IN THE MATTER OF EXCLUDING TENDERERS, FOR PUBLIC CONTRACTS, THAT CONDUCT BUSINESS WITH ISRAELI SETTLEMENTS IN THE OCCUPIED PALESTINIAN TERRITORIES

OPINION

BACKGROUND

1. We are asked to provide Amnesty International (Amnesty) with a legal opinion on whether it would be lawful for a public body to exclude a tenderer on the basis that they have not had sufficient regard to human rights obligations and responsibilities in areas of the world where it is involved in business. We are asked to advise as to whether such a decision could be made by a public body on the basis that the actions or inactions of the tender would amount to 'professional misconduct which brings into question the supplier's integrity' for the purpose of the Procurement Act 2023 (PA 2023)[1], which comes into force on 24 February 2025.

2. Although we are requested to provide general advice on this issue, we are also asked to consider specifically the example of tenderers who conduct business with Israeli settlements situated in the Occupied Palestinian Territories (OPT), in the context of the nexus between Israeli settlements and human rights violations, as described in a number of international sources and reports, and in the light of the July 2024 advisory opinion provided to the UN General Assembly by the International Court of Justice (ICJ).

3. This Opinion, therefore, is structured in three parts. First, we will consider the domestic statutory framework coming into force in February 2025 in relation to procurement and the powers of public authorities to exclude suppliers. Second, we will look at the international law responsibilities of businesses and discuss whether breaches of these responsibilities can provide grounds for exclusion under domestic legal provisions. Third, we will consider the specific example of businesses with links to Israeli settlements in the OTP.

[1] Paragraph 11(1) of Schedule 1 PA 2023

4. We note that in 2020 we provided an Opinion on some of these issues based on the Public Contracts Regulations 2015 (the 2015 Regulations). The 2015 Regulations are soon to superseded by the PA 2023, which (as noted above) will come into force on 24 February 2025.

THE RELEVANT DOMESTIC LAW – PROCUREMENT ACT 2023

5. Sections 26 and 27 PA 2023 cover how the grounds in relation to the exclusion of suppliers must be considered and applied in different procurement procedures.

6. Section 26 deals with excluding suppliers from a competitive award, and s. 27 from a competitive flexible procedure. Both provisions provide that a contracting authority must exclude an 'excluded supplier', and that it 'may' exclude an 'excludable' supplier.

7. Section 57 provides definitions of an 'excluded supplier' and an 'excludable supplier'. An excluded supplier is one where a mandatory ground applies, and an excludable supplier is one where a discretionary ground applies. The mandatory exclusion grounds are set out in Schedule 6 PA 2023, but none of these are applicable for the purposes of this Opinion. The discretionary exclusion grounds are set out in Schedule 7 PA 2023.

8. A study of the exclusion grounds narrows down the relevant grounds for the purposes of this Opinion to the ground relating to 'professional misconduct'. Thus paragraph 11 'Professional misconduct' of Schedule 7 states:-

> 11 (1) A discretionary exclusion ground applies to a supplier if the decision-maker considers that the supplier or a connected person has engaged in professional misconduct which brings into question the supplier's integrity.
>
> (2) A discretionary exclusion ground applies to a supplier if a court, regulator or other authority has ruled that the supplier or connected person has engaged in such professional misconduct.
>
> (3) "Professional misconduct" includes conduct involving –
> (a) dishonesty
> (b) impropriety;
> (c) a serious breach of ethical or professional standards applicable to the supplier (whether those standards are mandatory or not).

9. For exclusion grounds which are the same as, or substantially similar to, a discretionary

exclusion ground under the previous legislation (as outlined in Schedule 6, paragraph 44(4) and Schedule 7, paragraph 15(3)) such as the 2015 Regulations, events which occurred more than 3 years before the Schedules come into force cannot be considered. For example, 'professional misconduct' is similar to the discretionary exclusion ground of 'grave professional misconduct' (under the 2015 Regulations and as discussed in our previous Opinion), with a three-year time limit. Therefore, under PA 2023 such misconduct that occurred prior to 3 years before PA 2023 comes into effect cannot be considered. In practice, therefore, only misconduct after February 2022 can be considered.

10. Section 57 PA 2023 states (our emphasis):-

> 57(1) A supplier is an 'excludable supplier' if –
>
> (a) the contracting authority considers that –
>   (i) a discretionary exclusion ground applies to the supplier or an associated person, and
>   (ii) the circumstances giving rise to the application of the exclusion ground are continuing or likely to occur again, **or**
>
> (b) the supplier or an associated person is on the debarment list by virtue of a discretionary exclusion ground.

11. Thus, it is important to note that, if 'professional misconduct' is relied upon as the discretionary exclusion ground, in effect that must be ongoing or likely to occur again. Whilst, in due course, a supplier being on a debarment list will be a relevant factor, plainly it will take time before suppliers end up being placed on that list. For the purposes of this Opinion therefore, we have focussed on the limb of the test set out in s. 57(1)(a)(ii), as set out above.

12. Section 57(3) PA 2023 provides that a supplier may be an excludable supplier if any exclusion ground applies to either the supplier or an 'associated person'. An 'associated person' for these purposes is defined in s.26(4) PA 2023 as a person the supplier is relying on in order to satisfy the conditions of participation (other than a guarantor).

13. The government's guidance on Exclusions under the PA 2023[2] explains that:-

> 34…Guarantors are included as an associated person for the conditions of participation provisions but not for the exclusions provisions, to avoid contracting authorities having to check entities such as banks for potential exclusion grounds.
>
> 35. Associated persons are likely to be within the first tier of sub-contractors, but may be further down the supply chain, for example in procurements of contracts with highly technical elements.

14. A 'connected' person in relation to a 'supplier', is defined in paragraph 45 of Schedule 6, PA 2023, as any of the following:-

> 45(a) a person with "significant control" over the supplier (within the meaning given by section 790C(2) of the Companies Act 2006 ("CA 2006"));
>
> (b) a director or shadow director of the supplier;
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> (c) a parent undertaking or a subsidiary undertaking of the supplier;
>
> (d) a predecessor company;
>
> (e) any other person who it can reasonably be considered stands in an equivalent position in relation to the supplier as a person within paragraph (a) to (d);
>
> (f) any person with the right to exercise, or who actually exercises, significant influence or control over the supplier;
>
> (g) any person over which the supplier has the right to exercise, or actually exercises, significant influence or control;

15. As set out above at paragraph 12, Paragraph 11 of Schedule 7 PA 2023 states that "A discretionary exclusion ground applies to a supplier if the decision-maker considers that the supplier or a connected person has engaged in professional misconduct which brings into question the supplier's integrity." It follows that it is possible for a contracting authority under the PA 2023 to decide that because a connected person to the supplier, but not the supplier itself, has engaged in professional misconduct, which brings into question the supplier's integrity, then the supplier is excludable. If, for example, a supplier's parent company (but not the supplier itself) were carrying out business in the OPT, then, for the reasons explained below, the discretionary ground for exclusion for professional misconduct would arise.

[2] https://www.gov.uk/government/publications/procurement-act-2023-guidance-documents-procure-phase/guidance-exclusions-html

16. The Guidance on Exclusions explains:-

> 44. Where a supplier is an excludable supplier because of the misconduct of a connected person, contracting authorities may factor in the strength of the connection between the connected person and the supplier when exercising their discretion on whether or not to exclude. Where the connection is weak, this might suggest that the risk of misconduct arising in the procurement or the delivery of the contract is lower and therefore the situation is less serious, meaning it may be appropriate to exercise discretion to permit the supplier to continue in the procurement.

17. Section 58 PA 2023 provides for a contracting authority to: (a) take account of 'self-cleaning' by a supplier, including the process for doing so; and (b) consider certain matters in the exercise of its discretion whether or not to exclude. This provision states:-

> (1) In considering, for the purposes of section 57(1)(a) or (2)(a), whether the circumstances giving rise to the application of an exclusion ground are continuing or likely to occur again, a contracting authority may have regard to the following matters—
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> (a) evidence that the supplier, associated person or connected person has taken the circumstances seriously, for example by paying compensation;
>
> (b) steps that the supplier, associated person or connected person has taken to prevent the circumstances continuing or occurring again, for example by changing staff or management, or putting procedures and training in place;
>
> (c) commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps;
>
> (d) the time that has elapsed since the circumstances last occurred;
>
> (e) any other evidence, explanation or factor that the authority considers appropriate.
>
> (2) Before determining whether a supplier is an excluded supplier under section 57(1)(a) or an excludable supplier under section 57(2)(a), a contracting authority must give the supplier reasonable opportunity to—
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> (a) make representations, and
>
> (b) provide evidence as to whether exclusion grounds apply and whether the circumstances giving rise to any application are likely to occur again (including information of a kind referred to in subsection (1)).
>
> (3) But a contracting authority may not require particular evidence or information unless the authority is satisfied that the requirements are proportionate in the circumstances, having regard to—
>
> (a) the nature and complexity of the matters being assessed, and
>
> (b) where relevant, the preliminary nature of a consideration under section 27(3).

18. It is plain that s. 58(2) PA 2023 draws a distinction between 'representations' on the one hand, and 'evidence' on the other. That means that, in respect of s. 58(3), whilst a contracting authority can choose not to require particular evidence or information from a supplier, it **must** still give the supplier an opportunity to make representations. This cannot be dispensed with under the PA 2023.

19. The Guidance on Exclusions also explains as follows in relation to the exercise of the discretion to exclude:-

> 75. Where a supplier is an excludable supplier, contracting authorities have a discretion to exclude the supplier. In exercising this discretion, contracting authorities are reminded of the duty to have regard to the objectives set out in section 12 of the Act including delivering value for money, maximising public benefit, information sharing and acting (and being seen to act) with integrity. More generally, the risk posed by the circumstances or misconduct giving rise to the exclusion ground should be considered and whether this outweighs the public interest in allowing the supplier to participate in the procurement.
>
> 76. Contracting authorities should consider all relevant factors when exercising discretion to exclude a supplier, or not to exclude a supplier. This will depend on the particular circumstances, but an example of where it may be appropriate to allow a supplier to continue to participate in the procurement or to be awarded a contract is where the type of contract is such that the relevant risk is unlikely to arise in relation to the contract even if the circumstances giving rise to the exclusion ground are likely to occur again.
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> ….
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> 78. The factors that may be relevant in any particular situation include (but are not limited to):
>
> > a. factors relating to the supplier, such as the seriousness of the circumstances or misconduct giving rise to the exclusion ground and the time elapsed since the circumstances or misconduct in question; and
> >
> > b. factors relevant to the procurement, such as whether there are other suitable suppliers, the impact of exclusion on public services and whether the risks posed by the supplier due to being an excludable supplier are likely to transpire in the delivery of the particular contract. For example, in a procurement for IT support services, a contracting authority may decide not to exclude a supplier for environmental misconduct relating to its operations overseas in a different sector.
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> 79. Contracting authorities should not operate a policy to always exclude, or to

> never exclude, on particular exclusion grounds. Case by case decisions must be made on the basis of the circumstances of each procurement and consideration of all relevant factors at that time.

20. The matters in paragraph 79 of the Guidance on Exclusions are not further enlarged upon. However, it seems to us that the intent is to ensure that contracting authorities do not 'fetter their discretion' in making decisions in relation to exclusion grounds by adopting policies which do not allow for any exceptions. This is a well-known public law principle applied in general to decision-making processes. It is often the case, however, that courts have found that a policy which allows only for departure from it in exceptional circumstances, will be lawful so long as individual cases can be considered: see, for example, R *(Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, in which the Court of Appeal held:-

> The principle against fettering of discretion does not prevent a public authority from adopting a policy, even a strict policy. What it does do is to prevent it from being willing to listen to anyone with something new to say.

21. In R *(West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441 the Court of Appeal held that:-

> …a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions. As is stated in De Smith's Judicial Review (7th edn.) paragraph 9-013,"… a general rule or policy that does not on its face admit of exceptions will be permitted in most circumstances. There may be a number of circumstances where the authority will want to emphasise its policy… but the proof of the fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself.

22. As explained above, it also worth noting that the position under the PA 2023 is also different than the 2015 Regulations 2015, in that the PA 2023 now provides for a Debarment List. This would not affect the individual decision made by a contracting authority once an exclusion decision has been made, but raises the possibility that the excluded supplier will be placed on a Debarment List by central government. It applies where a contracting authority has excluded an excludable supplier from participating in, or progressing, as part of, a competitive tendering procedure. The contracting authority must, within 30 days, give notice of that fact to the relevant appropriate authority (which will be a government body managing the Debarment List). An investigation can then be

carried out and a decision made as to whether the supplier should be placed on Debarment list published pursuant to s. 62(10) PA 2023.

WHAT CONSTITUTES PROFESSIONAL MISCONDUCT?

23. In our previous Opinion in 2020 we considered the position (current until 24 February 2025) under the 2015 Regulations which reads as follows:-

> (8) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations:—
>
> …
>
> (c) where the contracting authority can demonstrate by appropriate means that the economic operator is **guilty of grave professional misconduct, which renders its integrity questionable**… (emphasis added).

24. We noted that there was little guidance in the case-law or otherwise as to what can constitute 'grave professional misconduct' (GPM). We also noted the need to establish that GPM would have to be of such a type such as to render an economic operator's integrity 'questionable'. Although the current provisions in PA 2023 now remove the reference to 'grave', it is still the case that professional misconduct needs to be of a type such that it 'brings into question the supplier's integrity'.

25. In our view, for professional misconduct to bring into question a supplier's integrity (which is required before there can be exclusion), such misconduct would still need to be at a significant level, and so the dropping of the word 'grave' from the statutory provision in the PA 2023 may well make little practical difference to situations in which it will be appropriate for a public authority to consider exclusion of a supplier.

26. There is, of course, no domestic case law on the PA 2023 (as it is not yet in force) to provide guidance on this issue. In our previous Opinion we referred to jurisprudence of the European Court of Justice (ECJ) in relation to what constitutes GPM. Although that jurisprudence is not now binding on UK courts, in our view it still provides a useful starting point for our analysis.

27. In relation to GPM, the European Court of Justice (ECJ) had issued some guidance on the phrase in *Forposta SA and ABC Direct Contact sp. zoo v Poczta Polska SA (Case C-465/11)*.

The ECJ held that the concepts of 'grave', 'professional' and 'misconduct' can be specified and explained in national law, provided that that national law has regard for EU law. The following paragraphs of the judgment are relevant:-

> 27. It must be observed …that the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs, which are established by the disciplinary body of that profession or by a judgment which has the force of res judicata.
>
> …
>
> 30. Nevertheless, the concept of 'grave misconduct' must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part. Accordingly, any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator at issue, but does not automatically amount to grave misconduct.
>
> 31. In addition, in order to find whether 'grave misconduct' exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out.

28. In a more recent case, the ECJ recalled that the concept of professional misconduct covered all wrongful conduct that had an impact on the professional credibility of the economic operator and that it did not only cover the infringement of ethical standards of the profession the economic operator belonged to: *Consorzio Nazionale Servizi Società Cooperativa (CNS) v Gruppo Torinese Trasporti Gtt SpA (Case C-426/18).* This decision was cited by the CJEU in *Landkreis AF v J. Sch. Omnibusunternehmen and K. Reisen* (Case C-416/21, dated 15 September 2022), in which it was stated that professional misconduct was a concept which must be 'interpreted broadly' (at paragraph 45).

29. The upshot of this case law is that contracting authorities can be said to have a relatively wide discretion when assessing whether behaviour of a business enterprise amounts to GPM or professional misconduct, and they are not limited to only considering violations of ethical or professional standards in the strict sense of the profession to which that operator belongs. The case law does not, of course, specifically say that the acts of committing, supporting or contributing to human rights breaches

come with the definition of professional misconduct, but neither does it provide a definition which excludes it.

INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND PROFESSIONAL MISCONDUCT

30. The purpose of this Opinion is not to explain in detail international humanitarian law (IHL) or international human rights law. However, a few words of explanation are provided to put the Opinion in context.

31. In relation to international human rights law, the Universal Declaration of Human Rights (UDHR) 1948 was drafted as a common standard of achievement for all peoples and nations, and spells out basic civil, political, economic, social and cultural rights that all human beings should enjoy. The UDHR, together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) form the backbone of international human rights law, together with a series of international human rights treaties and other instruments adopted since 1945 (such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the UN Convention on the Rights of the Child).

32. Other instruments have been adopted at the regional level reflecting the particular human rights concerns of the region and providing for specific mechanisms of protection (see for example the European Convention of Human Rights and the Inter-American Convention on Human Rights). Most States have also adopted constitutions and other laws which formally protect basic human rights.

33. International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is part of international law, which is the body of rules governing relations between States. International law is contained in agreements between States – treaties or conventions –, in customary rules, which consist of State practise considered by them as legally binding, and in general principles.

34. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

35. A major part of international humanitarian law is contained in the four Geneva Conventions of 1949. Nearly every State in the world has agreed to be bound by them. The Conventions have been developed and supplemented by two further agreements: the Additional Protocols of 1977 relating to the protection of victims of armed conflicts. Other agreements prohibit the use of certain weapons and military tactics and protect certain categories of people and goods. Many provisions of international humanitarian law are now accepted as customary law – that is, as general rules by which all States are bound.

36. International humanitarian law protects those who do not take part in the fighting, such as civilians and medical and religious military personnel. It also protects those who have ceased to take part, such as wounded, shipwrecked and sick combatants, and prisoners of war. These categories of person are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal guarantees. They must be protected and treated humanely in all circumstances, with no adverse distinction. There are also detailed rules governing the conditions of detention for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power. This includes the provision of food, shelter and medical care, and the right to exchange messages with their families.

37. All States are at all times bound to respect, protect, promote and fulfil the human rights enshrined in international legal instruments to which they are parties, as well as those human rights which are considered part of customary international law. As the UN Office of the High Commissioner on Human Rights at the UN commented in 2014:-[3]

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[3] Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, 6 June 2014.

> In international conflicts, international humanitarian law — including the treaties to which a State is party and those provisions of international humanitarian law which have become customary international law — also applies….A situation of conflict does not release States from their human rights obligations – these obligations continue to exist alongside international humanitarian law and provide complimentary and mutually reinforcing protection.

UN Guiding Principles on Business and Human Rights

38. In this vein, and importantly for the purposes of this Opinion, the UN has published the "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*" (the UN Guiding Principles),[4] which were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

39. The UN Guiding Principles on Business and Human Rights (UNGPs) are the global standard for human rights due diligence. Supported by governments from all regions of the world, they carry considerable authority as an internationally accepted framework for enhancing standards and practices with regard to business and human rights.

40. The UN Guiding Principles make it clear that States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. They also say that States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights. This makes it clear, in our view, that the state bodies in the UK (including local authorities) are expected to take into account human rights and IHL considerations when carrying out functions such as procurement matters. As the Commentary to the UN Guiding Principles states:-

> Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises'

[4] https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights

activities, including through the provision of adequate independent monitoring and accountability mechanisms.

41. The UN Guiding Principles also set out responsibilities for businesses and state that business enterprises should respect human rights. 'This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved' (principle 11). The Commentary explains that:-

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

42. The UN Guiding Principles state that the responsibility to respect human rights requires that business enterprises:

    (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
    (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

43. The UN Guiding Principles set out that, to comply with these expectations, business enterprises need to have:-

    (a) A policy commitment to meet their responsibility to respect human rights;
    (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
    (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

44. The UN Guiding Principles set out in detail how business enterprises should ensure that these responsibilities are met and then conclude that, in all contexts, business enterprises

should:

(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;

(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;

(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

45. Specifically in relation to due diligence principle 17 of the UN Guiding Principles states that:-

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
>
> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
> (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
> (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

46. The Commentary to the UN Guiding Principles sets out that:-

> Human rights risks are understood to be the business enterprise's potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation…
>
> …
>
> Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a nonlegal matter, business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that

party.

> As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases…
>
> Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

DISCUSSION

47. It is clear that where international humanitarian law and international human rights laws continue to apply in zones of conflict, there is a duty of due diligence on businesses in relation to compliance with human rights in such areas. The UN Guiding Principles apply to businesses with interests in these areas, requiring businesses to be aware of the effect their business enterprises have on the human rights of people in these areas, and to take action if their activities adversely affect those human rights.

48. In such a situation where the law is clear and the guidance to businesses so strident as to how they conduct themselves, it seems to us that it is appropriate for local authorities and other public authorities to consider whether lack of compliance by suppliers (and associated and connected persons) with the UN Guiding Principles and other advice provided by UN bodies does indeed amount to professional misconduct in a way which brings into question the supplier's integrity in the context of the PA 2023.

49. As noted above the ECJ has confirmed that 'professional misconduct' is not limited to professional norms in the particular area of a business. It seems to us that 'misconduct' therefore can be a word of wide meaning which would encompass any conduct which breached accepted norms or agreed standards of behaviour (such as the UN Guiding Principles).

50. Thus, in our view local authorities are entitled to include questions, requests for information and guidance in tender documents which cover the issue of their involvement and links in conflict areas and the way in which that involvement and links impact on the populations and human rights in those areas.

51. As explained at paragraphs 20-21 above, a local authority would not be entitled to adopt a blanket policy to the effect that a supplier would *always* be disqualified from participation in a procurement were it, an associated or connected person, to have carried out or have business interests in a particular area of conflict where such interests impact negatively on the human rights situation in that area. However, we consider a local authority would be lawfully entitled to adopt a policy that unless there were exceptional circumstances, such business interests would likely disqualify a supplier from participating in that procurement.

52. It is also the case that any identified 'professional misconduct' needs to bring into question the supplier's integrity which indicates to us that a certain gravity is required. Thus it may be that not all involvement with impacts which adversely affected human rights in an area by a business, would meet the definition in PA 2023. Any decision to exclude a tenderer on the basis of professional misconduct would need to be a proportionate one, taking into account individual circumstances including those specifically referred to in PA 2023, such as efforts to 'self-clean' made by a potential supplier.

53. However, it should be noted that in some areas of the world it may be difficult for a business which does have links, for example with regimes overtly abusing human rights, to be able to justify such links.

54. How is our Opinion tempered by current government policy and guidance? It is difficult, four months after the general election, to gauge where the new government stands on these issues. Still available on-line is the 2016 government policy position which includes this:-

> Public procurement should never be used as a tool to boycott tenders from suppliers based in other countries, except where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government.[5]

55. Whether that still represents the government position is not known. In June 2023, the previous government introduced the Economic Activity of Public Bodies (Overseas

[5]Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts Information: Note 01/16 17th February 2016.

Matters) Bill 2022-23.[6] Clauses 1 and 2 would have forbidden public authorities to make procurement or investment decisions based on their own moral or political disapproval of policies or conduct by foreign authorities. Clause 3 would have provided for exemptions to this ban. Clause 4 would have forbidden public authorities to make statements about boycott and divestment campaigns and their decisions in this respect. With the election of the new Labour government in July 2024, the Bill is now in abeyance and it is understood will no longer be pursued. The advice obtained by the Labour Party (from Richard Hermer KC (now the Attorney-General)) when the bill was published, made it very clear that the Labour Party did not support the Bill.[7]

56. In any event, we note that what is discussed in this Opinion is not whether public authorities should consider boycotts or sanctions against particular countries or firms (UK or otherwise) that trade with them. In our view individual consideration of circumstances in which it could be said that the involvement of a business in a particular area of conflict, or with a government known to abuse human rights, amounts to professional misconduct because of the contribution to human rights abuses, is not the same as introducing a general boycott or sanctions against companies or countries.

57. Rather, it is a straightforward application of international advice from the UN to businesses in the context of settled UK policy. It is noteworthy that the UK Government's national action plan, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (last updated 2016),[8] shows considerable enthusiasm for implementing the UN Guiding Principles in the 'belief that the promotion of business, and the respect for human rights, go hand in hand' and includes the following in the list of actions to 'reinforce its implementation of its commitments' under the UN Guiding Principles:-

> 18 (iii) Continue to ensure that UK Government procurement rules allow for human rights-related matters to be reflected in the procurement of public goods, works and services, taking into account the 2014 EU Public Procurement Directives and Crown Commercial Service guidance on compliance with wider international obligations when letting public contracts.

[6] https://bills.parliament.uk/bills/3475
[7] https://www.matrixlaw.co.uk/news/richard-hermer-kc-publishes-opinion-on-economic-activity-of-public-bodies-overseas-matters-bill/.
[8] https://www.gov.uk/government/publications/bhr-action-plan

58. In our view, the present government can be expected to take a similarly enthusiastic approach to ensuring that human rights-related matters are taken into account when PA 2023 comes into force.

THE SPECIFIC EXAMPLE OF ISRAEL AND THE OPT

59. We are asked to consider as a specific example the position of businesses with links to the Israeli settlements in the OTP and to apply the principles discussed above in relation to that example.

60. We are instructed, by way of background, that Amnesty launched a campaign in June 2017 calling on States to prevent companies domiciled in their territory from operating in Israeli settlements or trading in settlement goods. This coincided with the fiftieth anniversary of Israel's occupation of OPT, and of the beginning of Israel's unlawful settlement enterprise.

61. There have been two outputs as part of this campaign both published in 2019. First, a report has been issued called *Destination: Occupation* on how online tourism companies list places to stay and promote activities in the Israeli settlements, which under international law are illegal. [9]

62. Second, a briefing has been written called *Think Twice* for companies addressing the question of whether they can do business with Israeli settlements in OPT while respecting human rights.[10]

63. We have also been directed to the 2021 Amnesty report *JCB Off Track*[11] which concluded that:-

> JCB[12] has not taken adequate steps within its power and capacity to prevent its equipment from being used to demolish Palestinian homes and construct Israeli settlements. This failure puts the company in breach of its responsibilities under international human rights standards applicable to business and may be sufficiently serious to carry legal liability.

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[9] https://www.amnesty.org/en/documents/mde15/9490/2019/en/
[10] https://www.amnesty.org.uk/resources/thinktwice
[11] https://www.amnesty.org/en/documents/mde15/4985/2021/en/
[12] This is a reference to JC Bamford Excavators Limited, a British multinational manufacturer of equipment for constructions, agriculture, waste handling and demolition.

64. The situation in the OPT is one of military occupation.[13] As the occupying power, Israel is bound by international human rights law and IHL.[14] Indeed, Israel has ratified international human rights and IHL treaties, and in any event (as explained above) some of these standards reflect customary international law or represent peremptory norms of international law.

65. Importantly, Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War prohibits the occupying power from transferring parts of its own civilian population into the territory that it occupies.[15] Applying this law, the International Court of Justice, the United Nations General Assembly, the Security Council and other international mechanisms have affirmed that Israeli settlements in the OTP are illegal under international law. UN Security Council Resolution 2334, passed on 23 December 2016, reaffirmed the illegality of Israeli settlements. United Nations human rights treaty bodies have also called on Israel to cease all construction of settlements.

66. The human rights situation has also been recently considered by the ICJ in an Advisory Opinion dated 19 July 2024 in response to questions asked by the UN General Assembly.[16] In its Advisory Opinion, the ICJ responded to the questions posed by the General Assembly by concluding that:-

- the State of Israel's continued presence in the Occupied Palestinian Territory is unlawful;

- the State of Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible;

- the State of Israel is under an obligation to cease immediately all new settlement activities, and to evacuate all settlers from the Occupied Palestinian Territory;

- the State of Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned in the Occupied Palestinian Territory;

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[13] See the International Court of Justice Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004. (A/ES-10/273) and Corr.1, para. 78

[14] As the occupying Power, Israel is bound under international humanitarian law by the obligations in the Hague Regulations of 1907, which are recognized as part of customary international law, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention), to which Israel is a High Contracting Party.

[15] Convention Relative to the Protection of Civilian Persons in Times of War. Geneva, 12 August 1949.

[16] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, No. 2024/57, 19 July 2024

- all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of the State of Israel in the Occupied Palestinian Territory and not to render aid or assistance in maintaining the situation created by the continued presence of the State of Israel in the Occupied Palestinian Territory;

- international organizations, including the United Nations, are under an obligation not to recognize as legal the situation arising from the unlawful presence of the State of Israel in the Occupied Palestinian Territory; and

- the United Nations, and especially the General Assembly, which requested the opinion, and the Security Council, should consider the precise modalities and further action required to bring to an end as rapidly as possible the unlawful presence of the State of Israel in the Occupied Palestinian Territory.

67. The ICJ also found that that the regime of comprehensive restrictions imposed by Israel on Palestinians in the OPT constitutes systemic discrimination based on, amongst other things, race, religion or ethnic origin, in violation of the International Covenant on Civil and Politicial Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination.

68. The Court was also of the view that, as a consequence of Israel's policies and practices, the Palestinian people has been deprived of its right to self-determination over a long period, and further prolongation of these policies and practices undermines the exercise of this right in the future. For these reasons, the Court considered that Israel's unlawful policies and practices are in breach of Israel's obligation to respect the right of the Palestinian people to self-determination.

69. In our view the ICJ Advisory Opinion can leave potential suppliers in no doubt that business interests involving the Israeli settlements in the OPT carries a significant risk of contributing to the identified human rights abuses.

70. Further, the UK Government has also made its position clear on the international position of the settlements in its Guidance '*Overseas business risk: The Occupied Palestinian Territories*' most recently updated in February 2022:-

> ….Settlements are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution to the Israeli-Palestinian conflict impossible. We will not recognise any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties.[17]
>
> There are therefore clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity. Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel's territory….

71. Especially since the publication of the July 2024 Advisory Opinion by the ICJ, it seems to us that Amnesty are correct when they say in their *Think Twice* report at paragraph 1.2:-

> Companies considering operating in, or doing business with, Israeli settlements in the Occupied Palestinian Territories, need to take account of the fact that any business activity there will unavoidably contribute to an illegal situation. It will also contribute to a situation of systematic human rights abuse of the Palestinian population. This applies regardless of the nature of the engagement or the particular sector. Companies should also consider the range of more specific adverse human rights impacts that could arise from their particular business activities.

72. We note that in June 2023 the UN published an updated database of business enterprises which have, directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements.[18] This should serve as a port of reference for public procurement decision-makers, (with the caveat that it is not a comprehensive list but addresses certain activities listed in a resolution of the UN Human Rights Council). The initial UN Human Rights Office report of January 2018, which detailed its work on producing the database stated that 'Businesses play a central role in furthering the establishment, maintenance and expansion of Israeli settlements.' The report stressed that as part of the due diligence process for companies seeking to operate in a complex environment like the occupied Palestinian territory, 'business enterprises

[17] https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories

[18] A/HRC/43/71
www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session31/database-hrc3136/23-06-30-Update-israeli-settlement-opt-database-hrc3136.pdf
and see update August 2024 update https://www.un.org/unispal/document/ohchr-report-02aug24/

may need to consider whether it is possible to engage in such an environment in a manner that respects human rights'.[19]

73. Most recently (18 September 2024), UN Special Rapporteurs and Working Groups (including the Working Group on the issue of human rights and transnational corporations and other business enterprises) issued a statement marking 50 days since the ICJ Advisory Opinion urging member steps to take action,[20] including action to:-

> Ban goods and services emerging from both the colonisation of occupied Palestinian territory and other unlawful activities that may be detrimental to Palestinians' rights, from entering their territory and markets, and take measures to label and permit goods and services emerging from Palestinian individuals and entities in occupied territory.
>
> Cancel or suspend economic relationships, trade agreements and academic relations with Israel that may contribute to its unlawful presence and apartheid regime in the occupied Palestinian territory.
>
> Impose sanctions, including asset freezes, on Israeli individuals, entities including businesses, corporations and financial institutions, involved in the unlawful occupation and apartheid regime as well as on any foreign or domestic entities and individuals subject to their jurisdiction that supply goods and services that may aid, assist or enable occupation and apartheid.

74. Considering the weight of the international legal consensus concerning the illegal nature of the settlements themselves and the pervasive nature of the negative human rights impact caused by them, there is a strong body of opinion and law which concludes that business dealings in the settlements can and, in many cases, inevitably do, contribute to the ongoing breaches of human rights law and IHL in the OPT.

75. In such a situation where the law is clear and the guidance to businesses so strident as to how they conduct themselves in the settlements, it seems to us that it must be appropriate for local authorities and other public authorities to consider whether lack of compliance by suppliers, and associated and connected persons, with the Guiding Principles and other advice provided by UN bodies, in relation to this particular example, does indeed amount to professional misconduct which would bring into question the supplier's integrity in the context of the PA 2023.

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[19] https://www.ohchr.org/en/press-releases/2018/01/un-rights-office-issues-report-business-and-human-rights-settlements
[20] https://www.ohchr.org/en/statements/2024/09/un-experts-warn-international-order-knifes-edge-urge-states-comply-icj-advisory

76. Thus, in our view local authorities are entitled to include questions, requests for information and guidance in tender documents which cover the issue of involvement and links with the settlements in the OPT (and of course business in other areas of the world where there are human rights concerns), and to adopt a policy which relates to these issues (so long as it includes a requirement to consider individual cases, and to consider representations made by tenderers).

CONCLUSION

77. We hope that this Opinion provides Amnesty with the advice it requires at this time. We would be happy to be consulted further on any issues which arise.

11 November 2024

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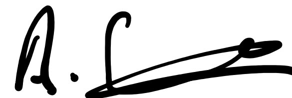

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