**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 that conducts business with Israeli settlements situated in the Occupied Palestinian Territories (OPT), on the grounds that this amounts to ‘grave professional misconduct’, for the purpose of the Public Contracts Regulations 2015, particularly given the nexus between Israeli settlements and human rights violations, as described in a number of international sources and reports.
2. 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.
3. 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. [[1]](#footnote-1)
4. 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.[[2]](#footnote-2)
5. We are instructed that Amnesty now wants to focus on the procurement policies of public bodies, particularly local authorities, with a view to generating influence on policy at a local level.
6. What follows focusses on the situation in relation to illegal settlements in the OPT. However, the principles, law and policy explored have equal applicability to other situations in the world where there is conflict and/or occupation and this Opinion should be read with that in mind.

THE RELEVANT LAW – PUBLIC CONTRACTS REGULATIONS 2015

1. As those instructing us are aware, the rules relating to public procurement derive from a number of EU Directives. Those Directives refer to different types of public contracts, including utilities, defence and more general works, services and supplies. For the purposes of this Opinion we proceed on the basis that the applicable law in question is the Public Contracts Regulations 2015 (PCR 2015), which transposes the EU Public Contracts Directive (2014/24/EU).[[3]](#footnote-3)
2. The PCR 2015 contain general regulations in relation to the public procurement process, i.e. the principles governing a fair competition/tendering process and how that process must be undertaken. Regulation 57(1) PCR 2015 contains *mandatory* grounds for exclusion of economic operators from a procurement procedure, but none of these would be applicable to the current scenario as outlined by Amnesty. However, regulation 57(8) PCR 2015 contains a list of *discretionary* grounds for exclusion. We have been asked to focus, for current purposes, on regulation 57(8)(c) PCR 2015 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).**

1. There is little guidance in the case-law or otherwise as to what can constitute ‘grave professional misconduct’ (GPM), and this is the main focus of the analysis below. In relation to whether GPM renders an economic operator’s integrity ‘questionable’, it seems to us that in most cases, at least, the establishment of GPM would be sufficient to establish this aspect of the discretionary ground.
2. In relation to GPM, the European Court of Justice (ECJ) has 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.

1. 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).
2. 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, 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. However, the discretion would have to be exercised in accordance with general principles of EU law, namely equal treatment, transparency and proportionality. The case law does not, of course, specifically say that committing, supporting or contributing to human rights breaches come with the definition of GPM, but neither does it provide a definition which excludes it.

SCOTTISH PROCUREMENT OFFICE GUIDANCE

1. It is certainly the case that the Scottish Government believes that breaches of human rights can amount to GPM. In 2014 the Scottish Procurement Office of the Scottish government issued guidance to public bodies in Scotland advising as to when it might be appropriate not to procure from companies that conduct business with Israeli settlements.[[4]](#footnote-4) It is important to note that the Scottish government was not proposing a general boycott and stated that ‘decisions should be taken on a case by case basis and appropriate legal advice should be sought’.
2. The procurement note includes the following *verbatim* points which set out the Scottish government’s approach:
	* The Scottish Government expects companies that are awarded public contracts to maintain high standards of business and professional conduct;
	* The Scottish Government strongly discourages trade and investment from illegal settlements. A decision to exclude a company from a public procurement exercise on the basis of its involvement in such a settlement has, however, to be taken in compliance with procurement legislation;
	* For a company to be excluded from competition it will have had to have been convicted of a specific offence and/or committed an act of grave misconduct in the course of its business;
	* Exploitation of assets in illegal settlements is likely to be regarded as constituting “grave professional misconduct” for the purposes of procurement law.
3. There are a number of important points to note from this formulation by the Scottish government:-
4. Although the Scottish Government ‘discourages trade and investment from illegal settlements’, it is recognised that any decision to exclude a company must be taken in ‘compliance with procurement legislation’.
5. It is recognised that there needs to be at least ‘an act of grave misconduct’ and that this has to happen ‘in the course of business’.
6. The example of ‘grave misconduct’ given is that of ‘exploitation of assets in illegal settlements’. It is not clear whether this includes all ‘trade and investment from illegal settlements’.
7. There is no analysis as to why or how ‘exploitation of assets in illegal settlements’ amounts to ‘an act of grave misconduct’.
8. As mentioned above, the Scottish Government recommends that the issue should be considered on a ‘case by case’ basis, and, further, that appropriate legal advice should be sought, presumably before a decision is made that it is appropriate to exclude a particular company from a particular procurement exercise.
9. The background note to the policy position notes the following:-
10. Companies from Israel have equivalent rights of access to bid for public contracts in the EU as do EU-registered companies.
11. The clear position of the UK and Scottish governments is that settlements in the OPTs are illegal under international law.
12. Any possible exclusion must be considered on a case by case basis, so that the decision is proportionate in relation to the nature and scale of the offence.
13. As a matter of practice, a public body might want to seek assurances from ‘an Israeli based company’ that it is not actively involved in illegal settlements, and where goods or produce originating in Israel is to be purchased, that these have not been produced in illegal settlements.
14. In the absence of these assurances, legal advice should be obtained as to whether grounds exist which would warrant exclusion of the bidder, which is likely to require further investigation as to the origin of goods with the help of cited papers from the European Commission and DEFRA.

INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND GPM

**Israeli settlements and international law**

1. The purpose of this Opinion is not to explain in detail the international humanitarian law (IHL) and human rights law position in relation to the OPTs and Israeli settlements therein. However, the law is settled and accepted by the vast majority of States. The situation in the OPT is one of military occupation.[[5]](#footnote-5) As the occupying power, Israel is bound by international human rights law and IHL.[[6]](#footnote-6) Indeed, Israel has ratified international human rights and IHL treaties, and in any event some of these standards reflect customary international law or represent peremptory norms of international law.
2. 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.[[7]](#footnote-7) Applying this law, the International Court of Justice, the United Nations General Assembly, the Security Council and other international mechanisms have affirmed that the settlements 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.
3. As well as the transfer by an occupying power of its own civilian population into occupied territory amounting to a breach of IHL, it is also a grave breach according to the First Additional Protocol.
4. 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:-[[8]](#footnote-8)

 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 military occupation is considered to be a conflict situation even if active hostilities may have ceased or occur periodically or sporadically. 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.

1. The UK Government has also made its position clear on the international position of the settlements:-[[9]](#footnote-9)

….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.

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….

1. The similar position of EU states has been stated by the European Council on Foreign Relations (ECFR).[[10]](#footnote-10)
2. This description of the general situation concerning settlements in the OPT does not address the responsibilities of enterprises who might do business there or have commercial links in the settlements. However, businesses are expected to act in accordance with human rights law and international humanitarian law, and are not expected to act in a way which contributes to human rights breaches. As Amnesty 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.

1. Furthermore, the establishment of settlements in the OPT impacts on the human rights of Palestinians on a daily basis. Amnesty explains the changes that have been made to occupied territory as follows in the *Think Twice* report:-
* the appropriation of more than 200,000 hectares of Palestinian land;
* the establishment of about 250 settlements, populated by 600,000 Israeli settlers;
* the physical enclosure and segregation of the 3 million West Bank Palestinians;
* the extension of Israeli laws to the West Bank and the creation of a discriminatory legal regime;
* the unequal access to natural resources, social services, property and land for Palestinians in the occupied West Bank.
1. The January 2018 report from the UN Office of the High Commissioner for Human Rights on a UN database of businesses involved in settlement-related activities,[[11]](#footnote-11) (see further below) reported as follows:-

The violations of human rights associated with the settlements are pervasive and devastating, reaching every facet of Palestinian life…. Owing to settlement development and infrastructure, Palestinians suffer from restrictions on freedom of religion, movement and education; their rights to land and water; access to livelihoods and their right to an adequate standard of living; their rights to family life; and many other fundamental human rights.

1. In February 2020 the UN published the above-mentioned database which 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.[[12]](#footnote-12)

**UN Guiding Principles on Business and Human Rights**

1. In this vein 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), 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.
2. 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’ activities, including through the provision of adequate independent monitoring and accountability mechanisms.

1. 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’. 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.

1. The UN Guiding Principles state that the responsibility to respect human rights requires that business enterprises:
2. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
3. 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.
4. The UN Guiding Principles set out that, to comply with these expectations, business enterprises need to have:-
	1. A policy commitment to meet their responsibility to respect human rights;
	2. A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
	3. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.
5. 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:
6. Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
7. Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
8. Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.
9. As referred to above, the UN Working Group on Business and Human Rights has issued a statement setting out the implications of the UN Guiding Principles in the context of Israeli settlements in the Occupied Palestinian Territories. The statement concluded that:-

Business enterprises that have activities in the settlements or have business relationships with entities in the settlements should take due note of reports and resolutions of the United Nations human rights system concerning human rights violations related to Israeli settlements in the OPT. For example the Working Group notes that the Secretary-General has highlighted a range of human rights which are affected by Israeli settlement policies and practices, involving construction of settlements, land confiscation, zoning and planning regime, forced evictions of Palestinians and demolitions of Palestinian structures, and lack of accountability for settler violence. These include, but are not limited to, rights and freedoms of non-discrimination, liberty, security of person and fair trial, freedom of movement, adequate housing, health, education, work and an adequate standard of living.

1. The UN Human Rights Office report of January 2018, referred to above, (which detailed its work on producing a database of business enterprises engaged in certain, specific activities in the OPT that are either explicitly linked to Israeli settlements), states that “Businesses play a central role in furthering the establishment, maintenance and expansion of Israeli settlements.” The report stresses that as part of the due diligence process for companies seeking to operate in a complex environment like the occupied Palestinian territory, “business enterprises may need to consider whether it is possible to engage in such an environment in a manner that respects human rights.”
2. 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, the report notes that “it is difficult to imagine a scenario in which a company could engage in listed activities in a way that is consistent with the Guiding Principles and international law.”

OPINION

1. The weight of this material (and only a selection has been highlighted above) indicates that 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.
2. It is clear that the UN Guiding Principles apply to businesses with interests in the settlements. The UN Statement of 2014 explicitly applied these principles to the settlements, requiring businesses to be aware of the effect their business enterprises have on the human rights of Palestinians, and to take action if their activities adversely affect those human rights.
3. 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 is appropriate for local authorities and other public authorities to consider whether lack of compliance with the Guiding Principles and other advice provided by UN bodies set out above does indeed amount to GPM in the context of the PCR 2015.
4. This is the approach the Scottish Government has taken and it seems to us that, taking account the factors in the previous section of this Opinion, it was entitled to do so (and so far as we are aware its advice has not been challenged). 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).
5. 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). We note that reg 57(8)(h) and (i) PCR 2015 provide discretionary grounds for exclusion where there is ‘serious misrepresentation’ in providing information, and for negligent provision of misleading information.
6. It is clear from the EU case law that it is not possible to have a blanket policy which excludes any business which has links with the settlements, and the case law is also clear that individual investigation is necessary where concerns are raised (and this is the model currently adopted in Scotland). It is also the case that any identified ‘professional misconduct’ needs to be describable as ‘grave’, which has been interpreted by the ECJ as requiring conduct of a ‘certain gravity’. Thus it may be that not all involvement with the illegal settlements by a business would meet the definition of GPM, especially so that any decision to exclude a tenderer on the basis of GPM would need to be a proportionate one. Instead the point is that a local authority would be able to investigate and form a view in individual cases where the point arises.
7. However, it should be noted that the 2018 UN document suggests that it may be difficult for a business which does have links with the settlement to be able to justify it, given the wide-ranging human rights abuses which are caused or exacerbated in the OPT. The fact that transfer of population into occupied territory amounts to a grave breach of IHL (see above), lends considerable weight to the argument that business links with the consequential settlements established through that grave breach should also be considered seriously.
8. We are also asked to comment on recent statements of government policy and how they might affect such an approach. First, there is the current 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.[[13]](#footnote-13)

1. Second, in the background briefing notes to the December 2019 Queen’s Speech, the government states that:-

We will stop public institutions from imposing their own approach or views about international relations, through preventing boycotts, divestment or sanctions campaigns against foreign countries and those who trade with them.

Stopping public institutions from taking a different approach to UK Government sanctions and foreign relations. This will be in the form of preventing public institutions carrying out independent boycotts and sanctions against (i) foreign countries, or those linked to them, (ii) the sale of goods and services from foreign countries, and (iii) UK firms which trade with such countries, where such an approach is not in line with UK Government sanctions. [[14]](#footnote-14)

1. 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 with the Israeli settlements, amounts to GPM because of the contribution to human rights abuses, is not the same as introducing a general boycott or sanctions against companies or countries. Rather, it is a straightforward application of international advice from the UN to businesses in the context of settled UK policy that the settlements in the OPT constitute a breach of international law. Indeed it is noteworthy that the UK Government’s nation action plan, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights,*[[15]](#footnote-15) 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.

 

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**1 May 2020**

1. <https://www.amnesty.org/en/documents/mde15/9490/2019/en/> [↑](#footnote-ref-1)
2. <https://www.amnesty.org.uk/resources/thinktwice> [↑](#footnote-ref-2)
3. The PCR 2015 constitute domestic law, and will remain in force even though the UK has left the EU. There is the possibility of course that these regulations will be amended at some point in the future. [↑](#footnote-ref-3)
4. [https://www.webarchive.org.uk/wayback/archive/20160111010720mp\_/http:/www.gov.scot/Resource/0045/00458485.pdf](https://www.webarchive.org.uk/wayback/archive/20160111010720mp_/http%3A/www.gov.scot/Resource/0045/00458485.pdf) [↑](#footnote-ref-4)
5. 10 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 [↑](#footnote-ref-5)
6. 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.) [↑](#footnote-ref-6)
7. Convention Relative to the Protection of Civilian Persons in Times of War. Geneva, 12 August 1949. [↑](#footnote-ref-7)
8. #  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.

 [↑](#footnote-ref-8)
9. <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories> [↑](#footnote-ref-9)
10. #  EU member state business advisories on Israeli settlements, 2 November 2016. <https://www.ecfr.eu/article/eu_member_state_business_advisories_on_israel_settlements>

 [↑](#footnote-ref-10)
11. A/HRC/37/39 <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Pages/ListReports.aspx> [↑](#footnote-ref-11)
12. A/HRC/43/71

<https://www.un.org/unispal/document/un-high-commissioner-for-human-rights-report-on-business-activities-related-to-settlements-in-the-opt-advance-unedited-version-a-hrc-43-71/> [↑](#footnote-ref-12)
13. ## Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts Information: Note 01/16 17th February 2016.

 [↑](#footnote-ref-13)
14. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/853886/Queen\_s\_Speech\_December\_2019\_-\_background\_briefing\_notes.pdf. [↑](#footnote-ref-14)
15. https://www.gov.uk/government/publications/bhr-action-plan [↑](#footnote-ref-15)