Economic Activity of Public Bodies (Overseas Matters Bill)

Note to the House of Commons Public Bill Committee

1. Ahead of my attendance tomorrow, I hope it of assistance to the Committee if I set out some additional thoughts on the meaning and effect of the Bill further to my published Opinion of 26 June 2023. In particular, I would wish to elaborate on three aspects of the Bill identified in my published Opinion, namely (i) the interrelationship between the Bill and international law; (ii) Information Notices and Legal Professional Privilege under Clause 7; and (iii) the interrelationship with Clause 1 of the Bill and s.17 of the Local Government Act 1988.

International Law

2. Let me first recap my earlier analysis.

3. International law is relevant to the assessment of the Bill in at least two respects.

4. Firstly, although Parliament is sovereign and thus has a power to promulgate legislation that breaches its international law, here the Government contends the Bill conforms with international law. The Committee will wish to consider whether this is correct, or whether there is at least a material risk that enactment would place the United Kingdom in breach of its international law obligations.

5. Secondly, international law is relevant because it has been given a 'domestic foothold' in this Bill by paragraph 6 of Part 2 of the Schedule. That provides:

> *Section 1 does not prevent regard to a consideration so far as the decision-maker reasonably considers it relevant to whether the decision (or anything done further to it) would place the United Kingdom in breach of its obligations under international law.*

6. Let me address first whether the Bill would if enacted place the United Kingdom in breach of its international law obligations, or at least gives rise to a material risk of a breach. In my published analysis, I sought to highlight the relevant international law position by reference to the Advisory Opinion of the International Court of Justice in the case concerning the construction of the wall in the OPT. I think it may be helpful to the Committee if I highlight one further international instrument with which the Bill appears to be in irreconcilable tension.

7. On 23 December 2016 the United Nations Security Council promulgated UNSCR 2334. Under the Charter of the United Nations (a treaty, to which the United Kingdom is a founding signatory) Member States of the UN are obliged to comply with Security Council Resolutions. UNSCR 2334 addresses the Security Council's ongoing and increasing concern about Israeli settlement activity in the OPT. Operative Paragraph 1 states that the Council:

> *Reaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;*

8. The preamble to the resolution itself invokes the ICJ Advisory Opinion and then, in Operative Paragraph 5, imposes an international law obligation on <u>all</u> states to ensure that they treat the OPT differently from Israel – it states:

> *Calls upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967*[1]

9. This mirrors, the wider obligation in international law, under Article 41 of the Articles on State Responsibility for Internationally Wrongful Acts, for states to cooperate to bring to an end systemic violations of peremptory norms of international law by others.

[1] This is consistent with the position articulated by the Security Council as long ago as 1980, when it promulgated UNSCR 471 which, amongst other things: "*Reaffrim[ed] the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel, including Jerusalem*."

10. In my opinion, Clause 3(7) of the Bill is incompatible with this international law obligation for at least two reasons:

    (i) On its face it gives equally heightened protection from economic sanction to goods/services emanating from the OPT as from within Israel. It is very difficult to see, as a matter of generality, how this could be compatible with our international law obligations as provided for in UNSCR 2334 and many other Security Council Resolutions and resolutions of the General Assembly, which oblige parties to work torwards ending the occupation. To a reasonable observer, providing extra protection to goods/services produced in (for example) unlawful settlements in the OPT (greater protection than afforded to any nation state in the world other than Israel), is impossible to reconcile with international law obligations;

    (ii) Contrary to Operative Paragraph 5, it fails to distinguish between Israel and the OPT. Although the phrase 'relevant dealings' is not defined, it is most certainly arguable that the promulgation of domestic legislation whose focus and impact has external consequences pertaining to Israel/OPT amounts to a 'relevant dealing' capable of engaging the obligation.

11. Let me break this down. As the Committee knows, Clause 3(5) of the Bill permits the Secretary of State by regulation to exempt States from the prohibition in Clause 1. Clause 3(7) however provides that exemptions in respect of Israel, the OPT and the Golan Heights can only be made by primary legislation – this applies to no other country and is plainly designed to prevent the Secretary of State from ever making any exemptions in respect of the OPT. Rather than distinguishing between Israel and the OPT, Clause 3.7 draws a distinction between (i) Israel and the OPT (to which one set of requirements applies and (ii) the rest of the world (to which a different set of requirements applies). Thus, far from distinguishing between Israel and the OPT, it subjects them to the same unique regime – a regime that does not apply to any other country. In my opinion this approach is inconsistent with the international law obligation owed under UNSCR.

12. I understand that some supporters of the Bill have sought to contend that because Clause 3(7) lists the OPT as a separate entity to Israel that this somehow 'distinguishes' them for

the purposes of compliance with the UNSCR. This in my view is an untenable view without any legal merit. The purpose of the clause is to ensure that the Secretary of State is precluded from exempting any Israeli activity under 3(5) irrespective of whether the behaviour concerns state action within the Green-line or in the OPT. For the purposes of the prohibition on exemption through regulation, they are treated as exactly the same and are subject to requirements which are entirely different to the requirements that apply to any other country or territory in the world. The counter argument (i.e. the argument that the Bill 'distinguishes' between Israel and the OPT in a manner which respects the requirement in UNSCR 2334) is in my view pure sophistry.

13. The second concern about the interrelationship between the Bill and international law concerns its impact on domestic law. The fact that the United Kingdom is in breach of its obligations under an unincorporated international treaty (e.g. the UN Charter) does not normally create a foundation for a claim in domestic law before the UK Courts. Here though the Bill provides a 'domestic foothold' through paragraph 6 of the Schedule (set out above) the effect of which is to give decision makers a right to take into account human rights violations of foreign states where a failure to do so would amount to a breach of international law. As touched upon non-exhaustively above, international law gives rise to a range of scenarios in which states are obliged to act to address the human rights violations of others. Domestic UK Courts are often very reluctant to review the legality of foreign states acts, for reasons of comity and justiciability – however here the Bill, if enacted, would oblige them to tackle the issues because it will be a pre-requisite to determining the legality of an impugned decision. Paradoxically therefore, this Bill if enacted will very materially increase the prospects of a domestic court pronouncing on the legality of various aspects of the occupation. In light of the relevant international law framework and many of the features of Israel's occupation of the OPT, this is unlikely to produce a result welcome to some of the supporters of the Bill.

Legal Professional Privilege

14. In paragraph 37 of my published Opinion, I expressed the view that the Enforcement Regime was so strident in its terms that the requirement to provide documentation potentially overrode legal professional privilege. That is certainly what a plain reading of the clause reveals. Having considered the matter further I consider that were the point to be litigated a Court would likely say that the language in the clause was insufficiently clear to be deemed to reflect an intention to override the fundamental right to legally privileged

communications – see for example the judgment of Lord Hoffmann in *R (Special Commissioner & Another) ex parte Morgan Grenfell* [2003] 1 AC 563. This reflects the principle of legality namely that express words are required before Parliament could be understood to have intended to legislate contrary to fundamental rights.

15. The language of the Bill does however remain very unclear. Assuming the Government does not wish to override LPP but does wish to avoid wasteful litigation, then it would be well advised to amend the clause to make the position clear.

Section 17 of the Local Government Act 1988

16. Over the summer, Mr Turner of the organisation 'Lawyers for Israel' wrote to me and asked me to reconsider aspects of my published advice in light of s.17 of the 1988 Act. In particular, Mr Turner suggested that my description of the Bill as 'unprecedented' was inaccurate in light of the terms of s.17. Separately, the obligations owed by local authorities under s.17 was a matter raised by a number of MPs during the Second Reading.

17. I do consider that s.17 of the 1988 Act is relevant to the Committee's considerations but not precisely in the sense I suspect was intended by Mr Turner.

18. Section 17(1) and (3) of the 1988 Act precludes local authorities from taking into account 'non-commercial matters' in connection to the public supply of works or contracts. By section 17(3) non-commercial matters includes consideration of contractors activities in what are termed 'irrelevant fields of Government activity'. These in turn are defined in s.17(8) as including matters of foreign policy. Local authorities are defined in Schedule 2 and apart from councils, include a small number of additional bodies.

19. The terms of s.17 therefore prohibit a local authority from making certain spending decisions on the basis of foreign policy. They would, on their face, preclude some of the activities currently sought to be prohibited by this Bill. Accordingly, in so far as the Bill restricts the activities of local authorities from making spending decisions based on foreign policy considerations, then from a legal perspective, it is replicative of pre-existing powers and thus otiose.

20. It is also relevant to note that although this provision has been on the statute book for some 35 years, it has only very rarely been invoked in litigation. In circumstances in which much of the debate around the Bill has been focused on the activities of local authorities (cf public bodies more generally) the lack of litigation may be thought to suggest that the need to strengthen the prohibition contained in s.17 is unwarranted.

21. In the short time available to me I have carried out a search for all cases in which s.17 has been relied in the Courts. I have also reviewed the debates on the passage of the Bill through the Commons (steered by the late Nicholas Ridley MP). There appear to be very few cases in which parties challenged decisions of councils under s.17 of the 1988 Act and none in which a challenge was upheld. There was one case brought challenging the policies of three local authorities (Leicester, Gwynedd and Swansea) to promote a trade embargo arising out of Israel's policies in the West Bank. These claims were brought by the NGO 'Jewish Rights Watch' in the case of *R (Jewish Rights Watch) v Leicester City Council* [2019] PTSR 488. The challenge failed because the relevant policies of the local authorities were non-binding and did not dictate any legally relevant decisions (i.e. spending decisions) of the local authorities.

22. It is reasonable to assume that if councils were in fact improperly basing spending decisions on foreign policy considerations that there would have been frequent challenges over the intervening 35 years. The fact that there have been very few challenges, and seemingly no successful ones, might tend to suggest that Clause 1 of the Bill, in addition to being otiose vis a vis local authorities, is also addressing a problem that does not appear to exist.

23. Accordingly, the position seems to be that on the one-hand there is pre-existing legislation which effectively does that which the sponsors of the Bill claim is now required – on the other hand the lack of litigation over the past 35 years suggests that local authorities are complying with the law as it stands and there is no need for the far more wide ranging and draconian Bill sought.

24. Furthermore, I remind the Committee that in so far as any public authority was motivated, directly or indirectly, in any policy or decision (whether spending or otherwise) by antisemitism, they would be readily and rightly amenable to judicial review and a range of other sanctions.

25. Notwithstanding this point, I remain of the view that the Bill is unprecedented in a variety of respects:

(i) Firstly, the scope of the Bill is unprecedented in that it seeks to bind not simply local authorities but anybody legal body exercising public powers. This is extraordinarily wide – it covers not simply local authorities but a wide and unlimited range of hybrid institutions such as universities, executive non-departmental bodies, pension funds, hospitals and departments of state etc. It would be a very material mistake to consider that this Bill merely addresses local authorities – it is far wider than that;

(ii) Secondly it contains the gagging provision in Clause 4, which as I previously explained is highly likely to be deemed incompatible with Article 10 of the ECHR;

(iii) Thirdly the elaborate and draconian enforcement regime goes well beyond the pre-existing remedy of judicial review – in light of the lack of litigation generated by s.17 of the 1988 Act it is very difficult to understand why the traditional tools and remedies available in judicial review are considered inadequate;

(iv) Fourthly, it is incompatible with the general stance of the United Kingdom which otherwise seeks to promote human rights in the decisions that both state and non-state actors take – see for example generally the UK's Action Plan for implementing the *UN Guiding Principles on Business and Human Rights*[2], and see specifically in respect of business activity in the OPT the UK Government's guidance '*Overseas business risk: The Occupied Palestinian Territories*"[3]. From a human rights perspective the Bill is a deeply retrograde step.

26. None of this to my mind can be justified by the principle that foreign policy in so far as it relates to human rights and spending decisions lies in the exclusive domain of the Executive. That does not reflect any principle of the British Constitution. There are of course some fields in which foreign policy and human rights operate simply at this level,

[2] https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020

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

obvious examples being entering treaties, the direct conduct of foreign relations, the recognition of foreign states etc). There is however no general constitutional principle of 'one voice' in this country – indeed the whole thrust of human rights law, enthusiastically promoted by the UK at home and abroad, in the public and private sectors alike, is that it should guide all relevant decision making– for it now to be sought to be regulated by the fiat of a Secretary of State would in my opinion be constitutionally jarring.

27. I hope that these additional observations will be of some assistance to the Committee in its deliberations.

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6 SEPTEMBER 2023

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LONDON