

Al-Haq Briefing: Economic Activity of Public Bodies (Overseas Matters) Bill Seriously Jeopardizes UK's Compliance with its International Obligations

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Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, Palestine. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the occupied Palestinian territory, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable.

On Monday, 3 July 2023, the *Economic Activity of Public Bodies (Overseas Matters)* Bill, will have its second reading in the House of Commons. Al-Haq, warns that the Bill may place the United Kingdom, in breach of its international law obligations with regard to the occupied Palestinian territory and occupied Syrian Golan.

The unwarranted singling out of Israel, the occupied Palestinian territory and the occupied Golan Heights, in a blanket exclusion from the exemption of application of the Bill, may have a chilling effect on decision makers from taking any decision in these relation to these territories, including on illegal settlements.

The Bill gives unfettered enforcement powers to the Secretary of State, the Treasury, and the Office for Students. The Bill operates to prevent decision makers in public bodies from implementing decisions on divestments and procurements, where the decision maker may have been influenced, even in part, by boycott campaigners. This has a chilling effect on the decision maker, who may risk compliance with international law obligations and abandon legitimate procurement and divestment decisions on such considerations.

The Bill is vaguely drafted with vague criteria placed on “a reasonable observer”, who must determine whether “a decision was influenced by political or moral disapproval of a foreign state conduct”. These are subjective standards devoid of legal certainty. Similarly, the clause proving that “‘territorial consideration’ is a consideration that relates specifically or mainly to a particular foreign territory”, is vaguely drafted and it is unclear whether the conduct pertains narrowly to a “territorial consideration”.

The silencing of decision makers, is effectively a gagging order and amounts to a serious infringement on the right to freedom of expression under Article 10 of the European Convention on Human Rights.

The Bill places the UK at considerable risk of breaching its international law obligations *vis-a-vis* occupied Palestine. Accordingly, Al-Haq calls for MPs to oppose the Bill in full.

(While the content of note focusses on examples from the occupied Palestinian territory, it applies in principle to the occupied Syrian Golan also).

1. The Bill Places Subjective Controls on Decision Makers, Devoid of Legal Certainty

Section 1 of the Bill prohibits a decision maker from having regard to a “territorial consideration in a way that would cause a reasonable observer of the decision-making process to conclude that the decision was influenced by political or moral disapproval of foreign state conduct”.¹

Although the Bill does not explicitly mention or prohibit boycott, a careful reading of several provisions of the Bill supports the view that one of its purposes is to curtail boycott campaigners from influencing decision makers. The Bill essentially operates to prevent decision makers in public bodies from implementing decisions on divestments and procurements, where the decision maker may have been influenced, even in part, by boycott campaigners.

This has a grave chilling effect on the actions of decision makers. For example, in cases where decision makers consider both the legal rationales and obligations on the State for divesting from companies or making procurements in an identified territory, and hear the concerns of boycott campaigners- in such cases, the considerations for divesting or making procurements based on the State’s legal obligations may be trumped by the interference of a boycott campaigner, should a boycott advocate have made an intervention with the decision maker, on grounds which may be considered as being influenced by “political or moral disapproval of a foreign state conduct”.

The decision maker is then prevented under the Bill from implementing decisions, including on divestments and procurements. **How a “reasonable observer” assesses “that a decision was influenced by political or moral disapproval of a foreign state conduct” is a vaguely drafted completely subjective standard and devoid of any legal certainty.**

2. Vaguely Construed Territorial Considerations

The Bill explains that a “‘territorial consideration’ is a consideration that relates specifically or mainly to a particular foreign territory”. **The clause is vaguely drafted and it is unclear whether the conduct pertains narrowly to a “territorial consideration”** such as for example, land appropriations, *de facto* and *de jure* annexations, planning and zoning of settlements, pillage of natural resources, which may all be regarded literally as a “territorial consideration”. Alternatively, the Bill may be more liberally construed to include all “foreign state conduct” within the jurisdictions of the territories. The former would prohibit considerations of annexation of territory and land appropriations, but could possibly allow for divestments and procurements based on non-territorial considerations. Such might include, for example, human rights harms arising from the denial of civil and political rights and the persecution of the civilian population. However, the terms of the Bill are not clear and may as such breach the principle of legal certainty.

2.1 Territorial Considerations in the occupied Palestinian territory

Notably “territorial considerations” run to the core of the occupation of Palestine. In 1967, Israel purportedly *de jure* annexed East Jerusalem, in occupied Palestine and in 1980 incorporated East Jerusalem as its “capital” into its Basic Law. In 1968 UN Security Council resolution 252 considered that all legislative and administrative measures and actions taken by Israel, including appropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status”.

In 2004, the International Court of Justice (ICJ) warned against the *fait accompli* created on the ground by the Annexation Wall and that could well become permanent and tantamount to *de facto* annexation.² In its second report, the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel reported that, “there are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law owing to its permanence and to actions taken by Israel to annex parts of the land *de facto* and *de jure*”. This permanent nature of Israel’s occupation of the OPT is reflected through “actions taken by Israel that are intended to create irreversible facts on the ground and expand its control over territory”, including “expropriating land and natural resources, establishing settlements and outposts, maintaining a restrictive and discriminatory planning and building regime for Palestinians and extending Israeli law extraterritorially to Israeli settlers in the West Bank”.³

Both the UN Security Council⁴ and the International Court of Justice,⁵ have recognised Israel’s settlement enterprise as a situation resulting from an internationally wrongful act. UN Security Council resolution 446 (1979) and UN Security Council resolution 2334 (2016), explicitly state that “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East”. In 2004, the International Court of Justice concluded that “the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”⁶ Further, Human Rights Council resolution 31/36 establishing a database of businesses in the Israeli settlements called upon, “all States not to provide Israel with any assistance to be used specifically in connection with settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan”.

Further crimes, including violations of the Rome Statute underpinning settlement activity are currently under investigation at the Office of the Prosecutor of the International Criminal Court (ICC).⁷ On 5 February 2021, the Pre-Trial Chamber I “ruled that Palestine’s referral of the Situation obliged the Office [of the Prosecutor] to open an investigation, the Office having determined that there existed a reasonable basis to do so in accordance with the Rome Statute criteria.”⁸

2.2 The United Kingdom’s International Law Obligations to the occupied Palestinian territory

Third States have international obligations to not recognise as lawful, and to not aid or assist in internationally wrongful acts entailing breaches of peremptory norms of international law, and to cooperate to bring the serious breach to an end.⁹ Such peremptory norms of international law include *inter alia*, the denial of the right of self-determination, the prohibition on the acquisition of territory through use of force, and the prohibition on racial discrimination and apartheid, breaches which are documented in Israel’s administration of the Palestinian territory.¹⁰

Critically States Parties to the Geneva Conventions, including the United Kingdom, have treaty obligations to “respect and ensure respect” for the Geneva Conventions. For example, the authoritative 1958 International Committee of the Red Cross commentary requires that State Parties “do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally”.¹¹ In *The Wall* Advisory Opinion, the International Court of Justice observed that “every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”.¹²

As such, “all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem”.¹³ Third States, including the United Kingdom, are “also under an obligation not to render aid or assistance in maintaining the situation created by such construction”.¹⁴ According to the ICJ, all States must see to it “that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end”. The obligation to respect and ensure respect obliges “all the States parties” to the Geneva Conventions, including the UK, to “ensure compliance by Israel with international humanitarian law as embodied in that Convention”.¹⁵

Subsequently, the UNGA “called upon all Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion”, underscoring the international community’s commitment to ensure that Israel respects IHL and to not recognise the situation created by Israel and not to aid or abet illegal Israeli acts.¹⁶ Similarly, pursuant to UNSC Resolution 2334, third States are further obliged to “distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”. In light of the above considerations, the UNSC has called upon “all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories”.¹⁷

In addition, the UN Guiding Principles on Business and Human Rights (UNGPs) provide standards on the responsibilities of companies to prevent and address human rights violations in their dealings, including “ongoing human rights due diligence”.¹⁸ The ramifications of the UNGPs include the responsibilities of States to ensure that companies within their territorial jurisdiction and operating in those contexts do not take part in human rights violations.¹⁹

As it stands, prohibiting decisions for divestments and procurements on the above-mentioned “territorial considerations”, when influenced by “political or moral disapproval of foreign state conduct”, places the UK in considerable risk of breaching of its international law obligations.

3. The Palestine Exception Clause Citing Israel, the occupied Palestinian territory and the occupied Golan Heights, is an Arbitrary and Baseless Exclusion

Section 3 grants the Secretary of State or the Minister for the Cabinet, powers to exempt territories from the application of the Bill.²⁰ However the Secretary of State or the Minister for the Cabinet Office, can never exempt “Israel, the Occupied Palestinian Territories, or the Occupied Golan Heights” from the application of the Bill.²¹ **The blanket exclusion of these territories from exemption, may have a chilling effect on decision makers from taking any decision in these relation to these territories,** and further risks placing the UK in breach of its international law obligations. The exception is arbitrary and unwarranted and it is not clear on what grounds, if any, that Israel and the territories under its effective control are subject to this discrimination.

In light of the seriousness of illegal practices and policies conducted by Israel in the OPT, in breach of preemptory norms of international law, and the obligations for Third States arising from this illegality, along with the lack of any justification whatsoever of the impossibility to subject Israel and the OPT to the exemption offered under Section III of this Bill, there is a strong case for challenging this clause.

4. Unfettered Enforcement Powers

Sections 6 of the Bill appears to grant unfettered powers to the Secretary of State, the Treasury and the Office for Students for enforcement. While Section 7 provides for unmeasurable and subjective future grounds for enforcement, including issuing written notices to decision makers who are “about to make a decision”, or “about to publish a statement”.

5. The Bill Infringes on Freedom of Expression

The attempts to curb citizens from actively participating in decision making and advocating for certain causes of concern, seriously impinges on the democratic process. Meanwhile, section 4 essentially prevents decision makers from publishing statements where this would; “indicat[e] that the person intends to act in such a way that would contravene Section 1, or that the person would intend to act in such a way were it lawful to do so”.²² Further, sections 9 and 10 foresee that the person who authored this statement may be subjected to financial penalties.

The silencing of decision makers amounts to a serious infringement on the right to freedom of expression under Article 10 of the European Convention on Human Rights. It is highly questionable whether this Bill would meet the tests for restrictions on freedom of expression laid out by the European Court of Human Rights, requiring that (1) the restriction is prescribed by a law, (2) the restriction must pursue a legitimate aim, and (3) be necessary in a democratic society. For example, in *Baldassi v France*, the European Court of Human Rights found that restrictions on freedom of expression in relation to calls to boycott Israeli settlement goods were not justified under the Article 10 of the Convention. In *Willem v France*, the Court considered that a mayor, as a public figure, should have promoted debate on the boycott of Israeli goods allowing for free discussion on matters of public interest.²³ As such, the authoritarian silencing of decision makers, and undemocratic blocks on campaigners to affect change, may further violate the freedom of expression.

6. The International Law Exception

While section 6 attempts to provide some safeguards, and does not “prevent regard to a consideration” where 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”. This essentially allows for international law-based considerations. However, these considerations may be derailed where the Secretary of State, the Treasury and the Office for Students, intervene even prior to a decision being made, and it only narrowly applies where the States obligations are incurred.

Section 8 on labour related misconduct, would benefit from additional specific reference to obligations arising from violations of peremptory norms of international law. Given the likelihood that enhanced due diligence requirements will come into effect when considering a business’s activities in a conflict affected areas for decision making purposes, **it would be beneficial to include a direct reference to the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, international humanitarian law, and grave breaches of the Geneva Conventions.** The latter includes acts of property appropriation, destruction of property, forcible displacement of the population, wilful killing, as acts giving rise to universal jurisdiction, and which every State has an obligation to investigate, extradite or prosecute.

Notably, a State cannot rely on provisions of its domestic law, as justification for failure to perform a treaty obligation.²⁴

Conclusion

The United Kingdom has clear obligations under international law to differentiate between the territory of the State of Israel and the occupied Palestinian territory, and specifically to not aid or assist in the maintenance of Israel's illegal settlement enterprise and its construction of a Wall and administrative regime. The territorial clause places undue restrictions on the United Kingdom in carrying out its clear international law obligations *vis-à-vis* Palestine and the Syrian Golan. The Bill silences decision makers denying their freedom of expression, where they seek to highlight grave breaches of international law, amounting to war crimes and the crime against humanity of apartheid in Palestine. It uses vague and unclear standards and is devoid of legal certainty. Al-Haq urges MPs to vote against the progression of the Bill.

¹ Economic Activity of Public Bodies (Overseas Matters) Bill, Main provision, Section 2.

² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (2004), para. 121.

³³ United Nations General Assembly (UNGA), "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", [A/77/328](#), 14 September 2022, para. 75.

⁴ UNSC, Res 2334 (23 December 2016) UN Doc S/Res/2334.

⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (2004), para. 120.

⁶ *Ibid.*

⁷ ICC, "[Situation in the State of Palestine](#)".

⁸ ICC, "[Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine](#)" (3 March 2021).

⁹ Article 40-41, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001).

¹⁰ "[Special Rapporteur on the situation of human rights in the Occupied Palestinian Territories: Israel has imposed upon Palestine an apartheid reality in a post-apartheid world](#)" (25 March 2022).

¹¹ Pictet, J.S. (ed), 'Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War', 1958, p. 16.

¹² International Court of Justice, Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 9 July 2004, at para. 158.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ United Nations General Assembly resolution ES-10/15 (2004).

¹⁷ United Nations Security Council resolution 465, para 7. See also UN Security Council resolution 471 (1980), para 5.

¹⁸ "[Don't Buy into Occupation, Exposing the financial flows into illegal Israeli settlements](#)", (5 December 2022) p. 79.

¹⁹ Working Group on Business and Human Rights, Statement on the implications of the UNGPs in the context of settlements in the OPT, 2014, pp. 3; UNGPs, Principle 5.

²⁰ Economic Activity of Public Bodies (Overseas Matters) Bill, Main provision, Section 3(5).

²¹ Economic Activity of Public Bodies (Overseas Matters) Bill, Main provision, Section 3(7) (a), (b) and (c).

²² Economic Activity of Public Bodies (Overseas Matters) Bill, Main provision, Section 4(1) (a) and (b).

²³ "[Baldassi and Others v. France](#): Criminal Convictions of BDS Activists Violate Freedom of Expression under the European Convention on Human Rights" *Opinio Juris* (16 June 2020).

²⁴ Article 27, Vienna Convention on the Law of Treaties (1969).