 186).

¹⁰² For the US, see Michael B. Gerrard & Gregory E. Wannier, *United States of America*, in CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE 587-588 (Richard Lord et al. eds., 2012).

¹⁰³ See, e.g., claims against tobacco companies in the US: *Cipollone v. Liggett Group, Inc.*, 505 US 504 (1992).

¹⁰⁴ See, e.g., BT plc breach of UK advertising standards in: *ASA v BT plc* [2013], Ref. A13-233704 [U.K.].

¹⁰⁵ OECD Guidelines, *supra* n84, Ch. III (Disclosure). ¶ 1, 2(f) & 4, ch. VII (Consumer Interests), ¶ 4 & 5.

¹⁰⁶ Amnesty International and Friends of the Earth Complaint to the UK and Dutch National Contact Points under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises (Jan. 25, 2011).

¹⁰⁷ *Id.*, 3.

¹⁰⁸ Amnesty International and Friends of the Earth v Royal Dutch Shell, Final Statement of Dutch National Contact Point (Mar. 21, 2013), at 5-6.

¹⁰⁹ *Id.*, 7.

class, and where the representative parties will protect the interests of that class.¹¹⁰ A number of mass tort claims have been brought against corporations for complicity in human rights violations. In *Doe v. Unocal*, the plaintiffs, a group of Burmese residents, alleged Unocal complicity in human rights abuses (e.g. forced labor, rape, murder and torture) by the Burmese military during the construction of a gas pipeline. After the District Court had granted Unocal's motion for a summary judgment partially in their favor, the Court of Appeals reversed the judgment to find sufficient evidence of complicity to justify consideration of the merits. The trial was set for April 2005 but the parties settled out of court in 2004.¹¹¹ In the Total recommendation, the Norwegian Council on Ethics relied on this case to accept "as a fact" that "Total is presumed to have had the same knowledge of, and responsibility for, the human rights violations in connection with the pipeline construction as Unocal".¹¹² The original case was against Total and Unocal, but claims against Total were dismissed due to lack of personal jurisdiction. This illustrates the complementarity and limitations of ethical and legal mechanisms. Although litigation offers a potential route to address past violations and compensate victims, plaintiffs will need to satisfy procedural requirements and establish a link to a parent company and overcome legal recognition of corporate personality and limited liability. No such requirements are necessary under the Council's ethical assessment process and there is a lower threshold to establish corporate complicity. However, the process does not address past conduct of the company and cannot compensate victims.

Recent case law in the US has raised concerns about the extent to which tort claims can be brought against corporations for complicity in human rights violations. In *Kiobel v. Royal Dutch Petroleum*, the Supreme Court decided that under the Alien Tort Statute, traditionally used by foreign national victims, there is a presumption against extraterritoriality so that it could not be used against an oil corporation allegedly complicit in human rights violations committed by the Nigerian state.¹¹³ This somewhat departs from previous case law under the Statute involving foreign nationals alleging corporations, with some connection to the US, were complicit in human rights violations in other states. Reading the *Kiobel* decision carefully it appears that the door has not completely shut on extraterritoriality. The Supreme Court set a specific requirement for rebuttal of the presumption against extraterritoriality: claims should "touch and concern the territory of the United States" with "sufficient force".¹¹⁴ How a claim "touches" and "concerns" the US and what exactly amounts to "sufficient force" was not explained, although it was stated that "mere corporate presence" will not be enough. So this area will have to develop on a case-by-case basis. Other possible consequences of *Kiobel* could be to encourage other jurisdictions to recognize extraterritoriality for application of domestic laws to corporate complicity; specifically in the US, for claims to be brought under state tort laws, and naming individual corporate officials as defendants in claims brought under the Torture Victim Protection Act.¹¹⁵

VII. Conclusion

Those who have money can shout the loudest, but those who do not can occupy spaces where they can be heard, fighting on their own terms not seeking to occupy the power-holder's position. This seems to be a pretty good maxim as to the potential for protest networks to have an impact on changing

¹¹⁰ FED. R. CIV. P. 23 (US).

¹¹¹ *Doe v. Unocal*, 963 F. Supp. 880, 897-898 (C.D. Cal. 1997); *Doe v. Unocal Corp.*, 395 F.3d 932, 962 (9th Cir. 2002); *Doe v. Unocal*, Nos. BC 237, 980 (Cal. Supr. Ct. 2000).

¹¹² Recommendation of 14 November 2005, *supra* n62, 12.

¹¹³ *Kiobel v Royal Dutch Petroleum*, 133 S. Ct., 1659 (2013).

¹¹⁴ *Id.*, section IV.

¹¹⁵ Paul L. Hoffman, *Kiobel v. Royal Dutch Petroleum Co.: First Impressions*, 52 COLUM. J. TRANSNAT'L L. 28, 49-51 (2013).

corporate behavior. Public participation in protest networks is a form of the democratic imperative; vocalizing public interest issues where formal state decision-making structures may prove inadequate. The democratic imperative is also about elected representatives acting in and on behalf of the public interest when dealing with corporations and, if this fails, alternative methods of public scrutiny and action against corporations taking place. Consumer boycott campaigns, sovereign wealth fund investments, and class actions against corporations represent the democratic imperative in action with varying degrees of protest network involvement.

In a relatively short period of time, the BDS campaign has not only attracted global public attention but also political action in setting up protests and boycotts of Israeli companies deemed complicit in human rights violations and crimes against humanity. These have led to companies pulling out of the oPt, governments not renewing contracts with Israeli companies, investor divestment, and closer scrutiny of corporate sponsorship activities. A key part of BDS' success is its ability to organize effectively and tap into public concerns. Consumer behavior research shows that the more a consumer's 'involvement' (*i.e.* psychological state of motivation evoked by a boycott topic based on personal inherent needs, values and interests) with an issue rises, the stronger their willingness to act in its support. This is the most important factor determining whether individuals participate in boycotts.

The Fund proactively exercises shareholder ownership rights to ensure investment growth for the benefit of Norwegian citizens, as well as protection against corporate complicity in human rights violations and breaches of ethical norms. This demonstrates implementation of the democratic imperative. The Council on Ethics' assessments of whether companies pose a present or future unacceptable risk of exposing the Fund to complicity in violations and breaches can lead to company exclusions from the investment portfolio. Among the current exclusions are Israeli companies involved in building illegal settlements in East Jerusalem and the remainder of the West Bank (constituting serious violations of the rights of individuals in war or conflict), and providing a surveillance system for the wall (constituting serious violations of fundamental ethical norms). From the victims' perspective, the Council's remit of prospective assessment of unethical conduct fails to establish corporate responsibility for past violations. But as a non-judicial body the Council applies the Ethics Guidelines rather than civil or criminal law to establish corporate complicity, lowering the threshold for establishing ethical responsibility.

The possibility of bringing class actions against corporations represents a form of the democratic imperative, although procedural requirements and costs may hinder success. A criticism of private consumer action, as opposed to class action by victims, is that it privatizes harm. Claimants are not acting on behalf of actual victims of harmful corporate conduct and seek redress for indirect harms suffered. Private profiteering could emerge with consumer litigants awarded damages. However, this could be avoided through consumer/stakeholder class actions whereby consumer bodies, NGOs or the state bring claims against corporations on issues of wide public importance. These types of actions are justifiable as they transcend individual concern to focus on wider public interest issues.

All three mechanisms demonstrate possibilities for scrutinizing corporate behavior, holding corporations to account, and perhaps even leading to change in corporate behavior. Realistically, a combination of responsible consumer and responsible investor actions will be necessary to bring about positive change in corporate behavior.