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Select Committee on Foreign Affairs and Trade and Defence

Attn: Noel Murphy, Clerk to the Joint Committee

[foreignaffairs@olreachtas.ie](mailto:foreignaffairs@olreachtas.ie)

24<sup>th</sup> May 2019

RE: Request for Written Submission on the Detailed Scrutiny of the Control of Economic Activity (Occupied Territories) Bill, 2018 [Seanad] [PMB]

Dear Noel,

Further to your correspondence of 23/4/2019, the American Chamber of Commerce Ireland (American Chamber) welcomes the opportunity to assist the Select Committee on Foreign Affairs and Trade and Defence as it undertakes a detailed scrutiny of the Control of Economic Activity (Occupied Territories) Bill, 2018. The American Chamber seeks certainty that our members can continue to operate in Ireland in compliance with its laws, framed within the EU treaties, and those of the United States.

The American Chamber's priority is that Ireland remains a unique EU-US transatlantic trade and investment hub and an inclusive location-of-choice for talent and innovation with global impact. No two other regions in the world are as deeply integrated as the U.S. and Europe, with Ireland a key hub for the transatlantic economy that generates some \$5.5 trillion in total commercial sales each year. According to figures from the US Bureau of Economic Analysis, Ireland's share of U.S. investment stock in Europe was 12.6% in 2017. Reflecting this, U.S. direct investment stock in Ireland grew by 14%, to reach a new high, in 2017 of \$446bn supporting over 155,000 direct jobs in over 700 enterprises. Complementing this, Ireland's investment stock in the U.S. totalled \$147.8 billion in 2017. Irish Government figures suggest that close to 800 Irish companies are active in the US market, collectively employing more than 100,000 people. Ireland's investment stakes in the U.S. are significant, generating an estimated \$116 billion in affiliate sales in 2017 and \$41 billion in U.S. economic output.

The American Chamber promotes efforts seeking transatlantic regulatory co-operation which aims to enhance common regulation between the US and EU; and in turn enhance regulatory standards globally. It is important that both the EU and US work together to avoid the introduction of tariffs and other barriers to trade and investment to the benefit of both sides of the Atlantic. The American Chamber would be concerned if Ireland enacted laws that presented a clear conflict dilemma for Irish firms doing business in the US, and US firms operating from Ireland. This is unhelpful to a complex and uncertain trade and investment environment challenged by Brexit, international trade tension and significant changes heralded by a wave of digital disruption and international taxation reform.

In considering the impact of this Bill the American Chamber seeks clarity on the following;

- **EU Treaty Compatibility:** Enterprise decision makers have a legitimate expectation that legislators in EU member countries act in a manner that is within their EU treaty obligations. Therefore, uncertainties and conflicting legal opinion on this point regarding the Bill's legality within the EU is unhelpful.
- **Scope of the Provisions:** It remains unclear whether the Bill as drafted only applies to goods and services that are destined for Ireland or whether it extends to goods and services that are destined for other jurisdictions via Ireland or an entity within the jurisdiction.
- **Applicability to Holding Companies:** Clarity around the nature of the enterprises that it applies to would be welcome. In particular, the Bill's impact on Irish registered operations forming part of a 'group' but whose ultimate holding company is based outside of Ireland.
- **Trade and Investment Relations:** As the Bill seeks extraterritorial effect – clarity surrounding its interaction with other jurisdictions and Israel is needed. The risk that a director, manager, secretary or other officer of an enterprise based in Ireland could (on visiting Ireland) be arrested, charged with committing an offence under the Act and face a fine of up to €250,000 or imprisonment for a term not exceeding 5 years or both, is added uncertainty to investor confidence that Ireland is an accessible hub for transatlantic business operations.

The American Chamber seeks certainty that our members can continue to operate in Ireland in compliance with its laws, framed with the EU treaties, and those of the United States. The American Chamber is grateful for the opportunity to give our input to the scrutiny process and remains available to be helpful to the Committee as it examines this matter further.

Sincerely



Brian Cotter

Director of Public Affairs and Advocacy

**Ambassador of Israel  
Dublin**



**שגריר ישראל  
דבלין**

**Ambasadóir Iosrael  
Baile Átha Cliath**

Mr. Noel Murphy  
Clerk to the Joint Committee on Foreign Affairs and Trade and Defence  
Houses of the Oireachtas  
Leinster House  
Dublin 2

May 22<sup>nd</sup> 2019

Dear Mr. Murphy,

Please find enclosed a summary of the views of the Government of Israel in respect of the scrutiny of the Control of Economic Activity (Occupied Territories) Bill, 2018 [Seanad].

Yours Sincerely,

A handwritten signature in blue ink, appearing to read 'Ophir Kariv', written over a horizontal line.

Ophir Kariv  
Ambassador of Israel

## **Embassy of Israel in Ireland**

### **Submission for Detailed Scrutiny**

#### **Control of Economic Activity (Occupied Territories) Bill 2018**

The Control of Economic Activity (Occupied Territories) Bill 2018 is a flawed piece of legislation, which should have never seen the light of day. It stands in stark contrast to the efforts to strengthen bilateral relations between Israel and Ireland.

This double-standard legislation was tailor made to apply solely to Israel, with complete disregard to the 200 other ongoing territorial disputes worldwide. Hence, it is clear that the motivation behind the bill is purely one sided and biased.

The Bill ignores the facts and indeed the complexities of the whole region in order to suggest that Jews have no rights whatsoever in Judea and Samaria (the West Bank), the cradle of the Jewish people and history, where Jewish presence has been preserved since ancient times.

The Bill seeks to prejudge any future agreement between Israel and the Palestinians, which by definition will necessitate addressing highly complex issues.

Should it become law, this Bill will be the most extreme anti-Israel legislation in the Western world. It will have a substantial and lasting negative impact on the relations between Ireland and Israel and will certainly jeopardize any opportunity that Ireland has to positively influence the current situation between Israel and the Palestinians.

24 May 2019

**Detailed Scrutiny – Control of Economic Activity (Occupied Territories) Bill, 2018 [Seanad]  
[PMB] – Written Submission of Al-Haq**

**Author:** Dr. Susan Power (BCL, NUI Galway, PhD, Trinity College Dublin), Head of Legal Research and Advocacy, Al-Haq

Al-Haq wishes to thank the Select Committee on Foreign Affairs and Trade and Defence for the invitation to submit a written communication for the detailed scrutiny process on the Control of Economic Activity (Occupied Territories) Bill, 2018. Al-Haq strongly welcomes the introduction of the Bill as a timely and important step in support of the human rights of the Palestinian people, and urges Members of the Oireachtas to progress it as a matter of urgency. The basis of this support is outlined below, in response to the questions in the detailed scrutiny schedule most relevant to our work.

**Al-Haq**

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. 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 OPT, irrespective of the identity of the perpetrator, or the victim, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. The organisation conducts research; prepares reports, studies and interventions on breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to promote the Rule of Law, and ensure that international human rights standards are reflected in Palestinian law and policies.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva and is a member of the International Network for Economic, Social and Cultural Rights (ESCR-Net), the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), the Palestinian Human Rights Organisations Council (PRHOC), and the Palestinian NGO Network (PNGO). In December 2018, Al-Haq and Israeli NGO, B'Tselem, were jointly awarded the prestigious 2018 Human Rights Award of the French Republic.

## PART A: Policy and Legislative Analysis

### The 'policy issue' and the policy and legislative context

#### 1. Define the Problem? The policy issue which the Bill is designed to address

According to the preamble of The Control of Economic Activity Bill (Occupied Territories) Bill 2018 (hereafter Occupied Territories Bill), the proposed legislation is:

“An Act to give effect to the State’s obligations arising under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and under customary international law; and for that purpose make it an offence for a person to import or sell goods or services originating in an occupied territory or to extract resources from an occupied territory in certain circumstances; and to provide for related matters.”

Al-Haq strongly welcomes the Occupied Territories Bill 2018, which gives effect to Ireland’s obligations under Common Article 1 of the Geneva Conventions, which requires State parties to “respect and to ensure respect for” the Fourth Geneva Convention in all circumstances. Critically, the most recent ICRC Commentary to common Article 1, of the First Geneva Convention underscores the preventative nature of the obligation, whereby “States have recognized the importance of adopting all reasonable measures to prevent violations from happening in the first place”.<sup>1</sup> It is important to note that the obligation relates not only to the provisions of the Geneva Conventions, “but to the entire body of international humanitarian law binding upon a particular State”.<sup>2</sup> For example, in its Advisory Opinion on the Wall in the Occupied Palestinian Territory (2004), the International Court of Justice outlined:

“Given the character and the importance of the rights and obligations involved, the Court is of the view that 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. *They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction*”<sup>3</sup> (emphasis added)

<sup>1</sup> Article 1, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 2016, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD>

<sup>2</sup> Ibid.

<sup>3</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, ICJ Rep 2004 136, International Court of Justice, para. 159.

The obligation to “ensure respect” includes the broad requirement “to suppress all other breaches of the Conventions”. Al-Haq considers that the introduction of the Occupied Territories Bill, fulfills this direct requirement of common Article 1.

Al-Haq and Palestinian civil society partners view with the utmost seriousness, the continued appropriation of private and public Palestinian lands wherein Israeli and international companies are located, the pillage of natural resources, and export of products and services from the settlements for profit, into the Irish and European market. In 2015, [the Government of Israel] estimated that the annual value of industrial products produced in settlements and exported to Europe is \$300 million per annum, while the sale of agricultural products in the Jordan Valley is the main source of income for the settlements, with 66 percent of the produce being exported.<sup>4</sup>

It is clear that revenues from industrial, agricultural and touristic settlements are the oxygen for Israel’s settlement enterprise and in many cases, individuals and corporations are complicit in aiding and abetting war crimes and crimes against humanity carried out in the OPT. For this reason, Al-Haq along with Palestinian Center for Human Rights, Al-Mezan and Addameer, have submitted six communications to the Office of the Prosecutor of the International Criminal Court for consideration for the ongoing preliminary examination.<sup>5</sup> It must be noted that two of the communications pertain to illegal acts amounting to war crimes, crimes against humanity and grave breaches related to the settlement regime<sup>6</sup>, and second, the role of corporate actors in aiding and abetting *inter alia*, the commission of pillage<sup>7</sup>, in relation to the exploitation of natural and agricultural resources in the OPT.

The Occupied Territories Bill 2018, fulfills Ireland’s international law obligations, under the Fourth Geneva Convention to criminalise the reception of settlement goods and services, and natural resources pillaged from occupied territory, entering the Irish market in order to prevent grave breaches of the Convention.

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<sup>4</sup> UN Secretary General, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, UN Doc. A/HRC/34/39 (16 March 2017) at para. 35

<sup>5</sup> Office of the Prosecutor, “Report on Preliminary Examination Activities 2018”, available at: <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>

<sup>6</sup> Al-Haq, “Palestinian Human Rights Organisations Submit Evidence to the ICC Prosecutor on Crimes Committed in West Bank” (20 September 2017), available at: <http://www.alhaq.org/advocacy/targets/international-criminal-court-icc/1140-palestinian-human-rights-organisations-submit-evidence-to-the-icc-prosecutor-on-crimes-committed-in-west-bank>

<sup>7</sup> Al-Haq, “Palestinian Human Rights Organisations Submit File to ICC Prosecutor: Investigate and Prosecute Pillage, Appropriation and Destruction of Palestinian Natural Resources” (26 October 2018), available at: <http://www.alhaq.org/advocacy/targets/international-criminal-court-icc/1314-palestinian-human-rights-organisations-submit-file-to-icc-prosecutor-investigate-and-prosecute-pillage-appropriation-and-destruction-of-palestinian-natural-resources>



## 2. To What Extent is it an Issue Requiring Attention?

### a. Products, Services, and Natural Resources Exported to Third States Incentivises Continuing Crimes

Al-Haq considers that the removal of Palestinians from their villages and lands, to expand the State of Israel has resulted in the ethnic cleansing of Palestinians to facilitate the Israeli colonisation of the territory. In 2014, the UN Special Rapporteur on the Situation in Palestine recommended the General Assembly refer the situation of Palestine to the International Court of Justice for an Advisory Opinion given that the **“prolonged occupation possesses legally unacceptable characteristics of ‘colonialism’, ‘apartheid’ and ‘ethnic cleansing’”** (emphasis added).<sup>8</sup>

According to Peace Now, Israel began construction of 1,814 new housing units between September 2015 and June 2016, representing a 34 percent increase of construction starts compared to the previous year.<sup>9</sup> Meanwhile, the Israeli organization B’Tselem identified, as of 31 January 2017, approximately 67 kilometers of roads in the occupied West Bank that ‘Israel had classified for the sole, or practically sole, use of Israelis, first and foremost settlers.’<sup>10</sup>

For the past 51-years, the continuing settlement expansion, appropriation of Palestinian land for Israeli settler roads, the appropriation of Palestinian lands and natural resources for the benefit of settlers, Israeli national and international corporations, destruction of Palestinian properties and forced displacement of Palestinians by the Israeli military, has resulted in catastrophic alteration of the facts on the ground. This has been buttressed by systematic discrimination, and collective penalties inflicted by Israel to suppress Palestinians who attempt to mobilise to assert their rights.<sup>11</sup> Penalties include, mass arrests and detentions<sup>12</sup>, forced

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<sup>8</sup> A/HRC/25/67, “Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk” (2014) 21.

<sup>9</sup> Peace Now, Peace Now’s Annual Settlement Construction Report 2016: Stark increase in Settlement Construction (May 2017), available at: <http://peacenow.org.il/wp-content/uploads/2017/05/annual-construction-report-2016-1.pdf>

<sup>10</sup> B’Tselem, Checkpoints, Physical Obstructions, and Forbidden Roads, 8 February 2017 (hereinafter B’Tselem, Forbidden Roads), available at: [http://www.btselem.org/freedom\\_of\\_movement/checkpoints\\_and\\_forbidden\\_roads](http://www.btselem.org/freedom_of_movement/checkpoints_and_forbidden_roads)

<sup>11</sup> Human Rights Council, Resolution adopted by the Human Rights Council on 18 May 2018 S-28/1. Violations of international law in the context of large-scale civilian protests in the Occupied Palestinian Territory, including East Jerusalem (22 May 2018)

<sup>12</sup> Addameer, *Joint report estimates that 3880 Palestinians arrested in June 2017, 16 July 2017, 9 August 2017*, available at: <http://www.addameer.org/news/joint-report-estimates-388-palestinians-arrested-june-2017><http://www.addameer.org/news/joint-report-estimates-880-palestinians-arrested-july-2017>



residency revocations<sup>13</sup>, punitive house demolitions<sup>14</sup>, and siege and blockade of large parts of the territory<sup>15</sup> and wilful killing.<sup>16</sup>

Israel and international companies are not only profiting from the colonisation, but have an integral role in fuelling the settlement expansion. For example, most of the large industrial settlements are located within or near settlement cities and are linked by settler only roads, and accessed through military and security checkpoints:

- Etzion Industrial Zone<sup>17</sup>: Located near settlements, Alon Shvut, Migdal Oz, Efrat, Kfar Etzion
- Atarot Industrial Zone<sup>18</sup>: Within access of settlement blocs in occupied Jerusalem
- Barkan Industrial Zone<sup>19</sup>: Near the settlements of Barkan, Kiryat Netafim
- Ariel-West Industrial Zone<sup>20</sup>: Near the settlements of Ariel and Barkan
- Bustani Hefetz: Near the settlement of Avnei Hefetz

The Occupied Territories Bill 2018, will prevent the goods and services from these companies located in illegal settlements, being imported into Irish territory. Such a measure, which targets the commercial basis of the illegal settlement enterprise, is hugely important. It is a meaningful

<sup>13</sup> Al-Haq and other Palestinian Human Rights Organisations, *Residency Revocation Infographic*, June 2017, available at: <http://www.alhaq.org/publications/papers/VP-ResidencyRevocation-FINAL-20170612.pdf>

<sup>14</sup> Al-Haq, *Action Alert: Palestine on the Brink*, 10 October 2015, (hereinafter Al-Haq, *Palestine on the Brink*), available at: <http://www.alhaq.org/advocacy/topics/wall-and-jerusalem/965-al-haq-action-alert-palestine-on-the-brink>

<sup>15</sup> Al-Haq, "Gaza Siege: Human Rights Council Must Act to End Israeli Impunity" (2010), available at: <http://www.alhaq.org/advocacy/topics/gaza/160-gaza-siege-human-rights-council-must-act-to-end-israeli-impunity>

<sup>16</sup> Al-Haq, "Escalations in Killings in the Occupied West Bank (Reporting Period: 4 March 2019 – 17 March 2019)", available at: <http://www.alhaq.org/documentation/weekly-focuses/1388-escalations-in-killings-in-the-occupied-west-bank-reporting-period-4-march-2019-17-march-2019>

<sup>17</sup> Gush Etzion Industrial Zone, available at: <http://economy.gov.il/English/Industry/DevelopmentZoneIndustryPromotion/ZoneIndustryInfo/Pages/Etzion.aspx>

<sup>18</sup> Atarot Industrial Zone, available at: <http://economy.gov.il/English/Industry/DevelopmentZoneIndustryPromotion/ZoneIndustryInfo/Pages/Atarot.aspx>

<sup>19</sup> The following businesses are located in the Barkan Industrial Zone:

Achva/Halva: <http://www.progressiveisrael.org/list-of-settlement-products/?print=pdf>;  
Distek: <https://whoprofits.org/company/distek/>  
<https://settlementproductshebrew.fandom.com/he/wiki/%D7%AA%D7%A2%D7%A9%D7%99%D7%94-%D7%9B%D7%9C%D7%9C%D7%99> <https://www.distekinc.com/>;  
Isratoy: [http://mp100.info/industry/share\\_website.php](http://mp100.info/industry/share_website.php) <https://www.isratoy.co.il/>; Keter Plastic: <https://whoprofits.org/company/keter-plastic-keter-group/>; Shamir Salads: <https://corporateoccupation.wordpress.com/2010/05/21/working-for-shamir-salads-in-barkan-industrial-zone/> [http://mp100.info/industry/share\\_website.php](http://mp100.info/industry/share_website.php)

<sup>20</sup> Ariel-West Industrial Zone, available at: <http://www.arielip.co.il/>

step towards cutting off a vital artery sustaining the viability of the settlements. Likewise, the Bill will criminalise and prevent the importation into Ireland, of agricultural produce grown in illegal agricultural settlements on Palestinian lands in the occupied Jordan Valley. This will prevent settlement dates, olives, citrus fruits, figs, pomegranates, guavas, melons, watermelons, grapevines, peppers, cucumbers, onions, herbs, cherry tomatoes, eggplants, organic melons, sweet potatoes and flowers, from entering the Irish market.<sup>21</sup> Meanwhile online booking platforms based in Ireland, will be prohibited from providing bed and breakfast and other touristic services<sup>22</sup> to settlements located in the West Bank.

Most of Palestine's natural resources are located in Area C, which constitutes over 60 percent of the West Bank.<sup>23</sup> According to the World Bank, the land, stone and Dead Sea mineral deposits in Area C could boost the Palestinian economy by \$1.7 billion each year, if Palestinians had access to them.<sup>24</sup> An additional \$1.7 billion would follow from the subsequent construction, tourism and telecommunications booms, which would in turn reduce poverty, unemployment and dependence on foreign aid. The Occupied Territories Bill 2018, will prevent Irish citizens ordinarily resident in Ireland from exploiting the resources of the occupied territory in violation of international law, ensuring that revenues from Palestine's natural resources are used for the benefit of the protected Palestinian population.

Al-Haq considers that the forced de-development of the Palestinian economy under Israel's military occupation coupled with the haemorrhaging of Palestinian national resources from the territory, is detrimental to the viability of an independent Palestinian State. In an authoritative study on 'Area C and the Future of the Palestinian Economy', the World Bank concluded that Israel's policies and practices in Area C, restricting Palestinian access to resources and production had cost Palestine, "some USD 3.4 billion—or 35 percent of Palestinian GDP in 2011", and that "tapping this potential output could dramatically improve the PA's fiscal position".<sup>25</sup>

<sup>21</sup> Al-Haq, "Feasting on the Occupation" (2013) 12, available at:

<http://www.alhaq.org/publications/Feasting-on-the-occupation.pdf>

<sup>22</sup> Al-Haq, "Business and Human Rights Focus Settler Tourism in the Occupied West Bank and Israel's Unlawful Appropriation of the 'Ein Fara Spring" (3 April 2019), available at:

<http://www.alhaq.org/advocacy/topics/business-and-human-rights-focus/1383-business-and-human-rights-focus-settler-tourism-in-the-occupied-west-bank-and-israels-unlawful-appropriation-of-the-ein-fara-spring>

<sup>23</sup> Al-Haq, "Facts on the Ground" (2015) 5, available at:

<http://www.alhaq.org/publications/facts.on.the.ground.pdf>

<sup>24</sup> Ibid.

<sup>25</sup> World Bank Study, "Area C and the Future of the Palestinian Economy" (2013) 5, available at:

<http://documents.worldbank.org/curated/en/257131468140639464/pdf/893700PUB0978100Box385270B00PUBLIC0.pdf>

b. The Illegality of Settlements under International Law, requires States to prohibit the import and sale of settlement goods and provision of settlement services

Al-Haq strongly supports the adoption of the Occupied Territories Bill 2018. In particular, Al-Haq considers the criminalization of the importation of settlement goods, sale of settlement goods, and provision of settlement services as consistent with Ireland's requirement to respect and ensure respect for the Fourth Geneva Convention, and obligations to provide effective penal sanctions for grave breaches of the Geneva Conventions.

In 1967, following the Six Day War, Israel on the basis of its military presence and substitution of governing authority *de facto* became the belligerent occupant of the Palestinian territory, i.e. the Gaza Strip and West Bank including East Jerusalem. As such, Israel under the framework of occupation law as provided for under the Hague Regulations (1907), the Fourth Geneva Convention (1949), the customary provisions of Additional Protocol 1 (1977) and general international law, assumed the function of administrative authority in the occupied territory. According to the principles of occupation law, the Occupying Power's administration of occupied territory is meant to be temporary and conservationist in nature, with the belligerent maintaining the *status quo ante bellum* of the territory, subject to the humanitarian provisions of the Fourth Geneva Convention and considerations of military necessity.<sup>26</sup> This significantly limits the occupant's competence to radically alter the laws in force in the occupied territory. Importantly, because the Occupying Power is not sovereign, it does not have the competence to alienate the public immoveable property of the occupied territory, a function of State held in abeyance throughout the occupation, for the returning sovereign.<sup>27</sup>

A number of key provisions of the Hague Regulations limit the belligerent occupants use of public and private property and therefore protect the land of the ousted sovereign and protected occupied population from confiscation for the purposes of settlement. For example, Article 46 of the Hague Regulations finds that private property cannot be confiscated, a provision that also protects private real estate in the occupied territory.<sup>28</sup> In addition, property is divided into moveable or immoveable property for consideration, where immoveable property can only be subject to the temporary use, or usufruct of the Occupying Power and where the capital of the property must be safeguarded for the returning sovereign *post bellum*.<sup>29</sup> This means that public lands remain under the ownership of the ousted sovereign.<sup>30</sup> The Occupying Power can temporarily use the fruits of the land, such as continuing mining or other functions,

<sup>26</sup> Article 43, Hague Regulations (1907)

<sup>27</sup> Allan Gerson, "War Conquered Territory, and Military Occupation in the Contemporary Legal System" 18 Harv. Int'l. L. J. 525 1977, p. 535.

<sup>28</sup> Article 46, Hague Regulations (1907).

<sup>29</sup> Article 55, Hague Regulations (1907).

<sup>30</sup> Allan Gerson, "War, Conquered Territory, and Military Occupation in the Contemporary International Legal System" 18 Harv. Int'l L. J. 525 1977, 537.

where to not do so, would impair the value of the stock. However, the Occupying Power is prohibited from permanently alienating public lands or allocating the land and resources of the occupied territory under long term lease for resource exploitation, or from developing public land for residential housing estates for the benefit of a foreign population for example, as this would amount to a significant breach of the temporary and *usufructuary* limitations inherent in Article 55 of the Hague Regulations.<sup>31</sup>

Accordingly, a number of the underlying acts involved in constructing settlements in occupied territory, amount to grave breaches of the Fourth Geneva Convention (1949). The latter obliges High Contracting Parties “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches”.<sup>32</sup> The grave breaches include *inter alia*, unlawful deportation or transfer and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. As such, the displacement of the protected population in the occupied territory and the resulting transfer in of the nationals of the Occupying Power to settle or colonise territory, amount to grave breaches of the Geneva Conventions subject to penal sanction. Similarly, the appropriation of land not carried out for the purposes of military necessity during military operations, but rather for long term residential, industrial and agricultural settlement amounts to the grave breach of extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

Notably elements of the settlement enterprise may also amount to war crimes and crimes against humanity under the Statute of the International Criminal Court, including the crimes of forcible transfer and transfer in<sup>33</sup>, extensive appropriation and destruction of property<sup>34</sup>, pillage<sup>35</sup> and also supporting crimes to ensure the maintenance of the settlement regime such as the crimes of wilful killing<sup>36</sup>, persecution<sup>37</sup>, and apartheid<sup>38</sup>. Al-Haq recalls that an Irish national who does any act which amounts to a war crime or crime against humanity is guilty of an ‘International Criminal Court offence’, under Article 12(1) of the International Criminal Court Act, 2006 and is liable to the penalty provided for it. In this respect, Al-Haq contends that the criminalization of the importation of settlement goods, the sale of settlement goods, and provision of settlement services is consistent with Ireland’s obligations under the Article 25 of the International Criminal Court Act, 2006, to hold persons criminally responsible for “the

<sup>31</sup> Pieter Bekker, The Legal Status of Foreign Economic Interests in Occupied Iraq, ASIL Insights, July 2003. At <http://www.asil.org/insigh114.cfm> (Last visited 27 November 2010).

<sup>32</sup> Article 146, Fourth Geneva Convention (1949)

<sup>33</sup> Article 8(2)(b)(viii) of the Rome Statute.

<sup>34</sup> Article 8(2)(a)(iv) of the Rome Statute.

<sup>35</sup> Article 8(2)(b)(xvi) of the Rome Statute.

<sup>36</sup> Article 8(2)(a)(i) of the Rome Statute.

<sup>37</sup> Article 7(1)(h) of the Rome Statute.

<sup>38</sup> Article 7(1)(j) of the Rome Statute.

purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission”.<sup>39</sup>

Although Israel is not party to the Hague Regulations, they apply as customary international law to Israel’s administration of the OPT, prohibiting Israel from appropriating public and private land in the occupied territory.<sup>40</sup> Notably, under Proclamation No 3, the military commander of Israel’s occupying forces determined that it would ‘observe the provisions of the Geneva Convention for the Protection of Civilians in Time of War’.<sup>41</sup> However, despite Israel’s ratification of the Fourth Geneva Convention, and initial commitment to apply the Geneva Conventions, it has limited the application of the Convention, to an undefined list of humanitarian norms applied on an ad hoc basis.<sup>42</sup> In addition, the Israeli High Court of Justice, has ruled that issue of settlements is non judiciable before the Israeli courts and is a matter for political resolution, granting the State a *carte blanche* to continue the colonial settlement enterprise.<sup>43</sup>

Specifically, the appropriation of land for settlements by the military force, infringes the principle of territorial integrity and amounts to an acquisition of territory by use of force, in violation of principles of international law, enshrined in Article 2(4) of the Charter of the United Nations. State parties have an obligation to not recognize as lawful, a situation (such as the creation of settlements) created by the illegal use of force or other serious breaches of a *jus cogens* obligation.<sup>44</sup>

Finally, Al-Haq highlights the UN Security Council Resolution 2334 (2016) mandate calling on all States, “to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”. Accordingly, in December 2018, UN Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary General, Nickolay Mladenov, in a Security Council briefing, mentioned the Occupied Territories Bill in relation to Resolution 2334 as a measure of State practice distinguishing between the OPT and the State of Israel.<sup>45</sup>

<sup>39</sup> Article 25 (3)(c), International Criminal Court Act, 2006, available at:  
<http://www.irishstatutebook.ie/eli/2006/act/30/enacted/en/print>

<sup>40</sup> Article 46, 52, 55, of the Hague Regulations (1907).

<sup>41</sup> Addameer, “Military Courts in the Occupied Palestinian Territory” (23 October 2018).

<sup>42</sup> HCJ 698/80, Kawasma v. Minister of Defence; HCJ 5973/92 Association for Civil Rights in Israel et al. v. Minister of Defence et al.; Yoram Dinstein, The International Law of Belligerent Occupation, Cambridge, 2009.

<sup>43</sup> HCJ 390/79, ‘Izzat Muhammad Mustafa Duweikat et 16 al. v. Government of Israel et al., At the Supreme Court Sitting as the High Court of Justice (6 September 1979), available at:  
[http://www.hamoked.org/files/2010/1670\\_eng.pdf](http://www.hamoked.org/files/2010/1670_eng.pdf)

<sup>44</sup> Article 41(2), The Articles of the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility).

<sup>45</sup> Security Council Briefing on the Situation in the Middle East, Reporting on UNSCR 2334 (As Delivered by UN Special Coordinator NICKOLAY MLADENOV), (18 December 2018), available at:



### 3. What is the Scale of the Problem and Who is Affected?

#### a. Immediate Settlement of West Bank in 1967

Almost immediately following the Six Day War and in the first months of the occupation, Israel began to implement its policy and plan to appropriate large tracts of Palestinian land for the purposes of settlement. On 11 June 1967, the second day of the occupation, Israel demolished the entire Magharib quarter of the Old City of Jerusalem with dynamite and bulldozers, destroying 135 homes and forcibly displacing 650 people, designating the entire area for 'Jewish Quarter redevelopment'.<sup>46</sup> In the same month, Israel altered and expanded the municipal boundaries of Jerusalem to include 28 Palestinian villages in the West Bank.<sup>47</sup> According to Meron Benvenisti, the mayor of Jerusalem at the time, the expanded boundary was intended to incorporate 'a maximum of vacant space with a minimum of Arabs'.<sup>48</sup> The following year, Israel issued a military order expropriating 29 acres of land in the south of the Old City for 'public purposes'. Jewish families were transferred into the area to establish a Jewish presence thus altering the demography of the Old City. Between September 1967 and 1968, Israel authorized and constructed Gush Etzion, a Jewish settlement in Hebron, alongside settlements in the Jordan Valley, East Jerusalem and the Dead Sea. By the end of 1967, Yigal Allon, the Head of Israel's Ministerial Committee for Settlements began to plan an official settlement map for Jewish settlements in the Eastern part of the West Bank.<sup>49</sup>

On 14 September 1967, Theodor Meron, Legal Advisor in Israel's Ministry of Foreign Affairs warned that 'in our settlement in Gush Etzion, evidence of intent to annex the West Bank to Israel can be seen'. Noting the absolute prohibition on settlement building under Article 49 of the Fourth Geneva Convention he suggested that settlements be carried out by military rather than civilian entities on a temporary basis, but warned that the international community had not accepted Israel's arguments that 'the West Bank is not "normal" occupied territory'.<sup>50</sup> It was evident that the Ministry of Foreign Affairs and the Political Secretary to the Prime Minister were put on notice that the colonisation was unlawful but it continued regardless with the support of all organs of the State, including the judiciary. Indeed, Israel's courts uphold the

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<https://unsco.unmissions.org/security-council-briefing-situation-middle-east-reporting-unscr-2334-delivered-un-special-0>

<sup>46</sup> Michael Dumper, 'Israeli Settlement in the Old City of Jerusalem' XXI (4) Journal of Palestine Studies (1992) 38.

<sup>47</sup> Abdel Monem Said Aly, Shai Feldman, Khalil Shikaki, Arabs and Israelis: Conflict and Peacemaking in the Middle East (Palgrave MacMillan, 2013) 130

<sup>48</sup> Hani Faris, The Failure of the Two-State Solution: The Prospects of One State in the Israel Palestine Conflict (I.B Taurus, 2013) 37.

<sup>49</sup> Paul Rivlin, The Israeli Economy from the Foundation of the State through the 21st Century (Cambridge University Press, 2011) 143.

<sup>50</sup> Ministry of Foreign Affairs, Settlement in the Administered Territories (18 September 1967)

colonisation of the occupied territory, deliberately refusing to apply Article 49 of the Fourth Geneva Convention to the occupied territory, perpetuating the colonisation under a veneer of legality.<sup>51</sup>

In June 1969, Israel's Prime Minister Gold Meir argued against the very existence of the Palestinian people, stating 'It was not as though there was a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them. They did not exist'.<sup>52</sup> The statement cut to the core of Israel's colonising ideology.

While Israel's colonising plans in occupied territory were immediately apparent beginning in 1967, also immediately apparent was the international community's failure to intervene to protect the occupied Palestinian population from the colonisation. Apart from a myriad of General Assembly and Security Council resolutions, and an Advisory Opinion from the International Court of Justice on nuanced issues relating to the conflict, the international community has failed to trigger the necessary mechanisms at its disposal to counter the illegal appropriation of Palestinian territory. No economic sanctions were authorized against Israel, no multinational forces were sent into the OPT to end the occupation, and Israel has been allowed to act for fifty-one years with impunity under the shield of a non-existent 'peace process'. Third States similarly failed Palestine for fifty-one years in their obligations 'to respect and ensure respect' for the Fourth Geneva Convention 'in all circumstances' failing to intervene to halt the colonisation.<sup>53</sup>

#### **b. Who is affected by the Settlement problem?**

The protected Palestinian population under the effective control of the Israeli military authority, are affected by land appropriations carried out for settlement construction.<sup>54</sup> The denial of freedom of movement in the West Bank, creation of enclaves to contain Palestinian communities<sup>55</sup> and the creation and expansion of settlements, directly and singularly impacts the protected Palestinian population. Critically the Palestinian population has the right to self-

<sup>51</sup> HCJ 698/80, *Kawasma v. Minister of Defence*; HCJ 5973/92 *Association for Civil Rights in Israel et al. v. Minister of Defence et al.*; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009.

<sup>52</sup> Carol Bisharat, 'Palestine and Humanitarian Law: Israeli Practice in the West Bank and Gaza' 12 *Hastings International and Comparative Law Review* (1988-1989) 325.

<sup>53</sup> See, Ardi Imseis, *The United Nations and the Question of Palestine: A Study in International Legal Subalternity* (Doctoral thesis) (2019), available at: <https://doi.org/10.17863/CAM.37976>

<sup>54</sup> Article 4, Fourth Geneva Convention (1949).

<sup>55</sup> Al-Haq, "Al-Haq welcomes the appointment of the Fact-Finding Mission to Investigate Impact of Israeli Settlements" (2012), available at: <http://www.alhaq.org/advocacy/targets/united-nations/598-al-haq-welcomes-the-appointment-of-the-fact-finding-mission-to-investigate-impact-of-israeli-settlements>



determination and permanent sovereignty over their national and natural resources, inalienable rights which are being violated by corporate exploitation and illegal settler trade with third countries.

#### 4. What is the Evidence Base for the Bill?

##### a. The Current Rate of Expansion of Settlements in the West Bank including East Jerusalem in 2019

Israel has radically amended the planning and zoning laws in the OPT to facilitate settlement construction. Under Military Orders 313,<sup>56</sup> and 418,<sup>57</sup> Israel altered the Jordanian Planning of Cities, Villages and Construction Law No. 79 of 1966, allocating the competence for planning, zoning and the construction process to the military commander and out of the control of Palestinian Village Councils. The military orders, issued for purposes unrelated to military necessity and ensuring the humanitarian guarantees of the Fourth Geneva Convention, breach Article 43 of the Hague Regulations. Israel now controls all planning and zoning in the West Bank, conferring competence to build in settlement areas, from the Palestinian Village Councils, to the Military Commander. At the same time, Israel has prohibited Palestinian construction on so-called state and survey land in declared firing zones, nature reserves or national parks, and on land that falls within the jurisdiction of settlement local and regional councils.<sup>58</sup>

According to the Israeli Civil Administration, Palestinians submitted 1,624 applications for building permits between January 2000 and September 2007.<sup>59</sup> Of these applications only 91 were approved.<sup>60</sup> During the same period the Civil Administration issued demolition orders for

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<sup>56</sup> Order concerning Monitoring of Construction Works (West Bank) No. 393, 1970.

<sup>57</sup> Order concerning Towns, Villages and Buildings Planning Law (West Bank) No. 418, 1971. On file with Al-Haq.

<sup>58</sup> Survey land: This term describes a category of land, which was not declared as state land. The status of this category of land is being examined by the Israeli occupying authorities, with a view that the land is kept as property of the government, which enables the occupying authorities to use it. This category makes up 20 percent of the land in Area C.

Firing zones: This category concerns lands that are declared but not necessarily used as firing fields. This land makes up 30 percent of area C and 18 percent of the West Bank. This land is mostly located in the Jordan valley and the eastern slopes of Bethlehem and Hebron governorates.

Nature reserve or national parks: This category makes up 14 percent of Area C. Lands under the jurisdiction of settlements' local and regional councils: This land constitutes 63 percent of Area C. Another 3.5 of percent Area C is located between the Annexation Wall and the Green Line.

<sup>59</sup> BIMKOM, *The Prohibited Zone: Israeli Planning Policy in the Palestinian Villages in Area C*, June 2008, page 10, (hereinafter BIMKOM *The prohibited Zone*), available at: <http://bimkom.org/eng/wp-content/uploads/ProhibitedZone.pdf>

<sup>60</sup> BIMKOM *The Prohibited Zone*, 10.

4,820 houses owned by Palestinians in Area C.<sup>61</sup> Between 2000 and 2016, Al-Haq documented the demolition by Israeli occupying forces of 3,025 structures in the West Bank, leaving 8,608 Palestinians displaced. There was a marked escalation in demolitions in 2016 whereby 73 percent of structures were demolished and an increase by 143 percent on the number of displaced people compared to 2015.

In March 2019, citing the lack of building permits, the Israel Occupying Force (IOF) demolished 23 structures across the OPT, including 12 homes, one mosque, and 10 private properties. In relation to the 12 demolished structures, two families were displaced for a second time after their homes were demolished.<sup>62</sup> Of all affected structures, nine were houses and three Bedouin dwellings. All these were located in the vicinity of the settlements, settlement planned areas or settler bypass roads. Five families were unable to remove their belongings prior to demolitions. While three demolished structures were under construction, all other homes were inhabited. Al-Haq documented the use of Hyundai, Caterpillar, JCB and Volvo equipment to demolish the structures.<sup>63</sup> Demolitions resulted in the displacement of 54 persons, including 27 women, 23 children, and two persons with disabilities. Meanwhile in March 2019, plans for the construction of 4,500 settlement units in the West Bank were reported in the Israeli media.<sup>64</sup>

Currently, there are approximately 250 settlements and outposts located in the West Bank, including East Jerusalem.<sup>65</sup> Of these, there are 131 settlements officially authorized by the Israeli Ministry of the Interior, 110 outposts and 11 settlement enclaves annexed to the Jerusalem municipality.<sup>66</sup> As of 2018, 628,000 Israeli settlers have been transferred into the West Bank, including 209,270 settlers in East Jerusalem.<sup>67</sup> The settlements comprise, not only the extensive city settlements, Maale Adumim, which, for example, has a population of 37,525 Israeli settlers, but also the surrounding Palestinian lands held ‘temporarily’ as military zones, but which are in fact intended to absorb future settlement expansion, and also lands appropriated for

<sup>61</sup> BIMKOM, *The Prohibited Zone*, 7.

<sup>62</sup> Al-Haq, “Israeli Occupying Forces Kill 21 Palestinians in March 2019 - Al-Haq Field Report March 2019”, available at: [http://www.alhaq.org/images/stories/PDF/March%20Report.English%20Translation\\_sp.pdf](http://www.alhaq.org/images/stories/PDF/March%20Report.English%20Translation_sp.pdf)

<sup>63</sup> Ibid.

<sup>64</sup> Middle East Monitor, “Israel to approve 4,500 new settlement units in West Bank” (30 March 2019), available at: <https://www.middleeastmonitor.com/20190330-israel-to-approve-4500-new-settlement-units-in-west-bank/>

<sup>65</sup> UN OCHA, Humanitarian Impact of Settlements, available at: <https://www.ochaopt.org/theme/humanitarian-impact-of-settlements>

<sup>66</sup> B’Tselem, “Settlements” (16 January 2019), available at: <https://www.btselem.org/settlements>

<sup>67</sup> Human Rights Watch, Israel and Palestine, Events of 2018, available at: <https://www.hrw.org/world-report/2019/country-chapters/israel/palestine>; B’Tselem, “Statistics on Settlements and Settler Population” (16 January 2019), available at: <https://www.btselem.org/settlements/statistics>

agricultural<sup>68</sup> and industrial settlements, land appropriated by Israel under military order for nature reserves, archaeological excavation, military zones and military training or firing zones.

Meanwhile industrial zones are established in close proximity to residential settlements to provide employment to the settlers in Israeli and international corporations located therein, including for example Siemens, Coca Cola, Volvo, Mercedes.<sup>69</sup> In the Dead Sea region in the Jordan Valley, the cosmetics company Ahava owned by the Chinese company Fosun, operates from the Mitzpe Shalem settlement.<sup>70</sup> Ahava has held the only Israeli granted license for extracting Dead Sea muds and minerals used in Dead Sea cosmetics, from the Palestinian Dead Sea coast.<sup>71</sup> Notably, while tourists flock on package holidays to the Dead Sea settlement resorts such as Kalia Beech and tourist settlement sites on Palestinian lands such as Qumran, a military checkpoint on the main and only coast road to the sites, restricts Palestinian access to Ahava and the Mitzpe Shalem settlement area.

Today the rapid expansion of settlements, has resulted in the mass appropriation of public and privately owned Palestinian land across the West Bank including East Jerusalem. Israel has appropriated on mass, communal Palestinian village lands including *Waqf*,<sup>72</sup> *Mulk*,<sup>73</sup> *Miri*,<sup>74</sup> *Matrouk* land,<sup>75</sup> *Mawat*<sup>76</sup> lands, each held under varying relationships of public or mixed public and private ownership, which were classified for public use under the Ottoman Land Laws (1858). Israel has categorised all uncultivated Palestinian lands, as no man's land, and absorbed it into the Israeli State portfolio, in stark violation of the *usufructuary* limitations of Article 55 of

<sup>68</sup> Kerem Navot, "Israeli Settlers Agriculture as a Means of Land Takeover in the West Bank" (August 2013), available at: <https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--reports/israeli-settlers-agriculture-as-a-means-of-land-takeover-in-the-west-bank.pdf>

<sup>69</sup> Al-Haq, "Business and Human Rights" (2016) 21, available at: <http://www.alhaq.org/publications/publications-index/item/business-and-human-rights-in-palestine;> Companies on file with Al-Haq.

<sup>70</sup> See, A/GRC/40/73, "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967" (15 March 2019), available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24349&LangID=Epara>. 26-28

<sup>71</sup> Al-Haq, "Pillage of the Dead Sea: Israel's Unlawful Exploitation of Natural Resources in the Occupied Palestinian Territory" (2012) 21 (footnote 41), available at: <http://www.alhaq.org/publications/publications-index/item/pillage-of-the-dead-sea-israel-s-unlawful-exploitation-of-natural-resources-in-the-occupied-palestinian-territory>

<sup>72</sup> Article 4, Ottoman Land Code; Raja Shehadeh, *The Land Law of Palestine*, page. 86; B'Tselem, *Under the Guise of Legality*, page. 22.

<sup>73</sup> Article 2(ii), Ottoman Land Code

<sup>74</sup> Raja Shehadeh, *The Land Law of Palestine*, page 94; B'Tselem, *Under the Guise of Legality*, page. 20.

<sup>75</sup> Article 5(ii) of the Ottoman Land Code.

<sup>76</sup> Article 103 of the Ottoman Land Code; B'Tselem, *Under the Guise of Legality*, page 29.

the Hague Regulations. Through this means alone, since 1967, Israel has declared approximately 755,000 dunams (186,564.563 acres) of the lands of the West Bank as Israeli state lands.<sup>77</sup>

The situation on the ground can only be described as dire. As Israel's impunity continues, buttressed by the support of the United States and inaction of the international community, tensions have escalated on the ground, with new peaks in settler violence against Palestinian communities. In January 2019, Israel unilaterally withdrew from the Temporary International Presence in Hebron (TIPH), a monitoring agency which had been present in Hebron for over twenty years to protect the Palestinian community against settler attacks with a mandate of "preventing violence and promoting a feeling of security for the population in Hebron". Prime Minister of Israel, Netanyahu withdrew arguing that Israel "will not allow the continued presence of an international force that acts against us".<sup>78</sup> In a statement, the EU spokesperson warned that the removal of the TIPH "risks further deteriorating the already fragile situation on the ground".<sup>79</sup>

Throughout April 2019, Al-Haq documented serious incidents of settler violence escalating across the West Bank. On 3 April 2019, Muhammad Abdel Mun'em Abdel Fatah, 23, was fatally shot by two Israeli settlers, at the Beita roundabout, south of Nablus.<sup>80</sup> On Saturday 13 April 2019, about 17 masked Israeli settlers from the settlement of Yitzhar, attacked Ziyad Abdel 'Aziz Shehadah and his family in the driveway of their home, in 'Urif village, south of Nablus.<sup>81</sup> At the time, Ziyad's wife, Raja', and their five-year old son, two-year old daughter and three-month old baby, were all in the family car, about to leave the house to attend a wedding. On Monday 29 April 2019, at approximately 5:20 pm, about 10 Israeli settlers, ages ranging between 15 and 18, from the Giva't Ronin outpost, attacked Muhammad Yousef Omran, 38, in the eastern side of Burin, south of Nablus.<sup>82</sup>

In Jerusalem, following the recognition by the U.S. of Jerusalem as the capital of Israel in December 2017, and subsequent relocation of the U.S embassy in May 2018, the situation has become progressively worse, with a marked acceleration in house demolitions, accompanied by approved settlement expansion. Between 2016 and 2018, Al-Haq documented 787 Palestinians

<sup>77</sup> Kerem Navot, *Blue and White Make Black. The Work of Blue Line Team in the West Bank*, December 2016, page 32, available at: <http://www.keremnavot.org/blueandwhitemakeblack>

<sup>78</sup> Reuters, "Netanyahu to eject foreign observers in flashpoint Hebron" Ynet (28 January 2019), available at: <https://www.ynetnews.com/articles/0,7340,L-5454258,00.html>

<sup>79</sup> European Union External Action, "Statement by the Spokesperson on the Israeli Government's decision not to renew the mandate of the Temporary International Presence in Hebron" (1 February 2019), available at: [https://eeas.europa.eu/headquarters/headquarters-homepage/57554/statement-spokesperson-israeli-government%E2%80%99s-decision-not-renew-mandate-temporary-international\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/57554/statement-spokesperson-israeli-government%E2%80%99s-decision-not-renew-mandate-temporary-international_en)

<sup>80</sup> Al-Haq, Special Focus: Israeli Settlers Wilfully Kill a Palestinian, Attack Palestinian Homes and Families - Reporting Period: 1 April - 15 April 2019, available at: <http://www.alhaq.org/advocacy/topics/settlements-and-settler-violence/1412--qq->

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.





announced the construction of 3,900 settlement units in 30 settlements across the West Bank.<sup>89</sup>

In April 2019, in a pre-election promise Prime Minister Netanyahu clarified that he would not remove “a single person” illegally transferred into the settlements and clarified, “I know what I said: I said there can’t be the removal of even one settlement, and [that Israel insists on] our continued control of all the territory to the west of the Jordan”.<sup>90</sup>

In December 2016, the preamble to UNSC Resolution 2334, affirmed 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”

As the years have passed, 51-years now into Israel’s belligerent occupation, the longest occupation in recorded history since the Hague Regulations (1907), the occupation has taken on a number of permanent elements. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice (ICJ) proposed that the Wall represented a *de facto* annexation of the territory, in that it created a ‘*fait accompli*’ on the ground that could well become permanent.”<sup>91</sup>

In February 2017, a radical and transformative law was passed at the Israeli Knesset detailing Israel’s new procedure for the expropriation of Palestinian land for settlement. The stated objective of the law is to “regularize settlement in Judea and Samaria, and to enable it to continue to strengthen and develop”.<sup>92</sup> Where there is “doubt” over the ownership of land located in the West Bank and the settlement has been constructed in “good faith”, the State will register the property as belonging to the Government of Israel. Additionally, in 2017, a number of bills<sup>93</sup> were tabled before the Israeli Knesset to expand the Jerusalem municipality and absorb the settlement blocs, in an attempt to extend Israeli sovereignty over the settlements. Palestinian protests against the alteration of the status of Jerusalem, including the relocation of

<sup>89</sup> Madeeha Araj/ NBPRS, “Report: Settlement expansion growing after referral of Israeli Crimes to ICC” (28 May 2018), available at: <http://english.pnn.ps/2018/05/28/report-settlement-expansion-growing-after-referral-of-israeli-crimes-to-icc/> The settlements include, Ariel, Ma’aleh Adumim, Kiryat Arba and Kfar Atzion.

<sup>90</sup> Times of Israel, “Netanyahu: If I’m re-elected, I’ll extend sovereignty to West Bank settlements” (6 April 2019), available at: <https://www.timesofisrael.com/netanyahu-if-im-re-elected-ill-extend-sovereignty-to-west-bank-settlements/>

<sup>91</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Reports 136 <[www.icj-cij.org/en/case/131](http://www.icj-cij.org/en/case/131)> [121].

<sup>92</sup> Law for the Regularization of Settlement in Judea and Samaria, 5777-2017, Available at: [https://www.adalah.org/uploads/uploads/Settlement\\_Regularization\\_Law\\_English\\_FINAL\\_05032017.pdf](https://www.adalah.org/uploads/uploads/Settlement_Regularization_Law_English_FINAL_05032017.pdf)

<sup>93</sup> See Greater Jerusalem Bill, P/20/4158, Proposed Greater Jerusalem Law, 2017 – 5777. Submitted to the Knesset Chairman and deputies and presented to the Knesset’s table on the date of 22 March 2017 [24th of Adar, 5777].

the US Embassy on 14 May 2018, were met with one of the worst days of violence in the OPT, with Israeli soldiers opening fire on and killing 61 and injuring 1,861 civilian protestors in the Gaza Strip.<sup>94</sup> In July 2018, Israel adopted the Nation State Law. Article 1(c), holds that the right to national self-determination in the State of Israel is singularly “unique to the Jewish People”.<sup>95</sup>

Meanwhile Israel has accelerated attempts to transform the Jerusalem periphery and absorb the so-called E1 area located in the West Bank, into the State of Israel. The “E1” area, encompassing 22,000 dunums (5,436 acres) of appropriated Palestinian land, is strategically located between the Ma’ale Adumim city settlement and Jerusalem.<sup>96</sup> For Israel, construction in the “E1” area translates into guaranteed contiguity between the Ma’ale Adumim settlement, Jerusalem, as well as Israel.<sup>97</sup> The military authorities have targeted entire Bedouin villages in the area with demolition orders, to force their removal.<sup>98</sup>

In light of the failure of the international community to intervene, due in part to the United States veto block in the Security Council, the situation in the occupied West Bank is now veering dangerously close to a full scale annexation. In 2017, United Nations Special Rapporteur announced that “Israel’s role as occupier in the Palestinian Territory – the West Bank, including East Jerusalem, and Gaza – has crossed a red line into illegality”.<sup>99</sup> In April 2019, two weeks after the United States formally recognised Israel’s annexation of the occupied Syrian Golan, Israel’s Prime Minister promised to annex the West Bank.<sup>100</sup>

Al-Haq urges the full support of the Irish State in adopting the Occupied Territories Bill, 2018, as an important first step in stemming the annexationist measures of Israel, by removing profits

<sup>94</sup> Al-Haq, “‘Bloody Monday’ - Documentation of the Shoot-to-kill, Egregious Killings Committed by the Israel Occupying Force (IOF) on 14 May 2018”, available at: <http://www.alhaq.org/advocacy/topics/gaza/1262-bloody-monday-documentation-of-the-shoot-to-kill-egregious-killings-committed-by-the-israel-occupying-force-iof-on-14-may-2017>

<sup>95</sup> Article 1(c), Basic Law: Israel - The Nation State of the Jewish People, available at: <https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf>

<sup>96</sup> Al-Haq, Virtual Field Visit: E1 Area, 28 January 2014, available at: <http://www.alhaq.org/advocacy/topics/settlements-and-settler-violence/774-virtual-field-visit-e1-area>.

<sup>97</sup> Jonathan Lis, Israeli Bill to Annex Jerusalem-area Settlement Will Include Controversial E1 Area (Haaretz, 19 January 2017), available at: <https://www.haaretz.com/israel-news/.premium-israeli-bill-to-annex-settlement-to-include-controversial-e1-area-1.5487449>.

<sup>98</sup> B’Tselem, “Three Israeli Supreme Court justices greenlight state to commit war crime” (27 May 2018), available at: [https://www.btselem.org/communities\\_facing\\_expulsion/20180527\\_supreme\\_court\\_greenlights\\_war\\_crime\\_in\\_khan\\_al\\_ahmar](https://www.btselem.org/communities_facing_expulsion/20180527_supreme_court_greenlights_war_crime_in_khan_al_ahmar)

<sup>99</sup> UN Human Rights Office of the High Commissioner, “Israel must face new international legal push to end illegal occupation of Palestine, UN expert says”, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22315>

<sup>100</sup> Times of Israel, “Netanyahu doubles down on West Bank annexation after ex-generals speak out” (21 May 2019), available at: <https://www.timesofisrael.com/netanyahu-doubles-down-on-west-bank-annexation-after-ex-generals-speak-out/>



## Implications and implementation of the Bill's proposals

### Policy implications / implementation

#### 6. How is the approach taken in the Bill likely to best address the policy issue?

##### a. The Bill removes the incentive to profit from unlawfully appropriated and pillaged goods

Al-Haq considers that the adoption of the Bill will have an important chilling effect on the export of goods, services and the extraction of natural resources unlawfully produced in the occupied territory. Al-Haq strongly welcomes the adoption of the Bill into law, and views Ireland's initiative as a pivotal first step in international State practice to provide for what the International Committee of the Red Cross has termed as, the minimum fundamental humanitarian guarantees of the Fourth Geneva Convention.<sup>101</sup> The Bill will ensure that Ireland upholds its obligations under international law, and removes the incentive for Irish citizens ordinarily resident in the State and companies to profit and trade in unlawfully appropriated and pillaged goods, which are the property of the Palestinian people and State of Palestine.

##### b. The Bill Represents a Pivotal First Step in International State Practice

During and since the passing of the Bill through the Seanad, Al-Haq has received delegations of parliamentarians from a number of States, including the Netherlands, Norway and Chile who are observing the Irish process and have expressed an appetite for pursuing similar legislative measures to prohibit the import of settlement goods, engage in the provision of settlement services and extraction of natural resources from the occupied territory.<sup>102</sup> In April 2019, the Palestinian Division at the United Nations in New York invited Senator Frances Black and Mr.

<sup>101</sup> 3, available at: [https://www.icrc.org/en/doc/assets/files/other/law10\\_final.pdf](https://www.icrc.org/en/doc/assets/files/other/law10_final.pdf)

<sup>102</sup> Al-Haq, "Al-Haq Welcomes Chilean Parliament Resolution Calling on the Government to Review Treaties with Israel" (6 December 2018), available at: <http://www.alhaq.org/advocacy/targets/third-party-states/1331-al-haq-welcomes-chilean-parliament-resolution-calling-on-the-government-to-review-treaties-with-israel>

Conor O’Neil to present on the Bill, underscoring the importance and esteem that the Bill is regarded, as an issue that is at the forefront of the Palestinian national agenda.<sup>103</sup>

## 7. Could the Bill have unintended policy consequences?

### a. Palestinian Unions representing Palestinian workers fully support the Bill

One of the arguments against the Bill has been a concern that the Bill might negatively impact Palestinian workers in settlements. Al-Haq emphasises the full commitment by all sectors of Palestinian civil society for the Occupied Territories Bill. On Friday, 23 November 2018, the Palestinian Human Rights Organisations Council (PHROC) communicated a letter to members of the Seanad in Ireland, showing appreciation for their support of the (Occupied Territories) Bill. The letter further stressed the importance of the continued support of the Bill by Members of the Seanad and Dáil.

The Occupied Territories Bill is supported by Adaleh Coalition, an umbrella group of sixty unions and labour organisations in the OPT, representing every industry in Palestine including, for example, the Private Health Sector Workers Union, the Pharmaceutical Industry Workers Union, New Labour Union Federation, Financial Sector Workers Union, The National Society of Democracy and Law and the Union of Social Workers and the Union of Agricultural Committees. In January 2019, Adaleh Coalition wrote a statement in support of the Bill. According to Adaleh Coalition:

“The Control of Economic Activity (Occupied Territories) Bill 2018 represents a laudable and historic first step towards the implementation of third State obligations under international law, by prohibiting the import and sale of illegal settlement goods and services....

Most notably this occupation has manifested itself in the aggressively expanding settlement enterprise, in violation of international law and through the denial of Palestinian rights of self-determination and permanent sovereignty over their natural wealth and resources. This has left Palestinians with few resources to develop an independent and viable economy. It has significantly contributed to high unemployment rates among Palestinians in the OPT, who are left with no other option than to seek work in Israel and Israeli settlements, working on land that had been forcibly taken from them, to secure their livelihoods. Meanwhile, Israel’s colonisation and annexationist measures are fueled and sustained by profits from its illegal settlement activity in the West Bank, including East Jerusalem. The denial of access to land and natural resources,

<sup>103</sup> United Nations, “Speakers Consider Proposed Law in Ireland to Ban Imports from Illegal Settlements, as United Nations Forum on Question of Palestine Discusses de Facto Annexation” (4 April 2019), available at: <https://www.un.org/press/en/2019/gapal1424.doc.htm>

accompanied by Israel's obstruction of Palestinian territorial contiguity, due to the building of the Annexation Wall and its associated regime, imposition of a discriminatory and segregationist ID system, appropriation of Palestinian lands and denial of freedom of movement, has caused irreparable losses for the Palestinian economy. In turn, this has negatively affected the rights of Palestinians generally and workers and the labour market condition specifically. In the case of Palestinian workers in Israeli settlements, labour rights and regulations are non-existent, exacerbating violations against the workers, which often go without accountability.

Palestinian workers in Israeli settlements are treated under a different legal regime to Israeli workers. Working conditions and the labour rights of Palestinians have declined as Israel's settlement enterprise flourishes; exploiting the Palestinian labour force that often enjoys no protection when working in Israeli settlements. For this reason, Palestinians often receive lower wages, no benefits or healthcare, and are not afforded workplace safety measures – especially when compared to their Israeli counterparts. In addition, Palestinian workers who seek jobs in Israeli settlements often go through a rigorous, long and humiliating process in order to acquire a permit from the Israeli authorities to be able to access their place of work in Israeli settlements. These permits can be revoked at any time, whereas the workers' dependency on these permits limits their choice of employment.

Ireland is the first country to take a step towards preventing grave breaches of international law, by prohibiting the import of goods and services stemming from Israel's illegal settlement enterprise, including the appropriation of land, unlawful exploitation of natural resources, and the forcible transfer of the protected Palestinian population. Adaleh Coalition stresses that by adopting the Bill, Ireland is further strengthening prospects of economic independence, stability and sustainable development for the Palestinian people."

Please find two letters of support in the Annexes from the Palestinian Human Rights Organisations Council and Adaleh Coalition, together expressing the support of seventy

## Part B – Legal Analysis

Palestinian civil society organisations representing all facets of Palestinian life.

### 8. Is the draft PMB compatible with EU legislation and human rights legislation (ECHR)

a. Occupied Territories Bill is compatible with EU legislation

Al-Haq considers that the Occupied Territories Bill is consistent with the wider EU context. At the EU level, the European Commission has issued several Notices to Importers<sup>104</sup> and an Interpretative Notice<sup>105</sup> stating that the Israeli settlements are illegal under international law. The EC's Interpretative Notice also stated that goods produced in those settlements are not covered by the EU-Israel Association Agreement of 2000. Despite these declarations, illegal settlement goods continue to reach the EU market.

In addition, the ECJ has held that Israeli settlement goods are not protected by the EU-Israel Association Agreement because those goods are not technically produced in Israel. The ECJ's Brita decision provides some clarity on the place of exported settlement goods vis-à-vis EU trade agreements.<sup>106</sup> First, the Court affirmed that the rules of customary international law are binding on EU institutions and Member States, regardless of whether the documents establishing those rules bind those institutions and States.<sup>107</sup> Second, the Court held that products obtained in locations under Israeli occupation since 1967 do not qualify as being obtained in Israel under the EU-Israel Association Agreement.<sup>108</sup> The Court did not specifically address the legality of Israel's use of the OPT for settlement industry *per se*; rather, the Court reasoned that the existence of both the EU-Israel Association Agreement and the separate EU-Palestinian Authority Interim Agreement<sup>109</sup> logically implies that each agreement must apply to different territories. Thus, the "territory of Israel" in the EU-Israel Association Agreement

<sup>104</sup> 1997 O.J. (C 338) 13, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:338:FULL&from=EN>; 2001 O.J. C (328) 6, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001XC1123\(02\)&qid=1527493813804&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001XC1123(02)&qid=1527493813804&from=EN); 2005 O.J. (C 20) 2, available at: [http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc\\_127720.pdf](http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127720.pdf); 2012 O.J. (C 232) 5, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0803\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0803(02)&from=EN).

<sup>105</sup> European Commission, *Interpretative Notice* C(2015) 7834 final, available at: [https://eeas.europa.eu/sites/eeas/files/20151111\\_interpretative\\_notice\\_indication\\_of\\_origin\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/20151111_interpretative_notice_indication_of_origin_en.pdf).

<sup>106</sup> Case C-386/08, Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010 E.C.R. I-01289, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=72406&pageIndex=0&doclang=EN&m ode=lst&dir=&occ=first&part=1&cid=152024> (hereafter Brita).

<sup>107</sup> See, e.g., *id.* at para. 42 ("even though the Vienna Convention does not bind either the [EU] or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the [EU] institutions and form part of the [EU] legal order."); see also *id.* At para. 40 ("the fact that that Vienna Convention does not apply to international agreements concluded between States and other subjects of international law is not to affect the application to them of any of the rules set forth in that convention to

<sup>108</sup> Brita (n 68) at para. 64 ("the customs authorities of the importing Member State may refuse to grant preferential treatment provided for under the [EU]-Israel Association Agreement where the goods concerned originate in the West Bank.").

<sup>109</sup> Euro-Mediterranean Interim Association Agreement, 1997 O.J. (L 187) 3, available at: [http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc\\_117751.pdf](http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117751.pdf).

necessarily does not include “the West Bank and Gaza Strip” in the EU-Palestinian Authority Interim Association Agreement.<sup>110</sup>

The EU’s 2015 Interpretative Notice likely harmonizes standards for how Israeli settlement products are to be labeled for import into the EU common market.<sup>111</sup> However Article 36 of the Treaty on the Functioning of the EU provides that “Nothing in this Agreement shall preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of public morality, public policy or public security”.<sup>112</sup> Thus, the option is still open for a Member State to implement a national provision to prohibit the import of goods from Israeli settlements in the OPT based on public policy or public security grounds, even in light of harmonized place of origin standards.

Critically Member States have the power to enforce a unilateral prohibition on the import of settlement goods, services and natural resources under the public policy exception of Article 27 of the EU-Israel Association Agreement.<sup>113</sup> States’ unilateral power to enforce such a restriction derives from the Treaty of Lisbon Articles 3 and 215, granting Member States the power to enforce the EU’s common policies.<sup>114</sup> Article 215 of the Treaty on the Functioning of the European Union (TFEU) allows the EU to adopt “restrictive measures” against “third countries,... natural or legal persons and groups of non-State entities.” The European Court of Justice has reaffirmed Member States’ duty to abide by and enforce international law (such as the UN Charter)<sup>115</sup> in their institutional dealings, particularly when those dealings involve occupying third-states.<sup>116</sup>

Notably, trade with Israel (as prescribed by the EU-Israel Association Agreement) is unaffected. Only products originating from settlements that are illegal under international law may be prohibited from entering the EU market. Accordingly, Al-Haq considers the restriction on

<sup>110</sup> Brita (n 68) at para. 47 (“[e]ach of [the EU-Israel Association Agreement and the EU-PA Interim Association Agreement] has its own territorial scope. Under Article 83 thereof, the [EU]-Israel Association Agreement applies to the ‘territory of the State of Israel.’ Under Article 73 thereof, the [EU-PA Interim] Association Agreement applies to the ‘territories of the West Bank and the Gaza Strip.’”).

<sup>111</sup> The fuzzy harmonization process in the EU makes it difficult to know whether the 2015 Interpretative Notice harmonizes the rules of origin for settlement goods. Taking the more legally conservative approach, the rest of this section proceeds from the assumption that harmonization has been achieved.

<sup>112</sup> EU-ISR Agreement, art. 27.

<sup>113</sup> Euro-Mediterranean Agreement, 2000 O.J. (L 147) 3, available at:

[http://eeas.europa.eu/archives/delegations/israel/documents/eu\\_israel/asso\\_agree\\_en.pdf](http://eeas.europa.eu/archives/delegations/israel/documents/eu_israel/asso_agree_en.pdf).

<sup>114</sup> *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community* art. 215(1)-(2), 13 December 2007, 2007 O.J. (C 306) 1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>.

<sup>115</sup> United Nations, *Charter of the United Nations* arts. 25, 48(2), 103, 24 October 1945, available at: <http://www.refworld.org/docid/3ae6b3930.html>

<sup>116</sup> Case C-266/16, *Western Sahara Campaign UK*, 27 February 2018 (unpublished), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0266>.

settlement goods and services, including natural resources entering the Irish market, as consistent with EU law.<sup>117</sup>

Al-Haq also notes the publication of several legal opinions eminent scholars, which address the capacity of an EU Member State to implement a unilateral ban on settlement goods on the basis of the aforementioned ‘public policy’ exemption in EU law. Al-Haq would urge the Members of the Committee to give due regard to these opinions, authored by Professor Takis Tridimas, Professor James Crawford and Michael Lynn SC.

## **9. Is there ambiguity in the drafting which could lead to the legislation not achieving its objectives and/or to case law down the line?**

### **a. Pillage**

In terms of reliance on the Fourth Geneva Convention, it would be useful to have some clarity on whether the Bill pertains to the entirety of the Fourth Geneva Convention, or refers more narrowly to the criminal aspect of the Fourth Geneva Convention, i.e. grave breaches in Articles 146 and 147. For example, pillage of natural resources is a violation of Article 33 of the Fourth Geneva Convention, but is not specifically criminalised under the grave breaches provision, which refers more narrowly to extensive destruction and appropriation. The 1958 Commentary to the Fourth Geneva Conventions explains that “appropriation and destruction mentioned in this Convention” as distinct from pillage, “must be treated as a special offence”.<sup>118</sup> While the 1916 Commentary to the First Geneva Convention treats pillage and ‘appropriation and destruction of property’ interchangeably, it should be emphasized that these are treated as two distinct crimes in the Statute of the International Criminal Court.

- Al-Haq recommends including reference to the Statute of the International Criminal Court, which criminalises pillage, and which has also been incorporated into Irish law under the Statute of the International Criminal Court (2006).

### **b. Expanding the Terminology of “Illegal Settler”**

Al-Haq wishes to draw attention to the limitations of referring to the “illegal settler” in the interpretation of the Occupied Territories Bill (Article 2 and Article 11, Occupied Territories Bill).

<sup>117</sup> See, Al-Haq, “Brief In Support Of Unilateral Action By A European Union Member State To Prohibit The Importation Of Israeli Settlement Goods” (July 2018), available at:

<http://www.alhaq.org/images/thumbnails/images/stories/Images/1280.pdf>

<sup>118</sup> Article 147, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Commentary of 1958, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=659A26A51BB6FE7AC12563CD0042F063>



While Al-Haq considers that illegal settlers, who are the nationals of the Occupying Power transferred into the occupied territory, are indeed producing settlement goods and services in the OPT, they are by no means the only actors. For example, Carmel Agrexco which operates on Palestinian lands in the Jordan Valley, produces agricultural produce such as herbs, packaged by migrants from Asian countries who work and live in the settlements. International corporations such as Siemens<sup>119</sup> and Coca Cola<sup>120</sup> operate in industrial settlements such as Atarot, on Palestinian village lands outside Ramallah<sup>121</sup> inside the Jerusalem municipality.<sup>122</sup> In particular, international corporations operating in industrial settlements in occupied territory, are not necessarily considered nationals of the Occupying Power transferred into the occupied territory, for the purposes of the Bill.

Notably, the authoritative 2016 ICRC Commentary on the Article 50 Grave Breaches provision of the First Geneva Convention (common to the four Geneva Conventions) makes specific reference to “industrialists and businessmen” as potential perpetrators of grave breaches making an important reference in the footnotes to the *Flick, Farben and Krupp* cases before the US Military Tribunal at Nuremberg. Significantly, the latter were industrialists and businessmen prosecuted at Nuremberg for *inter alia* the systematic economic exploitation of occupied territory, amounting to pillage.

- Al-Haq recommends including individuals such as corporate agents from third States who are actively producing goods and services in occupied territory and are as such, not members of the civilian population of the Occupying Power. In doing so, drawing on the terminology of “ industrialists and businessmen” as referenced by the ICRC Commentary.

In addition, Al-Haq considers that the Bill should be expanded more broadly to include, legal persons, in addition to “illegal settler” as natural persons, who are actively producing goods and services in occupied territory. In the 2018 Report of the United Nations High Commissioner of Human Rights on the mandate of the Human Rights Council to compile a Database on all business enterprises active in the settlements and involved in “listed activities”,<sup>123</sup> the report

<sup>119</sup> Documentation on File with Al-Haq.

<sup>120</sup> Who Profits, “The Central Bottling Company - CBC (Coca Cola Israel), available at: <https://whoprofits.org/company/the-central-bottling-company-cbc-coca-cola-israel/>

<sup>121</sup> Israel Ministry of Economy and Industry, Jerusalem-Atarot Industrial Area, available at: <http://economy.gov.il/English/Industry/DevelopmentZoneIndustryPromotion/ZoneIndustryInfo/Pages/Atarot.aspx>

<sup>122</sup> Al-Haq, “Development of Atarot threatening Palestinian neighborhoods of East Jerusalem” (23 June 2016), available at: <http://www.alhaq.org/advocacy/topics/wall-and-jerusalem/1054-development-of-atarot-threatening-palestinian-neighborhoods-of-east-jerusalem>

<sup>123</sup> In resolution 31/36, the Council defined the parameters of activities to be reflected in the database by reference to the list compiled by the mission in its report, which comprised: (a) The supply of equipment and materials facilitating the construction and the expansion of settlements and the wall, and associated infrastructures; (b) The supply of surveillance and identification equipment for settlements, the wall and checkpoints directly linked with settlements; (c) The supply of equipment for the demolition of housing



highlighted the integral role that businesses play in actively maintaining and expanding the illegal settlement regime:

“Businesses play a central role in furthering the establishment, maintenance and expansion of Israeli settlements. They are involved in constructing and financing settlement homes and supporting infrastructure, providing services to the settlements, and operating out of them. In doing so, they are contributing to Israel’s confiscation of land, facilitate the transfer of its population into the Occupied Palestinian Territory, and are involved in the exploitation of Palestine’s natural resources”.

Al-Haq considers that this central tenet, the role that businesses play in producing the goods and services in question to sustain and prolong the occupation, is not adequately addressed in the Bill.

- Al-Haq recommends the expansion of the Interpretation of the Act, to include other actors besides “illegal settlers” such as Israeli national and international corporations as legal persons who may be complicit in producing goods or services in occupied territory.

### c. S. 3 Occupied Territory

Al-Haq welcomes the application of the Bill to “relevant occupied territory” in Article 3(1), but would recommend that the Committee consider whether the insertion of the Fourth Geneva Convention is the most appropriate basis for establishing occupation. Critically, Article 42 of the Hague Regulations *de facto* establishes “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” While Article 2 of the Fourth Geneva Convention applies to “all cases of partial or total occupation of the territory of a High

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and property, the destruction of agricultural farms, greenhouses, olive groves and crops; (d) The supply of security services, equipment and materials to enterprises operating in settlements; (e) The provision of services and utilities supporting the maintenance and existence of settlements, including transport; (f) Banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses; (g) The use of natural resources, in particular water and land, for business purposes; (h) Pollution, and the dumping of waste in or its transfer to Palestinian villages; (i) Use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements; (j) Captivity of the Palestinian financial and economic markets, as well as practices that disadvantage Palestinian enterprises, including through restrictions on movement, administrative and legal constraints.

Contracting Party, even if the said occupation meets with no armed resistance<sup>124</sup>, this does not provide the test for when territory is considered occupied.

In this vein, the United States military manual asserts that Article 42 of the Hague Regulations which “provides a standard for when the law of belligerent occupation applies, is regarded as customary international law”.<sup>125</sup> To quote two international law experts, Ginnane and Yingling, “While the Civilian Convention contains no definition of ‘occupation,’ probably nothing could be added to the principle in Hague Article 42 that ‘Territory is considered occupied when it is actually placed under the authority of the hostile army’”.<sup>126</sup>

Notably, the preamble to the Bill already mentions that the Bill gives effect to the States obligations under customary international law (CIL). While the Hague Regulations comprise CIL, it is not immediately clear why the Hague Regulations are not mentioned here, as the specific law which establishes when territory can be considered occupied.

- Al-Haq recommends that Article 42 of the Hague Regulations be specifically mentioned as the law governing the standard for when an occupation is considered to apply, with a linking reference to Articles 2 and 154 of the Fourth Geneva Convention, the latter which considers the Convention “supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.”

Al-Haq cautions that while court cases may recognise a situation of occupation, the characterisation of occupation is always premised on an appraisal of the facts on a case by case basis, examining whether military presence and substitution of governing authority has been established. Nevertheless, there are other instruments which may also recognise a situation of occupation, which should be considered, including the rulings of regional courts<sup>127</sup>, domestic

<sup>124</sup> Notably, this is also the definition of occupation in Article 5 of the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) Act 2017.

<sup>125</sup> Department of Defense, Law of War Manual, (June 2015, updated December 2016) p. 757, available at: <file:///C:/Users/susan.power/Desktop/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf>

<sup>126</sup> Raymund T. Yingling and Robert W. Ginnane, The Geneva Conventions of 1949, 46 AJIL 393, 417 (1953)

<sup>127</sup> ECHR, Case of “Chiragov and others v. Armenia”, Application no. 13216/05, Strasbourg, 16 June, 2015, Available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-155353%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155353%22]})

courts<sup>128</sup>, Security Council resolutions<sup>129</sup>, General Assembly resolutions<sup>130</sup>, Human Rights Council resolutions<sup>131</sup> etc.

d. Extraction of Resources from a Relevant Occupied Territory

During prolonged occupation, a situation may arise whereby neighbouring States are unwilling to conclude an agreement for the delimitation of the exclusive economic zone with the occupied State during belligerent occupation or where the belligerent occupant is the neighbouring State.<sup>132</sup> In 2005, Israel and Egypt bypassed Palestine and concluded a Memorandum of Understanding for the laying of the El Arish gas import pipeline in the OPT, some 13 nm off the Gaza coast (and along the entire 40km Palestinian), to pipe gas from Egypt to Israel, in an area that falls outside the territorial sea, but lies in the contiguous zone.<sup>133</sup>

In 2011, Noble Energy, a Houston based company, began extracting gas from the Israeli side of a shared contiguous gas resources, straddling Israeli and Palestinian waters. The gas field is located approximately 20 nautical miles out at sea, beyond the territorial waters but within the Gaza Maritime Zone agreement concluded under the Oslo Accords.<sup>134</sup> The latter requires joint cooperation for the exploitation of contiguous resources. The issue of exploitation of contiguous resources, especially when these are contiguous to the territory of the Occupying Power, is a particular problem evident in the Palestinian context.

It is evident in many contemporary occupations, that the belligerent occupant also establishes control over the sea, including the exclusive economic zone. On 4 November 2018, the Israeli Ministry of Energy announced that the second bidding round for oil and gas exploration licenses will soon be opened to “all the Israeli EEZ area”, including an area of the Mediterranean Sea encompassing disputed waters bordering Palestine, which have not yet been settled by a

<sup>128</sup> Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank, et. al., Israeli High Court of Justice, HCJ 2164/09, Judgment, 26 December 2011

<sup>129</sup> SC/RES/1483 (2003).

<sup>130</sup> A/HRC/34/L.41, 34/...Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan (2017)

<sup>131</sup> Human Rights Council, Resolution adopted by the Human Rights Council on 18 May 2018 S-28/1. Violations of international law in the context of large-scale civilian protests in the Occupied Palestinian Territory, including East Jerusalem (22 May 2018)

<sup>132</sup> For example, in 2006 the EU and Morocco concluded a “Fisheries Agreement”, whereby Morocco granted lucrative fishing licenses to EU Member States, to fish off the coast of both Morocco and occupied Western Sahara. In 2018, the European Court of Justice held that the “Fisheries Agreement” did not include the waters adjacent to the territory of Western Sahara, Judgment in Case C-266/16 The Queen, on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs

<sup>133</sup> Memorandum of Understanding Relating to the Purchase and Transmission of Natural Gas Through a Pipeline Between the Government of the State of Israel and the Government of the Arab Republic of Egypt, available at: <https://www.jewishvirtuallibrary.org/jsource/Peace/mou2005.pdf>

<sup>134</sup> 1995 Israel Palestinian Interim Agreement.

delimitation agreement between Israel and the State of Palestine.<sup>135</sup> Critically, Palestinians have the right to self-determination and permanent sovereignty over natural resources in the Palestinian continental shelf, including contiguous natural gas resources, and also potential claims to other natural resources in the disputed waters. The rights of a State over the continental shelf exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land and according to the International Court of Justice, the State does not need to make a good claim over these areas.<sup>136</sup>

- Al-Haq recommends that the provision for extraction from “associated territorial waters” outlined in Articles 9(1) and 9(2) be amended to include “associated territorial waters and continental shelf”.

e. Prohibit and Criminalise the Import of Natural Resources from Relevant Occupied Territory and its Associated Territorial Waters and Continental Shelf

Al-Haq notes that the United Nations Fact Finding Mission on Settlements did not differentiate between settlement blocs and areas where natural resources are located in the West Bank:

“For the purpose of its work, the mission understands —Israeli settlement to encompass all physical and non-physical structures and processes that constitute, enable and support the establishment, expansion and maintenance of Israeli residential communities beyond the Green Line of 1949 in the Occupied Palestinian Territory (see annex I). 1 The mission did not differentiate between —settlement, —settlement block, —outposts or any other structures that have been erected, established, expanded and/or appropriated or any land or natural resources appropriated.”<sup>137</sup>

Al-Haq observes that while Articles 9(1) and 9(2) make it an offence for a person to attempt to engage, or assist another person to engage in the extraction of resources from a relevant occupied territory or its associated waters, it does not explicitly prohibit and criminalise the import of the said extracted natural resources from a relevant occupied territory and its associated territorial waters (and continental shelf).

- Al-Haq recommends that the Bill clarify either in the Interpretation section, that “settlement goods” includes “natural resources”, or else adds an additional provision Article 9(3), making it an offence for a person to attempt to import natural resources

<sup>135</sup> Ministry of Energy, “Bid Round Block Delineation” [http://www.energy-sea.gov.il/English-Site/Pages/Offshore%20Bid%20Rounds/Tender\\_Block\\_Delineation.aspx](http://www.energy-sea.gov.il/English-Site/Pages/Offshore%20Bid%20Rounds/Tender_Block_Delineation.aspx)

<sup>136</sup> North Sea Continental Shelf Cases, ICJ Reports 1969 p. 22, para. 19.

<sup>137</sup> Human Rights Council, “Report of the independent international fact finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem” (7 February 2013), para. 4.

from a relevant occupied territory or its associated territorial waters (and continental shelf).

f. Extraction of resources

It might be useful to qualify the offence “to engage or attempt to engage” in the extraction of natural resources. Article 55 of the Hague Regulations permits continued extraction of already operating resources in the occupied territory, in line with the *usufructuary* rights of the Occupying Power. In fact, the Occupying Power is obliged to continue the operations of already operating mines, to ensure their continued maintenance. However, the belligerent occupant is prohibited from opening and operating new mines in occupied territory, this being a function held by the ousted sovereign.

- Al-Haq recommends inserting the qualifications following Articles 9(1) and 9(2), “where to do so would breach Article 55 of the Hague Regulations” or “where to do so amounts to an excess *usufruct*”

## Conclusion

In Palestine, there is widespread public support for the Bill, to the point where in July 2018, following the vote in the Seanad, the Irish flag was raised outside the Ramallah City Hall in solidarity for the passage of the Bill into law and a mark of gratitude and respect to the people of Ireland from the people of Palestine.<sup>138</sup>

In a rapidly deteriorating environment, with eruptions of hostilities in Gaza, accelerated house demolitions, authorisations to provide for sweeping settlement expansion across the West Bank, including East Jerusalem, mass arrests and detentions, killings and the dangerous and real threat of full scale annexation, the Occupied Territories Bill provides a symbol of hope to the Palestinian people – hope for the rule of law, hope for the realisation of Palestinian human rights, hope for the creation of a viable Palestinian State and hope for the dream of peace to come to be enjoyed by future generations.

Al-Haq strongly supports the passage of the Bill into law and urges the full and continued support of the Irish State.

<sup>138</sup> See, <https://www.facebook.com/CWUIE/posts/2485089561508578/>

**Detailed Scrutiny - Control of Economic Activity (Occupied Territories) Bill, 2018 [Seanad]**  
**Written submission by the Department of Foreign Affairs and Trade to the Select Committee on**  
**Foreign Affairs and Trade and Defence**

*The Department of Foreign Affairs and Trade was requested to answer questions 2,3,6-8 and 10-20. DFAT has also supplied some material in response to questions 4 and 5.*

**PART A: Policy and Legislative Analysis**

**(i) The 'policy issue' and the policy and legislative context**

**2. What is the current policy and legislative context, including are there any proposed Government Bills or general schemes designed to address the issue? Have there been previous attempts to address the issue via legislation?**

The Government is wholly opposed to the construction of Israeli settlements on occupied Palestinian territory, which are illegal under international law. The Israeli authorities have been made aware of these views at the highest levels.

The EU shares the view that these settlements are illegal under international law, and has frequently reiterated its strong opposition to Israel's settlement policy and actions taken in that context.

Settlement goods are already excluded from the normal lower tariffs applying to goods from Israel and from other countries with which the EU has trade agreements. For those types of goods which already are subject to geographic origin labelling regulations within the EU, the EU has issued guidelines on clearer labelling of settlement goods. This removes ambiguity for consumers and allows them to make their own choices in this matter. Ireland has worked to bring about these rules, and the Tánaiste has directed his Department to continue to explore further such options.

However, it is not open to Ireland, as an EU Member State, to impose unilateral trade restrictions on any country or territory. As outlined below, trade is an exclusive competence of the European Union and it is not possible for Ireland or any other Member State to impose import restrictions outside of the EU framework.

**3. Is there a wider EU/international context?**

Passage of this Bill would have implications for Ireland's obligations as a Member State of the EU.

- Trade is an exclusive competence of the European Union. Ireland is part of a single unified EU market, the integrity of which is in Ireland's overall interests. This State is not in a position to raise a barrier and declare that it is prohibited to bring to Ireland, for sale or personal use, goods which enter the EU legally, and are freely circulating elsewhere in the Single Market<sup>1</sup>.
- This is the essence of the Single Market – the defence of which is something which the EU takes very seriously, as has been seen in the context of Brexit. (On this point, it is worth noting that when Ireland imposed a ban on the direct importation of South African fruit and vegetables in the 1980s, the EU legal context was different, in that neither the Single Market nor the associated enforcement mechanisms were as developed as they are now.)

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<sup>1</sup> The argument that a "public policy" exception could be used in this case is addressed in response to Q16.

- As outlined below (Q15-20), the formal advice to the Government of the Attorney General on this matter is that enactment of the Bill would put Ireland in breach of EU law and expose Ireland to legal action by the European Commission, which could result in substantial fines and legal costs.
- Should Ireland attempt to take a unilateral step, in breach of EU law as proposed in this Bill, it would diminish our overall standing within the Union and damage EU support for other objectives important to Ireland, not limited to those related to this Bill.

Passage of the Bill would damage Ireland's relations with the US, and impact on US support for a range of Irish interests.

- The legislative process is being closely watched in the US and already the Bill has attracted significant negative attention across the political spectrum as a mis-described "boycott of Israel". The Taoiseach, Tánaiste and Ireland's diplomatic missions in the US have been contacted by Members of Congress and other political figures from both main political parties, influential political lobby groups, businesses and private citizens expressing deep concern regarding the Bill and its potential impact on Ireland's reputation in the US and therefore on Ireland-US relations.
- The co-sponsors of the US "Combatting BDS Act of 2019" (*see response to Q4*) include a number of members of the "Friends of Ireland" Congressional caucus, and passage of the Bill would be expected to significantly weaken Congressional support on other issues that are important to Ireland, including Brexit, Northern Ireland and US immigration regulations.
- Passage of the Bill would also adversely affect Ireland's ability to advocate effectively for a fair and balanced US approach to this conflict. The US is, and will remain, an indispensable player, without which bringing a peaceful resolution to the Israel/Palestine conflict would not be feasible.

Passage of the Bill would be badly received in Israel, and would damage Ireland's bilateral relations there. (The Irish Government has consistently and firmly rejected suggestions, already made in public in Israel, that the Bill is motivated by anti-Semitism).



## **(ii) Implications and implementation of the Bill's proposals; Policy implications / implementation**

### **4. How is the approach taken in the Bill likely to best address the policy issue?**

The Bill would not successfully achieve its intended policy objectives and would likely have a counter-productive effect.

The proponents of the Bill have expressed the hope that a decrease in export revenue, coupled with the political message that this Bill would send, would put pressure on the Israeli government to change its policy on settlements in occupied Palestinian territory. However, the Department anticipates that the direct economic impact of such a measure on Israeli settlements would be minimal, as the volume of settlement goods reaching Ireland is thought to be insignificant in relation to the settlement economy.

The political signal this Bill would send would need to be evaluated in its totality, including both the immediate effect and the ultimate outcome. If this Bill were enacted, it is fully expected that the law would be successfully challenged in the ECJ. Ireland would be under an obligation to repeal the law and could be liable to pay steep EU fines, in addition to legal fees. There is also the potential that the State would be liable to pay damages to settler interests. This would be a public relations victory for the proponents of settlements, rather than a rebuke to their activities. The measure thus risks ultimately being counterproductive, even in terms of the political message it is intended to send.

The proposers of the Bill suggest that unilateral action by Ireland would encourage fellow EU Member States and others to take similar actions, increasing the pressure against settlements. However, it is more likely that the inevitable EU court proceedings against Ireland would discourage others with similar views from following suit. The very fact of Ireland taking a unilateral step away from the EU consensus could, however, embolden others, with differing views of the conflict, to take their own unilateral steps which would break with established EU policy positions in a way which would be deeply harmful to Palestinian interests.

### **5. What alternative and/or additional policy, legislative and non-legislative approaches were considered, including those proposed by the Government and what, does the evidence suggest, are the differences between and the merits of each?**

Any changes to the rules governing the importation of goods or services from the occupied Palestinian territory would need to be pursued at EU level, and would require a unanimous decision by all EU Member States.

### **6. Are there Government-sponsored Bills (or General Schemes) which are related to and/or broadly aim to address the same issue? Are there merits in combining them?**

It is not open to Ireland to impose unilateral trade restrictions on any country or territory, since trade is an exclusive competence of the European Union<sup>2</sup>. There are no Government-sponsored Bills which attempt to do so.

### **7. What are the specific policy implications of each proposal contained within the Bill (environmental / economic / social / legal)? Has an impact assessment (environmental/**

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<sup>2</sup> The argument that a "public policy" exception could be used in this case is addressed in response to Q16.

**economic /social / legal) been published (by Government or a third party) in respect of each proposal contained within the Bill?**

The legal implications of this Bill are set out in answer to questions 15-20.

In terms of economic implications, passage of the Bill could impact on investment decisions by US companies in Ireland, as well as trade links, due to reputational, legal and practical concerns.

- In the US, the draft “Combatting BDS Act of 2019”, which enjoys strong cross-party support in Congress, seeks to penalise entities which knowingly engage in restrictive trade or investment practices or boycotts against Israel *or Israeli-controlled territories*. Similar legislation already exists at state level in many US states. If the “Combatting BDS Act of 2019” is passed, as seems likely given the very broad bipartisan support it has received, US companies in Ireland, and Irish companies in the US, could be placed in an impossible conflict of jurisdictions. Irish Government Departments, State Agencies and diplomatic missions overseas have already received queries from companies concerned about this impact of the Bill, and the lack of clarity on their legal obligations. The uncertainty that this conflict of jurisdictions would cause could impact negatively on investment decisions by US companies in Ireland and on Irish companies’ ability to do business in the US. Both trade with the US, and Foreign Direct Investment from the US play an extremely significant role in Ireland’s economy, with over 700 US companies in Ireland directly and indirectly employing over 250,000 people.
- Expected impacts on Ireland’s reputation in the US are set out under Q3 above. As stated there, passage of the Bill would be expected to significantly weaken US Congressional support on other issues that are important to Ireland. Thus, the passage of the Bill could also have a significant economic impact on Ireland at a time when we are seeking to strengthen our economic relations around the world in light of Brexit.
- The cost of compliance is likely to have an impact on businesses active in Ireland, with a negative impact on Ireland’s attractiveness as a place to do business. These compliance costs would not necessarily be confined to businesses importing goods or services from Israel. This Bill would hold businesses responsible for knowing the origin of any goods and services purchased, including those which are in free circulation in the Single Market. (Since the Single Market operates according to a certain set of rules, businesses would not usually need to know the ultimate origin of the goods purchased legally elsewhere in that market; however, in order to know that goods and services do not ultimately come from settlements, businesses would presumably need to know where all goods they import *are* from).
- The additional costs to the Exchequer which will arise from this Bill are outlined elsewhere in this submission (Q12, Q13). These include detection and enforcement costs, legal costs, fines, and potential damages to third parties. The unequivocal advice of the Attorney General is that this Bill contravenes EU law and legal action against the State at EU level could very much be expected.

**8. Could the Bill, as drafted, have unintended policy consequences, if enacted?**

The unintended policy consequences have been set out in answer to other questions. To summarise, these include:

- Damage to Ireland’s standing as an EU Member State (*the suggestion that it is feasible for Ireland to operate according to different rules for the import of goods and services than the rest of the EU is particularly ill-timed in the context of Brexit*).

- State incurring legal costs as a result of the legislation being contested in the EU courts, and fines in the event of a finding against Ireland;
- Potential for a “public relations” victory for the settler movement when the legislation is overturned in the EU courts;
- State could potentially be liable for damages to settler interests, if they should successfully take a case arguing that the legislation has harmed their interests;
- Compliance costs for businesses in Ireland;
- Unclear and potentially conflicting legal obligations for companies doing business in Ireland and the US, including for multinationals with a presence in Ireland, Israel and the US;
- Negative impact on Ireland’s relations with, and influence in, the US, reducing Ireland’s ability to be heard on Middle East issues;
- Negative impact on Ireland’s relations with, and influence in, the US, across both US political parties, significantly weakening Congressional support for other objectives important to Ireland, not related to the Middle East;
- Ireland being seen as a political outlier in the EU on the Middle East, and Ireland’s ability to influence general EU positions being correspondingly reduced.
- A unilateral decision by Ireland to break away from agreed EU positions on the MEPP could encourage other Member States to break with the agreed EU positions in a way that could be seriously injurious to Palestinian interests.
- Negative impact on Ireland-Israel relations, with potential impact on Ireland’s ability to represent our positions to Israel, and to pursue development projects designed to assist Palestinians in the occupied Palestinian territory, especially in Gaza, where Israeli acquiescence is particularly necessary.
- The provision in Section 3(3) of the Bill that *“The Minister shall publish on the internet and maintain a list of all territories for the time being constituting a relevant occupied territory under this section”* would oblige Ireland to take rigid public positions in relation to the many alleged situations of occupation around the world, depriving the Minister of the flexibility and discretion essential to pursuing foreign policy. (The potential for legal ambiguity around the concept of occupation is noted under Q17.)
- As noted in answer to Q17 below, the Bill is essentially “outsourcing” part of the determination of the scope to an international body. Doing so would mean that the Bill could in future automatically apply to other occupied territories without further consultation of the Oireachtas or Government. The consequences of this are entirely unpredictable, and therefore unforeseeable.

## 10. How would the Bill, if enacted, be implemented?

Quite apart from the legal problems, the measures outlined in this Bill would be difficult to implement and would require the provision of additional human and financial resources as set out below in answer to Q 11.

Most goods imported from Israel and the occupied Palestinian territory do not arrive in Ireland directly, but are transported via other EU Member States. From a Customs perspective, existing mechanisms to prevent the possible illegal import of goods into the State do not include assessing the risk that goods, which are already in free circulation in the Single Market, could not be legally imported to Ireland by reason of their origin. (It should be noted that such goods would usually be indistinguishable from legally imported goods, since it would be their origin, rather than their nature, which would give rise to the offence). Implementation of this Bill would not, therefore, be a question of using existing Customs mechanisms. Instead a new risk assessment approach would need to be developed and instituted. Additional resources would therefore have to be devoted to

this. Nor does the infrastructure currently exist at Irish ports and airports to carry out checks on goods which are in free circulation in the EU.

The Bill also poses complex challenges from an enforcement perspective. New approaches would be needed to monitor goods and services imported into Ireland, and to respond to complaints or allegations regarding suspected settlement imports. As the only illegal aspect of a good under investigation would be its origin, and given that most categories of goods and services are not subject to mandatory geographic origin labelling requirements, it would not be immediately obvious from the nature of a good that an offence had been committed (as would be the case with goods excluded from Ireland on e.g. public health grounds). Therefore, a detailed investigation would be required to establish the provenance of a good or service. This would most likely require the involvement of the authorities of other States, since evidence of a good's origin is likely to be found only outside the State. Again, this would require the establishment of new systems and the investment of significant new resources.

Furthermore, as outlined below, the intended extraterritorial application of the Bill also poses complex challenges for enforcement, particularly with regard to securing mutual legal assistance and extradition where necessary, as we are not aware of any corresponding offence in any EU or other relevant jurisdiction.

All of these difficulties would be magnified in the case of the import of services, the origin of which can be difficult to define. No EU system has been developed to identify service imports from settlements for example, which further highlights the complexity of attempting to implement this Bill.

**11. Are there appropriate performance indicators which the Department, or whoever is ultimately charged with implementing the Bill, can use to assess the extent to which it meets its objective? Does it include formal review mechanisms?**

The Bill does not contain performance indicators, or a formal review mechanism. There is thus no direct mechanism by which the Government can cease to apply the Bill, if it is found by the ECJ to be in breach of EU law.

It has been suggested that in the event of infringement proceedings being successfully brought against the State, the legislation could simply be repealed. It has also been suggested that such repeal could be done by ministerial regulation pursuant to section 3 of the European Communities Act 1972 (as amended). The Department has a number of misgivings in this regard. First, no government, can guarantee that the Oireachtas would repeal offending legislation in the wake of such a judgment. The potential use of a ministerial regulation under the 1972 Act to repeal the legislation to bypass potential opposition to repeal in the Oireachtas is undermined by the fact that such regulations can be annulled by a simple majority in either House of the Oireachtas under section 3A of that Act.

### **(iii) Cost evaluation**

#### **12. Will there be enforcement or compliance costs?**

Enforcement costs would arise from this legislation. There would be significant resource implications for the Customs authorities, An Garda Síochána and the criminal justice system more broadly:

- As outlined above (Q.10), existing Customs monitoring and risk assessment systems are not designed to identify or prevent the import of goods which are circulating freely and legally in the Single Market, and whose import into Ireland would be illegal by reason of their origin rather than their nature.
- The Bill would create a number of new offences. As outlined above (Q.10), the enforcement of these would be costly due to the need to develop and resource new monitoring systems, as well as the complexity of investigating suspected breaches. The nature of the offences in the Bill – including the extraterritorial aspect – is such that investigation of an offence could require evidence-gathering outside the state. Investigation of these offences cannot be regarded as a routine part of existing law enforcement.

The effort to implement these measures would also pose problems and create compliance costs.

- As set out in answer to Q7, businesses based in Ireland, including multinationals, do not usually operate different regimes between Ireland and other EU countries. However, under this Bill, companies importing goods into Ireland from another EU Member State would need to undertake a measure of due diligence with respect to the provenance of all imported goods, including goods for which origin labelling is not mandatory purchased elsewhere in the EU, in order to identify which goods might be governed by this Bill.
- A number of multinational businesses based in Ireland also have a presence in Israel, and undertake regular intra-company transfers. While it is not necessarily the case that such companies would also have business activity located in an Israeli settlement, there would be compliance costs in ensuring this is not the case (e.g. in the case of provision of services via e-working from an employee's home, which could be covered by the scope of the Bill).

#### **13. What are the likely financial costs of implementing the proposals in the Bill, and what is the likely overall fiscal impact on the exchequer? (PMBs may only be taken at Committee Stage (normally following Committee scrutiny stage) if (a) in the case of Bills involving charges on the people – SO 178(2) – a Financial Resolution has been passed, or (b) in case of Bills involving appropriation of revenue or public monies (SO 179(2) – a Money Message has been received from Government).**

Implementation of the Bill, if enacted, would generate additional charges on public funds under a number of headings outlined under Q12 above. Further additional charges would arise from fines imposed on the State through legal action due to the fact that the Bill would contravene EU law.

The provision of a Money Message by Government would therefore be required.

As outlined under Q.12 above, costs would arise in the implementation of the law, which would create new offences, the detection, investigation, enforcement and potential prosecution of which would have resource implications for the customs authorities, An Garda Síochána and the criminal justice system more broadly. The exact scale of the overall fiscal impact on the exchequer cannot be fully quantified in advance.

The unequivocal advice of the Attorney General is that this Bill contravenes EU law and legal action against the State at EU level would be expected to follow its enactment. In addition to legal costs, it is fully expected that the State would be found liable for significant and recurring fines and damages so long as the law remained on the Statute Book. Fines recommended by the Commission in such cases can include lump sums of over €1.5 million, plus daily fines. Cumulative annual costs of these fines can range from hundreds of thousands of euro per year at the lower end of the scale, up to tens of millions of euros per year at the highest end. For infringements considered by the European Courts to be at the more serious end of the scale, fines and penalties can amount to tens of millions of euro in the first year.

The Bill is likely to be challenged by companies or individuals claiming to be adversely affected by it. (The very strong probability of such action can be anticipated from the fact that a case was taken by a private company against the French Government in the European Courts in 2018, to challenge regulations on labelling of certain settlement goods. This case is ongoing.) Any such challenge by private individuals will incur attendant legal costs for the State. A finding against Ireland in favour of a private party could give rise to damages being awarded against the State.

**14. Have cost-benefit analyses (CBA) been provided / published (by Government or a third party) in respect of each proposal contained within the Bill? Will benefits /costs impact on some groups / stakeholders more than others?**

Although a formal “cost/benefit analysis” process has not been undertaken, the Department is aware of a number of impacts from the proposals contained within the Bill, most notably the impact on Ireland of introducing a measure which is known not to be in line with EU law. The suggested beneficial effects of the Bill would be political, and the Department has indicated that it does not believe that these would be achieved.

The Department is not aware of any rigorous process of weighing costs and benefits having been undertaken by the proponents of the Bill or by any external party.



## PART B - Legal Analysis

*Note: The Department's responses under this heading have been prepared in consultation with the Office of the Attorney General. The advice of the Attorney General is privileged and confidential and it is the longstanding policy of successive governments not to publish such advice. The following answers are therefore intended to be consistent with and faithfully reflect the advice of the Attorney General, but should not be considered as a full elaboration of that advice. For the avoidance of doubt, the Department also wishes to clarify that this submission in no way constitutes a waiver of legal privilege.*

### 15. Is the draft PMB compatible with the Constitution (including the 'principles and policies' test)?

Pursuant to section 4(4) of the Bill, "The Minister may make regulations prescribing a territory as being a relevant occupied territory within the meaning of section 3". This provision would give rise to constitutional difficulties as it permits the Minister to extend the scope of the Bill without recourse to the Oireachtas and without adequate principles and policies to regulate the exercise of the discretion of the Minister, contrary to Article 15.2 of the Constitution. This principle was confirmed by the Supreme Court in *Mulcreavy*<sup>3</sup>:

*"It is well established that the exclusive role assigned to the Oireachtas in the making of laws by this Article (15.2) does not preclude the Oireachtas from empowering Ministers or other bodies to make Regulations for the purpose of carrying into effect the principles and policies of the parent legislation. (See Cityview Press -v- An Comhairle Oiluna [1980] IR 381). But it is also clear that such delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent act purports to confer such a power, it will be invalid having regard to the provisions of the Constitution".<sup>4</sup>*

In *Cityview Press*<sup>5</sup>, the Supreme Court declared:

*"... the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised, for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power."<sup>6</sup>*

The power in section 4(4) would go beyond filling in the details of the law as laid out in the statute. To do so would be too broad a regulation making power. The power of the Oireachtas to annul the regulation does not have any impact on the original validity of the power or alter the scope of the principles and policies to guide the Minister's regulation making discretion.

### 16. Is the draft PMB compatible with EU legislation and human rights legislation (ECHR)?

The most fundamental of the legal difficulties with the Bill is that it is inconsistent with EU law. Article 3 of the Treaty on the Functioning of the European Union provides that the Union shall have

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<sup>3</sup> *Mulcreavy v Minister for the Environment, Heritage and Local Government* [2004] 1 IR 72.

<sup>4</sup> *Ibid*, p. 87.

<sup>5</sup> [1980] IR 381

<sup>6</sup> *Ibid*, p. 399.

exclusive competence in the area of the common commercial policy. Article 207 TFEU provides that external trade falls within the Common Commercial Policy of the EU. Therefore this is an area where the EU has exclusive competence.

The proponents of the Bill seek to rely upon the “public policy” exception contained in Article 24(2)(a) of Regulation 2015/478 on Common Rules for Imports. It has been argued, *inter alia*, that the requirement on a Member State to comply with international law and/or ensure compliance with international law by third states (in particular Israel) would entitle the State to refuse to import goods from the occupied territories on public policy grounds.

The Department contends that the legal arguments made in support of this proposition are aspirational and speculative. There is no clear legal authority for it stemming from the Treaties, other sources of EU law or decisions of the Court of Justice of the European Union. On the contrary, although the Court of Justice has not considered the “public policy” exception specifically in the context of Regulation 2015/478, there are a number of decisions on the interpretation of “public policy” more generally and the overriding principle is that the Court interprets the public policy exception narrowly and within strict limits, it should be used extremely sparingly and ought to operate only in exceptional circumstances. As a rule, a restrictive interpretation applies to any exception, and in this case it would not permit a ban on produce from illegal settlements because of the Member States’ and the EU’s commitment to the observance of international law.

#### **17. Is there ambiguity in the drafting which could lead to the legislation not achieving its objectives and/or to case law down the line?**

The text of the Bill contains considerable ambiguity. Turning first to section 3(1) and the definition of “relevant occupied territory”, paragraph (d) brings within the definition a territory duly designated by the Minister. However, paragraphs (a)-(c) incorporate into the definition territories confirmed as occupied by a decision or advisory opinion of the International Court of Justice, or by a decision of the International Criminal Court or of an international tribunal. Paragraphs (a)-(c), which appear designed to make the Bill applicable to the Palestinian territory by default, are particularly problematic for the following reasons:

- Although they are authoritative statements on matters of international law, advisory opinions of the International Court of Justice are not binding. Moreover, decisions of the Court in contentious cases are only strictly speaking binding on the parties to the case.
- Occupation is a fluid concept in international law and can change in respect of certain geographical areas very quickly depending on the extent of control being exercised by the occupying armed forces. Relying on a decision or advisory opinion – which may be many years out of date and no longer accurately reflect factual circumstances on the ground – to define the scope of an Act creates significant uncertainty.
- The Bill is essentially “outsourcing” part of the determination of the scope of the Bill to an international body. Doing so would mean that the Bill could in future automatically apply to other occupied territories without further consultation of the Oireachtas or Government.

The structuring of the criminal offences in the Bill is also problematic. In order to be constitutional, the components of an offence must be specified with precision and clarity. With regard to the offences contained in the Bill, the components of the offences are far from clear. The extremely broad definitions of “settlement good” and “settlement service” contribute significantly to the open ended nature of the offences. No EU system has been developed to identify service imports from settlements, which further highlights the complexity of attempting to implement this Bill.

Further, there appears to be no *mens rea* (mental element) requirement in any of the offences, thereby seemingly criminalising even unintentional importation of “settlement goods”, etc., for

example through the purchase of such goods in free circulation within the EU internal market. Most goods in free circulation within the internal market have no geographic origin labelling requirement and no distinguishing features to identify their origin, making it extremely difficult for Irish consumers to avoid accidentally importing goods produced “in whole or in part within a relevant occupied territory by an illegal settler”.

The ambiguities identified above would appear to leave the Bill, if enacted, vulnerable to constitutional challenge.

**18. Are there serious drafting deficiencies or technical drafting errors (e.g. incorrect referencing to Acts etc.)?**

In addition to the significant deficiencies identified elsewhere in this submission, it is noted that the long title of the Bill includes the following: “An Act to give effect to the State’s obligations arising under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War”. The Department would wish to note in this regard that legislation to give effect to the State’s obligations under the Fourth Geneva Convention has already been enacted, namely the Geneva Conventions Act 1962, as amended.

The Department does not accept that measures of the nature provided for in this Bill are required pursuant to the Geneva Conventions, nor under other rules of international law. Again, there is no clear legal authority for such a proposition, and it is not supported by State practice.

**19. Are there potential unintended legal consequences which may stem from the PMB as drafted?**

The foremost legal consequence stems from the Bill’s inconsistency with EU law, which would mean that infringement proceedings would inevitably be brought against the State and substantial fines could be imposed by the Court of Justice of the European Union.

**20. Are appropriate administrative and legal arrangements necessary for compliance and enforcement of the provisions of the Bill included? (e.g. if draft Bill contains a prohibition, whether the necessary criminal sanctions - including the class of fine - are included).**

The very nature of the offences that would be created by the Bill, in particular their vagueness, means that enforcement would be problematic. There is also the very practical consideration that many of the goods the importation of which the Bill seeks to criminalise would not enter the State directly but rather would already be in free circulation in the EU internal market. As noted earlier, once imported into the EU, most categories of goods have no geographic origin labelling requirement and no distinguishing features to identify their origin.

The Bill would create extraterritorial offences (i.e. certain acts committed outside the State would be offences under the Bill) and there would be significant practical difficulties in enforcing such offences. They would be difficult to investigate and prosecute. Moreover, extradition would be manifestly unworkable in this instance as there would appear to be no corresponding offence in any EU or other relevant jurisdiction, and double criminality is a key consideration in securing an extradition. Mutual legal assistance, which is often required for the collection of evidence necessary to prosecute an offence committed abroad, is unlikely to be available.

*Department of Foreign Affairs and Trade  
24 May 2019*



**EUROPEAN COMMISSION**  
Directorate-General for Trade

The Director General

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Noel Murphy  
Clerk to the Joint Committee  
Select Committee on  
Foreign Affairs and Trade and Defence  
Leinster House  
Dublin 2

**Subject: Detailed Scrutiny - Control of Economic Activity (Occupied Territories) Bill, 2018 [Seanad] [PMB] – Request for Written Submission**

Dear Mr Murphy,

Thank you for the invitation to my predecessor on behalf of the Select Committee on Foreign Affairs and Trade and Defence to make a written submission in the framework of the scrutiny of the Control of Economic Activity (Occupied Territories) Bill, 2018. As Director General of DG Trade since 1 June, I would like to share, on behalf of the European Commission, the elements below, which may be useful to the work of the Irish Parliament on this initiative.

I would like to recall that the EU has exclusive competence on the common commercial policy also referred to as trade policy, as provided by the Treaty on the Functioning of the EU (Articles 3.1(e) and 207 TFEU), establishing a common commercial policy. As a customs union, the EU applies common arrangements for imports of goods from third countries uniformly across the Union. In principle, only the EU can decide to prohibit the importation of goods and services and not the Member States individually. In the absence of an express authorisation by the EU, in general Member States or their infra-national territorial units such as regions cannot adopt own national rules in this respect (Article 2(1) TFEU) and must comply with Regulation 2015/478 of 11 March 2015 that sets out the detailed general EU Common Rules for imports.

In the specific case of Israeli settlements in the territories occupied by Israel since 1967 it is worth recalling that the EU and its Member States consider, in line with UN Resolutions, the settlements illegal and have committed in 2016 to ensure continued, full and effective implementation of existing EU legislation and bilateral arrangements applicable to products originating in settlements. The key principle in this respect is and remains that, in line with international law, all agreements between the State of Israel and

the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel since June 1967 (Council Conclusions of 18 January 2016<sup>1</sup>).

In fact, products that are originating in Israeli settlements in the territories occupied by Israel since 1967, when exported to the EU, do not and cannot benefit from any trade preference under the *EU-Israel Association Agreement* or, given Israeli control of these territories and hence the absence of effective control by the Palestinian Authority, under the *Interim Association Agreement between the EU and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip*<sup>2</sup>. This does not mean that such products cannot be exported to the EU, but it means that they can under no circumstances benefit from the “trade preferences” (for instance reduced or zero custom duties/tariffs) granted by the respective agreements<sup>3</sup>. When products originating in Israeli settlements in the territories occupied by Israel since 1967 are imported to the EU, non-preferential custom duties (so called Most Favoured Nation tariff rates bound in the EU's tariff schedules at the World Trade Organisation) apply.

Hoping that these elements are useful for any further work of the Joint Committee, I remain available for any further clarification as necessary.



Sabine WEYAND

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<sup>1</sup> <https://www.consilium.europa.eu/en/press/press-releases/2016/01/18/fac-conclusions-mepp/>

<sup>2</sup> See Case C-386/08 *Brita*, ECLI:EU:C:2010:91 and the Commission's Notice to importers on Imports from Israel into the EU, OJ C 232, 3.8.2012, p. 5.

<sup>3</sup> The EU clarified aspects of EU consumer protection rules relevant to the correct indication of origin of products originating in Israeli settlements when placed on the EU market in the Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, OJ C 375, 12.11.2015.



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Written Submission to the Oireachtas  
Select Committee on Foreign Affairs  
and Trade and Defence regarding the  
Control of Economic Activity  
(Occupied Territories) Bill 2018



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8. Could the Bill, as drafted, have unintended policy consequences, if enacted?	
12. Will there be enforcement or compliance costs?	
13. What are the likely financial costs of implementing the proposals in the Bill, and what is the likely overall fiscal impact on the exchequer?	
14. Have cost-benefit analyses (CBA) been provided / published (by Government or a third party) in respect of each proposal contained within the Bill? Will benefits /costs impact on some groups / stakeholders more than others?	
<b>Part B: Legal Analysis.....</b>	<b>17</b>
15. Is the draft PMB compatible with the Constitution (including the 'principles and policies' test)?	
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## Part A: Policy and Legislative Analysis

### The 'policy issue' and the policy and legislative context

1. Define the problem / the policy issue which the Bill is designed to address  
To what extent is it an issue requiring attention?  
What is the scale of the problem and who is affected?  
What is the evidence base for the Bill?

It is evident from statements by proponents of the Bill that it is intended to target Israeli settlements in the West Bank by boycotting them. The proponents of the Bill seem to believe that this will promote the prospect of peace in the Middle East and benefit Palestinians. In our view, it will have the opposite effects.

We wish to make two observations arising out of this identification of the target of the Bill.

First, the Bill is discriminatory. It pretends to relate to occupied territories generally, but has been carefully drafted so as to apply automatically only to the disputed West Bank territory - even though there are many other disputed territories around the world in which nationals of the state that administers them have been permitted to settle. Professor Eugene Kontorovich examined several such territories in a careful study:

*"Economic Dealings with Occupied Territories"*

53 Columbia Journal of Transnational Law 584

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2494964](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494964) (Annex 1)

As that study shows, commercial dealings with those disputed territories are not prohibited.

Reports published by the Kohelet Policy Forum, entitled *"Who Else Profits"* show that many major companies operate in other disputed territories around the world:

[https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2017/06/WhoElseProfits\\_most-final-19.6.pdf](https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2017/06/WhoElseProfits_most-final-19.6.pdf) (Annex 2)

<https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/WhoElseProfits-e-version.pdf> (Annex 3)

We attach a further memorandum (Annex 4) prepared by the Kohelet Policy Forum which identifies companies operating in other disputed territories

- (1) in which the Ireland Strategic Investment Fund (ISIF) has invested;
- (2) which have raised money on the Irish Stock Exchange;
- (3) which promote their businesses in disputed territories in Ireland;
- (4) in which Irish Life Assurance has invested; or
- (5) which sell in Ireland goods produced by settlers in disputed territories.

If the Bill had been drafted so as to apply to other disputed territories, it would affect numerous businesses around the world, including businesses in which major Irish institutions have invested. Those who drafted it chose to restrict its application to the West Bank because they want to attack Israeli settlements and avoid attacking settlements in other disputed territories.

If this Bill is passed, the discrimination and hypocrisy in targeting only Israeli settlements will undoubtedly strengthen the views of many Israelis that they cannot rely on Ireland or other nations to deal fairly with them. Many of the majority Jewish population of Israel are very conscious of a long history of murderous persecution all round the world. They will regard this Bill as a further indication that they should not make any further withdrawals from territory under their control, since the world will not deal fairly with them, including when they attempt to defend themselves within essentially indefensible borders. They will also consider that Ireland is not an honest broker whom they can trust to help efforts to bring peace to the Holy Land.

The second observation is that the proponents of the Bill seem to think that Israeli settlements in the West Bank produce and supply goods and services. In general, this is not the case. Goods and services are produced by a multitude of businesses and other organisations in Jerusalem and areas of the West Bank under Israeli administration that employ Israelis and also many Palestinians. These businesses and other organisations may be in the vicinity of Israeli settlements but they are not settlements themselves. Yet they are all attacked by the Bill, in that the supply of the goods and services of any of these businesses or organisations in Ireland or by Irish persons would be made a serious criminal offence. As we show below, if this approach were followed by other countries, it would have serious consequences for Palestinian families, the Palestinian economy, and the creation of a viable Palestinian state. And if this approach is not followed by other countries, it would have very little impact except on Irish citizens, Irish businesses and Irish influence.

*2. What is the current policy and legislative context, including are there any proposed Government Bills or general schemes designed to address the issue? Have there been previous attempts to address the issue via legislation?*

*3. Is there a wider EU/international context?*

There is legislation on the labelling of products so that consumers are not misled as to their origin and can choose not to purchase products made in Israeli administered areas of the West Bank if they so wish. This legislation gives effect to EU harmonizing legislation. The EU Commission has provided Guidance on the interpretation and application of that legislation:

[https://eeas.europa.eu/sites/eeas/files/20151111\\_interpretative\\_notice\\_indication\\_of\\_origin\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/20151111_interpretative_notice_indication_of_origin_en.pdf) (Annex 5)

There is obviously a wider EU and international context. The EU member states have pooled their competences over international trade policy, recognizing that they must act collectively if they are to be effective in achieving objectives in this arena. Accordingly, they have agreed to the EU having exclusive competence over foreign trade policy. Having chosen to be and to remain an EU member state, Ireland cannot adopt a unilateral policy on foreign trade.

The significance of this point is highlighted by the existence of very extensive “counter-boycott” legislation in the World’s largest economy, the USA, imposing serious liabilities and sanctions for participating in boycotts of Israeli businesses, including Israeli businesses operating in Jerusalem and the West Bank. We enclose a Memorandum prepared by The Lawfare Project of New York summarizing this legislation (Annex 6A) and an Addendum to this Memorandum discussing in further detail the potential loss of US tax benefits for US corporations with subsidiaries in Ireland (Annex 6B).

The effects of some of this legislation have been demonstrated by the Airbnb case. When Airbnb announced the withdrawal of its service for properties in Israeli settlements in the West Bank:

- the State of Florida adopted sanctions against the company

<https://www.jns.org/florida-takes-action-against-airbnb-amid-its-boycott-of-west-bank-properties/> (Annex 7a)

- the States of Illinois and Texas initiated the procedures for implementing sanctions

<https://www.jpost.com/BDS-THREAT/Illinois-board-finds-Airbnb-in-breach-of-state-law-over-settlements-move-574325> (Annex 7b)

<https://www.calcalistech.com/ctech/articles/0,7340,L-3757543,00.html> (Annex 7c)

- legal actions were brought in Delaware, California and Jerusalem

<https://www.jpost.com/Arab-Israeli-Conflict/12-Israeli-Americans-sue-Airbnb-in-Delaware-cite-religious-discrimination-573094> (Annex 7d)

[https://www.jpost.com/Arab-Israeli-Conflict/Airbnb-faces-civil-rights-suit-in-US-over-West-Bank-settlement-boycott-578575?utm\\_source=newsletter&utm\\_campaign=21-2-2018&utm\\_content=airbnb-faces-civil-rights-suit-in-us-over-west-bank-settlement-boycott-578575](https://www.jpost.com/Arab-Israeli-Conflict/Airbnb-faces-civil-rights-suit-in-US-over-West-Bank-settlement-boycott-578575?utm_source=newsletter&utm_campaign=21-2-2018&utm_content=airbnb-faces-civil-rights-suit-in-us-over-west-bank-settlement-boycott-578575) (Annex 7e)

<https://www.usnews.com/news/business/articles/2018-11-22/israeli-sues-airbnb-over-west-bank-settlement-listing-ban>) (Annex 7f)

The litigation in Delaware was settled on the basis that Airbnb would resume its services to these properties:

<https://www.bbc.co.uk/news/world-middle-east-47881163> (Annex 7g)

Like many US based businesses, Airbnb has its EMEA headquarters in Ireland, where it employs hundreds of staff. Many of those staff would be committing serious criminal offences and liable to imprisonment under Irish law if this Bill were enacted. It is difficult to see how Airbnb could continue to operate its EMEA headquarters in Ireland while complying with the reported settlement of the Delaware litigation, let alone avoiding liabilities and sanctions under other US State and Federal laws. Airbnb and similarly placed companies would have to reconsider their investment in Ireland with potentially serious consequences for jobs and government revenue. They would also have substantial claims for compensation from the Irish State if the Bill is found to be illegal under EU law.

As The Lawfare Project's Addendum (Annex 6B) explains, the potential effects of the US legislation include the loss of tax benefits for businesses that participate in boycotts, which could have major implications for US-based groups with operations in Ireland and lead them to relocate those operations.

In addition, US legislation requires US negotiators of international trade agreements to oppose actions which restrict commercial relations with Israel and Israeli-controlled territories:

*Bipartisan Congressional Trade Priorities and Accountability Act of 2015*  
s.102(b)(20)

<https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf>

(Annex 8)

The USA may also consider that the Bill contravenes World Trade Organisation rules.

Ireland does not have the clout to go against the USA on its own in relation to international trade. If it is desired to challenge the USA in this arena, this can only be done effectively and without risking serious damage to Irish interests by the members of the EU acting together through the EU.

The Bill also impacts on the single internal market of the EU and the whole Ireland economy in which there is supposed to be free circulation of goods, services and people. We understand that the Supreme Court of the UK and the Court of Appeal of Versailles have held the supply of goods produced in Israeli settlements and the provision of travel services by Israelis in East Jerusalem are in principle lawful:

*Richardson v Director of Public Prosecutions* [2014] UKSC 8 at §17

<https://www.supremecourt.uk/cases/docs/uksc-2012-0198-judgment.pdf>

(Annex 9)

*AFPS and OLP v Alstom and Veolia* (case 11/05331, 22 March 2013)

[https://www.france-palestine.org/IMG/pdf/decision\\_de\\_la\\_cour\\_d\\_appel.pdf](https://www.france-palestine.org/IMG/pdf/decision_de_la_cour_d_appel.pdf)

(Annex 10)

It follows that the Bill would make it a criminal offence to carry out or participate in the cross-border supply of goods and services that are lawful in other EU countries and in the UK.

Furthermore, at the time of writing, the Brexit arrangements have not been finally concluded. Avoiding regulatory divergence between Northern Ireland and the Republic of Ireland has been a major objective of Ireland and the EU. That position could be compromised if the Oireachtas enacts a Bill that creates regulatory divergence by proscribing in Ireland goods and services that are lawful in Northern Ireland. This might assist a British government to argue that regulatory divergence in other matters should be permitted, which could be against Ireland's interests.



The Bill also contradicts the recent resolution of the German Parliament, supported by all parties except the far right and the far left, which rightly recognises that the arguments and methods of the BDS movement are antisemitic:

<http://dip21.bundestag.de/dip21/btd/19/101/1910191.pdf> (Annex 11)

Finally, the Bill impacts on Churches and other international religious organisations, as well as on religious freedoms enshrined in European and international conventions and declarations and in Article 44(2) of the Irish Constitution. We have produced a brief video which tells the story of an Irish Christian couple, Norman and Karen Ievers, who travelled to Jerusalem. The video shows how pilgrims such as these would be at risk of imprisonment if the Bill is enacted. Please watch the video here:

<https://youtu.be/JssHzqQRYZY>

## **Implications and implementation of the Bill's proposals**

### *Policy implications / implementation*

*4. How is the approach taken in the Bill likely to best address the policy issue?*

*5. What alternative and/or additional policy, legislative and non-legislative approaches were considered, including those proposed by the Government and what, does the evidence suggest, are the differences between and the merits of each?*

*6. Are there Government-sponsored Bills (or General Schemes) which are related to and/or broadly aim to address the same issue? Are there merits in combining them?*

In our view, the Bill would not promote peace or help Palestinians. On the contrary, any impact would be detrimental to Palestinians, hinder the creation of a viable Palestinian state, and undermine prospects for peaceful coexistence.

We have already mentioned the discriminatory nature of the Bill and the conclusions that will be drawn from this by many Israelis.

We discuss below the importance of the jobs provided by Israeli businesses in the West Bank to a substantial proportion of the Palestinian population and the Palestinian economy, and their contribution to promoting peaceful coexistence by enabling Israelis and Palestinians to work together and appreciate each other.

The lack of a viable Palestinian economy has been a major barrier to the creation of a Palestinian state ever since the division of the territory West of the Jordan into an Arab State and a Jewish State was proposed by the British Peel Commission of 1937. It was the reason why the Woodhead Commission concluded in 1938 that this proposal was unfeasible and it remains a fundamental problem to this day. The Bill would hinder the realization of a viable Palestinian state by harming businesses in which many Palestinians earn their livelihood enabling them to support their families.

Views expressed by Palestinian leaders on this point should be treated with skepticism. They have not prioritized the welfare of the Palestinian people, as is illustrated by the Palestinian Authority's refusal to stop paying salaries to terrorists under its "pay for slay" policy and its rejection of tax revenues which the Israeli government has sought to transfer after deduction of sums equal to the salaries which the Palestinian Authority paid to terrorists. Instead, the Palestinian Authority has halved the salaries of many Palestinian civil servants and stopped referring Palestinian patients to Israeli hospitals – see the reports by Palestinian Media Watch:

[http://www.palwatch.org/main.aspx?fi=157&doc\\_id=27533](http://www.palwatch.org/main.aspx?fi=157&doc_id=27533) (Annex 12)

[http://www.palwatch.org/main.aspx?fi=157&doc\\_id=27582](http://www.palwatch.org/main.aspx?fi=157&doc_id=27582) (Annex 13)

Palestinian leaders do not need to care about the welfare of the Palestinian people. They do not face elections and they do not share in the cuts. For example, senior Palestinian leader Jibril Rajoub is being treated in an Israeli hospital, despite the ending of referrals for ordinary Palestinians:

[http://www.palwatch.org/main.aspx?fi=157&doc\\_id=27682](http://www.palwatch.org/main.aspx?fi=157&doc_id=27682) (Annex 14)

On the contrary, Palestinian leaders benefit from the dependency of Palestinians on massive external aid which provides opportunities for the diversion of funds into their own pockets.

We believe that the Irish government is doing what it can to promote peace and to help Palestinians and Israelis. The fact that Ireland has limited ability to help to resolve the longstanding conflict is not a good reason for taking a step that would be positively detrimental.

*7. What are the specific policy implications of each proposal contained within the Bill (environmental / economic / social / legal)?*

*Has an impact assessment (environmental/ economic /social / legal) been published (by Government or a third party) in respect of each proposal contained within the Bill?*

*8. Could the Bill, as drafted, have unintended policy consequences, if enacted?*

We believe that the Bill would have damaging consequences for many Palestinians and the prospects for peace in the Middle East, if enacted.

It is also liable to discourage international companies from locating or maintaining operations in Ireland, due to their exposure to liabilities, sanctions and loss of tax benefits under US laws if they have to comply with the Bill, with adverse consequences for jobs and public revenues.

As at 5 May 2019, 32,210 Palestinians work in industrial zones in Israeli administered parts of the West Bank (Area C), according to information provided to us by Israeli government officials. The goods and services which they produce are also partly produced by Israelis working with them in the West Bank, and would therefore be treated as illegal under the Bill.

The figure of 32,210 Palestinian employees does not include Palestinians who work in Israeli settlements in the West Bank outside of industrial zones, nor Palestinians who work in Israeli businesses in East Jerusalem. A report of the Israeli Manufacturers' Association of August 2017 found that 2353 Palestinians were working in the Atarot industrial zone in East Jerusalem.

In the Barkan industrial zone in the Northern West Bank (Samaria) alone, there are 164 factories employing about 7,200 workers of whom about 4,000 are Palestinians. Please watch this short video "[Islands of Peace](https://www.youtube.com/watch?v=PwJ9JX95u5Q&feature=youtu.be)" <https://www.youtube.com/watch?v=PwJ9JX95u5Q&feature=youtu.be> in which Palestinians and Israelis speak about working together peacefully and productively in the Barkan Industrial Zone. Jackie Goodall, Founder and Director of the Ireland Israel Alliance, has visited this industrial zone and witnessed this for herself.

Palestinians employed by Palestinian businesses or organisations in areas under Palestinian administration earn an average of 2,000 Israeli Shekels per month, without pension, social welfare or employee rights. By contrast, Palestinians employed by Israeli businesses earn a minimum wage of 5,400 Israeli Shekels per month and are protected by Israeli labour laws, providing for social welfare benefits, a maximum 8-hour day, convalescence pay, pension and paid leave on both Muslim and Jewish holidays.

The average salary of Palestinians working in Israeli industrial zones in East Jerusalem and the West Bank is more than three times the average salary in the Palestinian Authority. These salaries enable these workers to provide for extended families; it is reasonable to estimate that each of these workers provides for 10 dependents on average. Thus the jobs in Israeli industrial zones in East Jerusalem and the West Bank are likely to provide directly the livelihood of around 350,000 Palestinians even without taking into account their indirect contributions to the livelihoods of other Palestinians providing goods or services to these workers, and their families.

Many qualified Palestinians hold management positions in Israeli businesses and earn salaries commensurate their position.

Palestinians employed in Israeli businesses pay income tax to the Palestinian Authority. About a third of the Palestinian Authority's budget is based on the income from Palestinians who work in Israeli businesses or organisations, although this does include those working in Israel within the "Green Line".

The employment of Palestinians in Israeli businesses in the West Bank also promotes peace and reconciliation through the good relations created between Israelis and Palestinians working together.

We refer to the book *"Defeating Denormalization – Shared Palestinian and Israeli Perspectives on a New Path to Peace"* published by the Jerusalem Center for Public Affairs at [http://jcpa.org/pdf/Defeating\\_Denormalization\\_Final\\_22\\_january.pdf](http://jcpa.org/pdf/Defeating_Denormalization_Final_22_january.pdf) (Annex 15).

The chapters can also be accessed individually at <http://jcpa.org/defeating-denormalization/>

We invite members of the Committee to read the whole book. We quote below the Executive Summary which summarizes the content of its chapters in turn:

### **The Palestinian Authority's Policy of Denormalization**

*Khaled Abu Toameh*

- The current Palestinian political economy, influenced far too greatly by the BDS and anti-normalization campaigns, amounts to a corrupt, unsustainable, terror supporting regime that is disinterested in the economic well-being of its own people and the development of a new state.
- Denormalization's first objective is to intimidate and threaten Palestinians and Israelis who seek peace and a "two states for two peoples" solution. Denormalization's second objective is to delegitimize and isolate Israel in the international community. In this regard, denormalization parallels

Hamas and other terror groups that are working to destroy any chance of peace between Israel and the Palestinians.

- Under the pretext of refusing to bolster Israel's "occupation economy," the Palestinian leadership has publicly declined to cooperate on joint projects with the Israeli government or the Israeli private sector that would benefit both economies and both peoples.

### **The Effects of BDS and Denormalization on West Bank Industrial Zones**

*Col. (res.) Dr. Danny Tirza*

- What will be the impact of an economic boycott of the products of the West Bank settlements and the Israeli industrial zones? Already in 2010, the PA announced a boycott of the settlement products, aimed at preventing their use in the Palestinian market. Except for the huge housing project in Rawabi, which is making use of engineers, planners, advisers, raw materials, and professionals from Israel, but not from the settlements, the boycott has been a failure.
- Clearly, the direct outcome of the Palestinian boycott of settlement products and industrial zones will be a mortal blow to Palestinian employment, which will also damage cycles of consumption and commerce. The PA offers no productive alternative to such employment, and the decreased standard of living will lead to violence and the strengthening of the radical Muslim elements that seek to destroy Israel and undermine Palestinian governance.
- Various models and initiatives to establish Palestinian industrial zones have failed to take hold, despite years of investment and interest from donors across globe, including Japan, Turkey, and European countries.

### **The Desire for Defined Status in Multicultural Jerusalem**

*Prof. Ali Qleibo*

- Fifty years after the annexation of Jerusalem, the innumerable employment opportunities provided by the Israeli system have fostered a de facto upgraded standard of living. Despite appeals by some Jordanians and Palestinians to boycott the Israelis (the concept of sumud), the integration of greater Jerusalem Arab residents into the Israeli sector has continued unabated.
- Former cave-dwelling Bedouin shepherds and peasants living in penury, have now moved from the kerosene-lamp-lit caves with outhouses, to comfortable villas and spacious apartments with full amenities including air-conditioning and at least two cars per household. As white and blue collar workers, they are beneficiaries of the flourishing Israeli labor market.
- However, despite advantageous economic conditions, Jerusalem's Arab residents are still in an untenable political situation. Since the signing of

the 1995 Oslo II Agreement, Arab Jerusalemites have been stateless. They cannot claim sovereign status in either Jordan or the Palestinian Authority.

### **SodaStream as a Model of “Economic Peace”**

*Daniel Birnbaum*

- SodaStream chose to employ Palestinians and Israelis at the Mishor Adumim facility in the West Bank out of business necessity, not ideological conviction. Some of my colleagues were skeptical about employing Israelis and Palestinians side by side, especially so shortly after the bloody Second Intifada that ended in 2004. However, we discovered peace “by accident,” just as Alexander Fleming discovered penicillin by accident.
- On the factory floor, I witnessed far more than simply “experiments” or “exercises” in coexistence and tolerance, but actual peaceful and harmonious relations between Israeli and Palestinian employees. Israelis worked under Palestinian managers and vice versa; Palestinians and Israeli SodaStream employees were exposed to one another five days a week, at least eight hours a day. As a result, interpersonal ties were also formed between SodaStream employees outside of the workplace.
- SodaStream employees in the Mishor Adumim factory became family. Our employees also represented broad diversity: Israelis, Palestinians, Bedouins, Sunni Muslims, Christians, Jews from the former Soviet Union, Ethiopian, Ashkenazi, Sephardi, and Mizrahi Jews, and Darfuri refugees.

### **Palestinian-Israeli Normalization in the Workplace: A Manager’s View**

*Nabil Basherat*

- Simply put, the global BDS movement has caused damage to the Palestinian public. The BDS movement has threatened my job security and livelihood. It damaged the livelihoods of hundreds of SodaStream factory workers, who were laid off as SodaStream left its Mishor Adumim factory in the West Bank.
- Even though the BDS movement portrayed SodaStream’s Palestinian workers as “slaves” who were abused by management, this is not the case. SodaStream’s Palestinian workers are very satisfied. I understand that the PLO, the PA, and the Fatah Party have long opposed Palestinians and Israelis working together.
- However, we also need to ensure that our own leadership and the international community know what moderate Palestinians want. It is important that they do not fall under the influence of pro-BDS extremists and instead listen to the average Palestinian worker. They have to understand that if they continue labeling Israeli products and boycotting Israel, they are hurting Palestinian workers and not the Israeli government or military.

## **Palestinian-Israeli Equality and Normalization: The Case of Rami Levy Supermarkets**

*Rami Levy*

- Employment at Rami Levy is in high demand among Palestinians for various reasons. In the Palestinian Authority-controlled parts of the West Bank, a Palestinian manager or teacher earns on average 2,000 shekels (570 U.S. dollars) a month, well below the Israeli minimum wage.
- Palestinian businesses regulated by the PA are not required to provide employees with social benefits such as pension-fund contributions. Palestinian business owners are also not required to pay property, excise, or sales taxes. Nor are businesses required to reimburse employees' transportation costs or to provide compensation or insurance for work-related injuries. At Rami Levy, however, a full-time Palestinian employee earns 4,000 to 7,000 Israeli shekels a month (1,142 to 2,000 U.S. dollars) plus full medical and social benefits as guaranteed by Israeli law. Palestinian managers earn more.
- The denormalization extremists have attempted to delegitimize our efforts at harmonious coexistence between Palestinian and Israeli employees. BDS and denormalization activists have also portrayed us as a source of tension and conflict. Rami Levy stores in the West Bank uphold the model of good-neighborly relations and peaceful normalization as envisioned and specified in the Oslo Accords.
- We are one of the few businesses that promote close cooperation between Israeli and Palestinian employees. In addition to being a model for economic growth and job creation in the region, Rami Levy stores also provide an important example of peaceful coexistence and cooperation in an otherwise chaotic and violent Middle East.

## **A Palestinian Woman's Perspective on Working for an Israeli Company**

*Nadia Aloush*

- I want people from all over the world to read and to understand the real Palestinian story. Palestinians simply want to support our families, and live a life of dignity and well-being in our neighborhoods and in good relations with Israelis. It is important to me that people should know that there is also coexistence in workplaces between people and that we fear that sanctions and international pressure could harm these ties and cause us great damage.
- At the end of 1997, an Israeli law was passed that determined that Palestinians working in Israeli factories or in the Civil Administration would receive worker's protections according to Israeli law. Under this law, Israeli and Palestinian Rami Levy employees are truly equal. Along with our regular salary, the Israelis also give us health and social insurance. Rami Levy also grants a yearly bonus.



- Most Palestinian Authority employees do not receive a salary slip, and there is nothing like social rights, a pension, or an education fund. I receive at least 4,000 shekels a month. In the PA, perhaps a famous doctor will receive 3,000 shekels a month, without insurance or rights.

### **EU-PA Cooperation and Risks to the Palestinian Future**

*Pinhas Inbari*

- Although the European Union repeatedly emphasizes its opposition to the Boycott, Divestment, and Sanctions (BDS) movement, its policy of labeling products manufactured in territories east of the 1949 Armistice Lines has reinforced the Palestinian BDS strategy to assault Israel, isolate it, and cause its economic collapse.
- However, the EU claims that its product-labeling policy – which seeks to differentiate between Israel within the pre-1967 lines, which Europe recognizes, and the territories located to the east of those lines, which Europe does not recognize as belonging to Israel – is only intended to pressure Israel to withdraw to the 1967 lines, thus enabling the creation of a Palestinian state.
- The EU labeling policy actually undermines the West Bank industrial zones that provide excellent employment to some 35,000 Palestinians. These zones come under the jurisdiction of Israeli local authorities but have no connection to “settlements.” Business and commercial enterprises in these 15 zones provide employment for Palestinian workers who cannot find alternative work in the PA-controlled territories.
- Europe, for its part, in cooperating with only the highest levels of the PA leadership, has willfully ignored the voices of thousands of Palestinian workers who welcome Israeli commercial enterprises in the West Bank and depend on West Bank industrial zones to support their families.

### **Wasatia: The Straight Path from Denormalization to Reconciliation**

*Prof. Mohammed S. Dajani Daoudi*

- Wasatia strives to foster a culture of religious, social, and political moderation and reconciliation to help lay the groundwork for Palestinian and Israeli children to grow up in peace, security, prosperity, and harmony.
- In March 2014, I took 27 students to Poland for an educational experience about the Holocaust. We also brought 30 Israeli students to the Dheisheh refugee camp in Bethlehem for an educational experience about the Nakba, the Palestinian “catastrophe” stemming from the 1948 war.
- My initiative was portrayed as Zionist propaganda, and I was labeled as a “collaborator” and “traitor,” two highly emotional terms in Palestinian lexicon. Nine political student organizations on campus issued a public statement against me titled “Normalization = Treason.” Students demonstrated against me on campus and delivered a letter to my secretary threatening to kill me if I returned to teach at the university. The social

networks buzzed against me. My car was torched. The only possession of mine to survive the torching was my personal copy of the Koran.

- I opted to exercise my freedom to dissent from the collective narrative and stand by the ideals of truth, righteousness, justice, compassion, and freedom; I took the risk by making that choice to alienate myself from the society in which I was born and bred. In wanting to break this taboo, I was aspiring to leave the door wide open for social change, reconciliation, democracy, and peace.

If those calling for a boycott succeed in closing Israeli businesses in the West Bank, the first to be hurt will be Palestinians, who will be forced to join the ranks of the tens of thousands of unemployed residents of the Palestinian Authority. They will not receive unemployment benefit from the Palestinian Authority, thus significantly aggravating their economic situation. The much decreased standard of living is likely to promote violence and the strengthening of radical elements that seek to prevent any progress toward peace.

Perhaps the best known example of a supposed triumph for the anti-normalisation and allied Boycott, Divestments and Sanctions (BDS) movement against Israel is that of SodaStream, an Israeli-based manufacturing company that operated its main plant in the Mishor Adumin industrial zone in the West Bank. Targeted for years by the BDS movement, it eventually relocated from the West Bank to Israel's Negev. Approximately 500 Palestinians lost their jobs.

Ali Jaffar, a shift manager from a West Bank village said: *"All the people who wanted to close [SodaStream's West Bank factory] are mistaken. They didn't take into consideration the families."*

Nabil Basherat, a department head with the same company said: *"The BDS movement threatens my job security and my livelihood. They undercut the livelihood of hundreds of SodaStream employees, who were fired when the company closed its [West Bank] factory."*

<https://aijac.org.au/fresh-air/campus-fiasco-highlights-the-disastrous-consequences-of-palestinian-anti-normalisation-activism/> (Annex 16)

## **Cost evaluation**

*12. Will there be enforcement or compliance costs?*

*13. What are the likely financial costs of implementing the proposals in the Bill, and what is the likely overall fiscal impact on the exchequer?*

*14. Have cost-benefit analyses (CBA) been provided / published (by Government or a third party) in respect of each proposal contained within the Bill? Will benefits /costs impact on some groups / stakeholders more than others?*

If the Bill is enacted, costs would have to be incurred to enforce it, unless it is immediately held to be illegal and invalid.

As mentioned below, we have no reason to doubt the advice given to the government by the Attorney-General that the Bill is contrary to EU law. If so, the State will be exposed to claims for substantial damages and potentially fines. The government will also incur legal costs in addressing these claims.

We also believe that there will be adverse fiscal impacts resulting from international companies relocating operations away from Ireland due to exposure to liabilities, sanctions and loss of benefits under US laws if they comply with the Bill, with consequent substantial losses of tax revenues in Ireland. So far as we are aware, these consequences have not been considered.

## **Part B: Legal Analysis**

*15. Is the draft PMB compatible with the Constitution (including the 'principles and policies' test)?*

As mentioned above, we consider that the Bill would penalise Christian pilgrims to the Holy City of Jerusalem contrary to Article 44(2) of the Constitution.

*16. Is the draft PMB compatible with EU legislation and human rights legislation (ECHR)?*

We have no reason to doubt the advice given to the government by the Attorney-General that the Bill is contrary to EU law. It appears to conflict with the EU's exclusive competence over the common commercial policy, the EU's

common foreign policy, and the requirement for free movement of goods, services and persons in the EU's internal market. It would also conflict with the currently proposed Brexit Agreement if that is adopted.

The EU Commission's answer to written question no. P-000081/2019 by Patrick Le Hyaric MEP indicates that it takes the view that the common commercial policy is the EU's exclusive competence and is based on uniform principles, and that EU member states have to comply with these uniform principles

[http://www.europarl.europa.eu/doceo/document/P-8-2019-000081-ASW\\_EN.html](http://www.europarl.europa.eu/doceo/document/P-8-2019-000081-ASW_EN.html) (Annex 17)

We are aware that supporters of the Bill have circulated opinions suggesting that the Bill complies with EU law. However, it appears to us that the authors of these opinions have wrongly assumed or have been misinformed that goods and services are generally produced by Israeli settlements in the West Bank. As mentioned above, nearly all goods and services produced in areas of the West Bank under Israeli control are produced by separate businesses, in many cases employing Palestinians alongside Israelis.

In addition, we understand that these opinions fail to appreciate that the Bill would be a measure of national commercial policy directly violating the allocation of exclusive competence over commercial policy to the EU, that would not be permitted under any exceptions.

We also believe that the Bill would contravene Article 9 of the European Convention on Human Rights by infringing freedom of religion, as discussed above.

## Appendix

### **Annex 1**

Prof. Eugene Kontorovich, "Economic Dealings with Occupied Territories"  
53 Columbia Journal of Transnational Law 584  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2494964](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494964)

### **Annex 2**

Who Else Profits? Report 1  
[https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2017/06/WhoElseProfits\\_most-final-19.6.pdf](https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2017/06/WhoElseProfits_most-final-19.6.pdf)

### **Annex 3**

Who Else Profits? Report 2  
<https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/WhoElseProfits-e-version.pdf>

### **Annex 4**

Ireland - Who Else Profits?

### **Annex 5**

EU Commission Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967  
[https://eeas.europa.eu/sites/eeas/files/20151111\\_interpretative\\_notice\\_indication\\_of\\_origin\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/20151111_interpretative_notice_indication_of_origin_en.pdf)

### **Annex 6A**

Memorandum prepared by The Lawfare Project

### **Annex 6B**

Addendum to Memorandum prepared by The Lawfare Project

### **Annex 7a**

Report: Florida takes action against Airbnb amid its boycott of West Bank properties  
<https://www.ins.org/florida-takes-action-against-airbnb-amid-its-boycott-of-west-bank-properties/>

### **Annex 7b**

Report: Illinois Board finds Airbnb in breach  
<https://www.jpost.com/BDS-THREAT/Illinois-board-finds-Airbnb-in-breach-of-state-law-over-settlements-move-574325>

**Annex 7c**

Report: Airbnb faces sanctions in Texas

<https://www.calcalistech.com/ctech/articles/0,7340,L-3757543,00.html>

**Annex 7d**

Report: Israeli-Americans sue Airbnb in Delaware and cite religious discrimination

<https://www.jpost.com/Arab-Israeli-Conflict/12-Israeli-Americans-sue-Airbnb-in-Delaware-cite-religious-discrimination-573094>

**Annex 7e**

Report: Airbnb faces Civil Rights suit in US over West Bank Settlement Boycott

[https://www.jpost.com/Arab-Israeli-Conflict/Airbnb-faces-civil-rights-suit-in-US-over-West-Bank-settlement-boycott-578575?utm\\_source=newsletter&utm\\_campaign=21-2-2018&utm\\_content=airbnb-faces-civil-rights-suit-in-us-over-west-bank-settlement-boycott-578575](https://www.jpost.com/Arab-Israeli-Conflict/Airbnb-faces-civil-rights-suit-in-US-over-West-Bank-settlement-boycott-578575?utm_source=newsletter&utm_campaign=21-2-2018&utm_content=airbnb-faces-civil-rights-suit-in-us-over-west-bank-settlement-boycott-578575)

**Annex 7f**

Report: Israeli sues Airbnb over West Bank settlements listing ban

<https://www.usnews.com/news/business/articles/2018-11-22/israeli-sues-airbnb-over-west-bank-settlement-listing-ban>

**Annex 7g**

Report: Airbnb reverses ban on West Bank settlement listings

<https://www.bbc.co.uk/news/world-middle-east-47881163>

**Annex 8**

Bipartisan Congressional Trade Priorities and Accountability Act of 2015

<https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf>

**Annex 9**

Richardson v Director of Public Prosecutions [2014] UKSC 8

<https://www.supremecourt.uk/cases/docs/uksc-2012-0198-judgment.pdf>

**Annex 10**

AFPS and OLP v Alstom and Veolia (case 11/05331, 22 March 2013)

[https://www.france-palestine.org/IMG/pdf/decision\\_de\\_la\\_cour\\_d\\_appel.pdf](https://www.france-palestine.org/IMG/pdf/decision_de_la_cour_d_appel.pdf)

**Annex 11**

Resolution 19/10191 of the German Parliament: "Der BDS-Bewegung entschlossen entgegenzutreten – Antisemitismus bekämpfen"

<http://dip21.bundestag.de/dip21/btd/19/101/1910191.pdf>

**Annex 12**

Palestinian Media Watch: Report 1

[http://www.palwatch.org/main.aspx?fi=157&doc\\_id=27533](http://www.palwatch.org/main.aspx?fi=157&doc_id=27533)

**Annex 13**

Palestinian Media Watch: Report 2

[http://www.palwatch.org/main.aspx?fi=157&doc\\_id=27582](http://www.palwatch.org/main.aspx?fi=157&doc_id=27582)

**Annex 14**

Palestinian Media Watch: Report 3

[http://www.palwatch.org/main.aspx?fi=157&doc\\_id=27682](http://www.palwatch.org/main.aspx?fi=157&doc_id=27682)

**Annex 15**

*"Defeating Denormalization – Shared Palestinian and Israeli Perspectives on a New Path to Peace"* Jerusalem Center for Public Affairs 2018

[http://jcpa.org/pdf/Defeating\\_Denormalization\\_Final\\_22\\_january.pdf](http://jcpa.org/pdf/Defeating_Denormalization_Final_22_january.pdf)

The chapters can also be accessed individually at

<http://jcpa.org/defeating-denormalization/>

**Annex 16**

Report: Campus fiasco highlights the disastrous consequences of Palestinian anti-normalisation activism.

<https://aijac.org.au/fresh-air/campus-fiasco-highlights-the-disastrous-consequences-of-palestinian-anti-normalisation-activism/>

**Annex 17**

EU Commission's answer to written question no. P-000081/2019

[http://www.europarl.europa.eu/doceo/document/P-8-2019-000081-ASW\\_EN.html](http://www.europarl.europa.eu/doceo/document/P-8-2019-000081-ASW_EN.html)





# **Control of Economic Activity (Occupied Territories) Bill, 2018 [Seanad]**

**Requested Submission**

**Ireland-Palestine Solidarity Campaign**

**May 2019**



IPSC, 35 North Lotts, Dublin 1, D01 A3E0 — [www.ipsc.ie](http://www.ipsc.ie) — (01) 8727798 — [info@ipsc.ie](mailto:info@ipsc.ie)

## INTRODUCTION

The Control of Economic Activities (Occupied Territories) Bill (henceforth the Occupied Territories Bill) seeks to address the serious problem of profiteering from illegal settlements in territories that are recognised as being occupied in international law. Allowing such entities to trade freely violates states' duties of non-recognition of and non-assistance to serious breaches of international law.

In the specific case of the Occupied Territories Bill and how it relates to the Ireland-Palestine Solidarity Campaign as a stakeholder, international law recognises Israel's occupation of Palestinian and Syrian territories since June 1967 and the illegality of all settlements built by Israel during the course of this occupation. This has been reaffirmed many times over, and is a position shared by the UN Security Council, the UN General Assembly, the European Union, the Irish Government and all major human rights organisations.

Amnesty International has noted that "hundreds of millions of dollars' worth of goods produced in Israeli settlements built on occupied Palestinian land are exported internationally each year", that "Israeli and international businesses have also enabled and facilitated settlement construction and expansion", and that these "profits have fuelled mass human rights violations against Palestinians".<sup>1</sup>

That Israel is able to materially gain from this occupation affects all Palestinians, not merely the three million or so that live in the Israeli-occupied West Bank, including East Jerusalem. As long as the Israeli state is guaranteed that it remains in its material interest to remain an occupying power, it will continue to deny the Palestinian people their right to self-determination.

Thus, international inaction over this is a problem that continues to affect millions of Palestinians who live under Israel's military occupation – and means that a just and lasting peace in the Palestine-Israel region will remain out of reach for all who live there.

## LACK OF LEGISLATIVE ACTION AT NATIONAL AND EU LEVEL

Furthermore, the continued lack of legislative action means that Ireland remains negligent in its duties of non-recognition of and non-assistance to internationally illegal situations, and therefore in a state of non-compliance with international law.

While successive Irish governments have maintained a nominal vocal opposition to Israel's illegal settlement enterprise, thus far the Oireachtas has passed no national legislation aimed at tackling the problem or at ensuring that Ireland complies with its duties of non-recognition of and non-assistance to serious breaches of international law.

Despite frequent institutional iterations that all Israeli settlement activities are illegal, at the EU level, only two – extremely minor – measures have been taken over the past 50 years.

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<sup>1</sup> ['States must ban Israeli settlement products to help end half a century of violations against Palestinians'](#), Amnesty International, 7<sup>th</sup> June 2017

In July 2013 the European Commission published its “Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards”. These guidelines were aimed at preventing Israeli projects in illegal Israeli settlements from receiving research grant funding and preventing Israeli companies and institutions that operate inside illegal Israeli settlements from participating in financial instruments such as loans that will be used inside the settlements.

The second measure came in November 2015 when the European Commission adopted an interpretative notice on the indication of origin of goods from the territories occupied by Israel since June 1967. In essence, these EU Labelling Guidelines were supposed to ensure that foodstuffs and other items requiring mandatory labelling that originate in Israel’s illegal settlements in Palestine and Syria must be labelled as such.

Both measures have proven to be ineffective in dealing meaningfully with the issue.

For example, in relation to the ‘Eligibility Guidelines’, despite having their headquarters located in the illegal settlement of Mitzpe Shalem, cosmetics manufacturer Ahava continues to receive funding under the EU’s Horizon 2020 Framework Program for Research and Innovation.

With regard to the ‘Labelling Guidelines’, it’s worth noting that under the terms of the EU-Israel Association agreement, EU Member States are obliged to be able to distinguish between goods originating in Israel, which have preferential tariff access to the EU Single Market, and goods originating in illegal settlements, which do not. For the purposes of charging the correct import tariffs, Member States are already required to identify settlement goods.

However, Israeli companies have, unsurprisingly, worked to avoid these labelling requirements, with an onus placed on *exporters* to ensure products are properly labelled. In this case, EU Member States must perform due diligence in checking proof of origin documentation and seeking sufficient assurances in order to correctly apply EU customs law. There is scant evidence, however, to suggest that the EU and its Member States have lived up to their obligation in this regard and have not actively worked to ensure rigorous and meaningful enforcement of these provisions.

On this basis, according to a 2016 interview with Oded Revivi, the Chief Foreign Envoy of the YESHA Council, an official umbrella organisation for settlers in the West Bank, the labelling guidelines have had an “almost non-existent” effect on trade with illegal Israeli settlements. At a very minimum, EU Member States must rectify this situation and ensure that currently existing EU laws are actually upheld.

Finally, and most importantly, labelling guidelines themselves are a *wholly insufficient* policy response to the proliferation of goods from illegal settlements. It is an approach that merely shifts any responsibility onto individual consumers to make their own ethical choices, whereas an import ban is the required response under international law for states to fulfil their own legal responsibility.

Neither measure has had any significant impact on the continued existence, and indeed, growth, of Israel’s illegal settlement enterprise and the ongoing trade with these entities

which is contrary to states' duties of non-recognition of and non-assistance to serious breaches of international law.

## **IRELAND HAS A LEGAL AND MORAL DUTY TO ACT**

The proposed legislation contained in the Occupied Territories Bill seeks to remedy this situation, and to ensure that Ireland moves to become compliant with its obligations under international law. Indeed, the fact that Ireland and other EU countries still trade with illegal Israeli settlements is not because international law is unclear, but rather because of a lack of compliance with the law.

There have been many legal opinions written testifying to this. It is not our intention to rewrite what has already been written by eminent lawyers and legal scholars. Below we quote from just one of these independent opinions, drafted by respected international law scholars Dr. Tom Moerenhout and Dr. John Reynolds<sup>2</sup> (the full opinion is appended to this submission for the consideration of the Committee):

The Duties of Non-recognition and Non-assistance (laid out in Art. 41(2) of the International Law Commission (ILC) Articles on State Responsibility) require that states shall neither recognize as lawful a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining the situation created by the breach. Trading with settlements is a violation of both duties, which complement each other.

International law mandates a prohibition on the importation of goods and services coming from settlements in occupied territories, and the exportation of goods and services to settlements in occupied territories. Ireland would fulfil its obligation under international law by withholding from trade with settlements.

It is important to point out that this trade prohibition is not a sanction. It is a rectification of an error in international economic relations between the State of Ireland and the State of Israel. Trade with settlement enterprises that primarily benefits the economy of the occupying power has never been allowed under international law.

The obligation to withhold from trading with settlements arises from the Duties of Non-recognition and Non-assistance, which are activated because of the violation of peremptory norms of international law (*jus cogens*) by Israel in its settlement activity. In particular: the obstruction of the right to self-determination, the acquisition of territory by the use of force [and] the violation of fundamental norms of international humanitarian law;

The Minister for Foreign Affairs and Trade has repeatedly stated that if passed, the Occupied Territories Bill would place Ireland in contravention of EU or World Trade Organisation laws. We share the view of a great many legal experts that this is an erroneous view. To refer once again to Moerenhout and Reynolds' opinion:

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<sup>2</sup> [Legal Opinion re 'Control of Economic Activity \(Occupied Territories\) Bill 2018'](#), Dr. Tom Moerenhout & Dr. John Reynolds, June 2018

Prohibiting settlement trade does not constitute a trade measure and is not in violation of the exclusive competence for common commercial policy of the European Commission. This measure is taken in response to obligations laid down in the International Law Commission Articles on State Responsibility. These obligations are customary, self-executing and of an erga omnes status. This means they do not require United Nations Security Council authorization and they apply immediately to individual states.

EU law invites member states to file a complaint before the Court of Justice of the European Union when the European Commission or other institutions of the Union fail to act in accordance with the EU treaties, which incorporate international law. The EU in its Regulation on Imports also allows Member States to deviate from the Common Commercial Policy for reasons of public morality.

Prohibiting trade with settlements does not violate World Trade Law. Article XXVI.5.(a) of the General Agreement on Tariffs and Trade (GATT), including its negotiation history, confirms that GATT does not apply to illegal settlements.

Indeed, by refusing thus far to ban trade with illegal settlements, it is the EU itself that is abdicating its responsibilities under international law; and where the EU has failed in its duties, it is incumbent upon member states must act to rectify this in national legislation.

[The] mandate to withhold from trading with settlements applies, at the same time, to the European Union as a whole and all of its Member States individually. Member states do not only have the right, but the obligation to act on their own account. Ireland can only be in accordance with its obligations under international law if it withholds from trade with settlements;

This is something the EU recognised when Russia occupied and annexed Crimea and Sevastopol in 2014. Then the EU swiftly deemed these annexations illegal, and applied its own laws and international law to halt Russian imports from the illegally annexed regions. This EU import ban underscores the EU's inconsistency and double-standards in not similarly banning imports from illegal Israeli settlements.

Thus we believe that ending trade with illegal Israeli settlements is not merely an option to be considered and debated, but a binding legal obligation. That the EU has failed stop this trade with illegal Israeli settlements is no excuse for inaction, rather the opposite is the case: it is the legal obligation of EU member states to act unilaterally and stop this trade themselves.

The Occupied Territories Bill provides Ireland with the opportunity to get our house in order in this regard.

## **WIDESPREAD PUBLIC SUPPORT FOR THE OCCUPIED TERRITORIES BILL**

The Ireland-Palestine Solidarity Campaign (IPSC) is both Ireland's oldest and largest NGO that focuses solely on solidarity with the Palestinian people's struggle for their inalienable rights. The organisation was founded in November 2001 and has since then been to the forefront of organising support for Palestinian-related issues in Ireland, north and south. We have organised innumerable public meetings, film screenings, book launches, cultural events, lobbying actions and public demonstrations of support for Palestinian rights and protest against Israeli state violence and violations of international law – including a 10,000-strong march in Dublin in August 2014.

Quite frankly, in all that time we have never seen such an enthusiastic response to any campaign or action as that we have seen for the Occupied Territories Bill. In a country where there is generalised public support and sympathy for Palestinians, and incredible active grassroots solidarity from individuals and organisations alike, this is really saying something.

Even amidst the turmoil of Brexit, the climate crisis, and an increasingly erratic and dangerous US Presidency, Palestine remains a major foreign policy concern for people in Ireland. This is clearly reflected in the huge amount of members of the public that have turned up to see Senator Frances Black and other members of the Oireachtas, such as Deputy Niall Collins, speak about the Occupied Territories Bill. There have been standing room-only meetings with audiences filling venues all across the country.

We have been told by politicians that there has been an “unprecedented” amount of positive correspondence in support of the Bill from people in Ireland. It's abundantly clear that there is overwhelming public support for this Bill. It is time for the Oireachtas, in particular the Irish government - which has so far not supported this Bill, in opposition to the vast majority of members of both Houses - should act now on this mandate from the Irish people.

We believe it would be hugely disappointing – if not legally and constitutionally unsound – were the government to attempt to stop the Bill's democratic progress by refusing to provide a money message for the Bill, should one be requested. Given that any costs related to the Bill are extremely minor and administrative in nature, it would be entirely inappropriate to do so.

## **THREATS AGAINST IRELAND FROM OUTSIDE ACTORS**

As the Occupied Territories Bill has progressed through the Oireachtas, there have been growing warnings that should it become law there will be an exodus of US multinationals from Ireland.

We believe this to be scaremongering of the worst kind.

Many countries operate an official trade boycott of the Israeli state (not merely goods and services from the illegal settlements, which is all the Occupied Territories Bill proposes). These include Saudi Arabia, Lebanon, Qatar, United Arab Emirates, Iraq and Kuwait. Yet despite this, US multinationals continue to operate in these countries, and the US State Department's Office of Investment Affairs continues to encourage Foreign Direct Investment within these states.

We believe these threats, which largely, if not all, originate from sources that wish to shield Israel from any action which may threaten the Israeli settlement enterprise, are calculated to instil fear and uncertainty into lawmakers, businesses and the Irish public in an attempt to halt this important legislation.

Furthermore, as we understand it, further legal advice from eminent US scholars has been sought by the Bill's sponsors, which will discuss this in comprehensive detail.

## **CONCLUSION: A MODEST BUT NECESSARY PIECE OF LEGISLATION**

Despite increasingly frantic outbursts from the Israeli government, its emissaries to Ireland, and lobby groups operating on the state's behalf about this being "the most extreme anti-Israel piece of legislation in the western world"<sup>3</sup>, this legislation does *not* call for a boycott of Israel, nor for sanctions to be placed on that state. In fact it does not mention Israel at all.

It is, in fact, a very modest Bill, concerned solely with Ireland's duty of non-recognition of and non-assistance to serious breaches of international law, which include Israeli violations in the Palestinian and Syrian territories which that state currently occupies.

It is our hope that this legislation will be passed by Ireland, and that we will see a domino effect with similar legislation being debated and passed across Europe, and the rest of the world. We also hope to soon see the day when trade with all illegal settlements in all occupied and/or illegally-annexed territories is banned.

Finally, we in the IPSC wish to thank Senator Frances Black for bringing this hugely important Bill to the Oireachtas and overseeing its passage through the Seanad. We would also like to thank Deputy Niall Collins and his colleagues in Fianna Fáil for bringing the Bill into the Dáil, and all members of both Houses of the Oireachtas who have so far supported this Bill.

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<sup>3</sup> Israeli ambassador to Ireland, Ophir Kariv, quoted in Simon Carswell, '[Israeli ambassador says calls for Eurovision boycott crosses a line](#)', *The Irish Times*, 9 May 2019.



# **APPENDIX**

## **Legal Opinion re 'Control of Economic Activity (Occupied Territories) Bill 2018'**

June 2018

Authors:

**Dr. Tom Moerenhout & Dr. John Reynolds**

## LEGAL OPINION

### LEGAL OBLIGATIONS OF THE STATE OF IRELAND WITH RESPECT TO: 'CONTROL OF ECONOMIC ACTIVITY (OCCUPIED TERRITORIES) BILL 2018'

TOM MOERENHOUT  
JOHN REYNOLDS

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#### 1. SUMMARY

- International law mandates a prohibition on the importation of goods and services coming from settlements in occupied territories, and the exportation of goods and services to settlements in occupied territories. Ireland would fulfil its obligation under international law by withholding from trade with settlements;
- This trade prohibition is not a sanction. It is a rectification of an error in international economic relations between the State of Ireland and the State of Israel. Trade with settlement enterprises that primarily benefits the economy of the occupying power has never been allowed under international law. The same applies to the Moroccan occupation of Western Sahara;
- The obligation to withhold from trading with settlements arises from the Duties of Non-recognition and Non-assistance, which are activated because of the violation of peremptory norms of international law (*jus cogens*) by Israel in its settlement activity. In particular: the obstruction of the right to self-determination, the acquisition of territory by the use of force, the violation of fundamental norms of international humanitarian law and the application of Apartheid;
- This mandate to withhold from trading with settlements applies, at the same time, to the European Union as a whole and all of its Member States individually. Member states do not only have the right, but the obligation to act on their own account. Ireland can only be in accordance with its obligations under international law if it withholds from trade with settlements;
- Prohibiting settlement trade does not constitute a trade measure and is not in violation of the exclusive competence for common commercial policy of the European Commission. This measure is taken in response to obligations laid down in the International Law Commission Articles on State Responsibility. These obligations are customary, self-executing and of an *erga omnes* status. This means they do not require United Nations Security Council authorization and they apply immediately to individual states.
- EU law invites member states to file a complaint before the Court of Justice of the European Union when the European Commission or other institutions of the Union fail to act in accordance with the EU treaties, which incorporate international law. The EU in its Regulation on Imports also allows Member States to deviate from the Common Commercial Policy for reasons of public morality.
- Prohibiting trade with settlements does not violate World Trade Law. Article XXVI.5.(a) of the General Agreement on Tariffs and Trade (GATT), including its negotiation history, confirms that GATT does not apply to illegal settlements.
- This legal opinion applies to trade with illegal settlements in occupied territories that primarily benefit the occupant. It does not make any submissions with regards to trade with Israel in respect of its recognized, pre-1967 territory.

## **(2) THE OBLIGATION UNDER INTERNATIONAL LAW OF THE STATE OF IRELAND TO WITHHOLD FROM TRADE WITH SETTLEMENTS**

### ***(A) The Duties of Non-recognition and Non-assistance***

The Duties of Non-recognition and Non-assistance (laid out in Art. 41(2) of the International Law Commission (ILC) Articles on State Responsibility)<sup>1</sup> require that states shall neither recognize as lawful a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining the situation created by the breach. Trading with settlements is a violation of both duties, which complement each other.

### ***(B) The violation of peremptory norms of international law by Israeli settlements***

First, Israeli settlement activity obstructs the Palestinians' right to self-determination<sup>2</sup> inter alia by the *de facto* acquisition of territory by the use of force (emphasized again in the UNSC Resolution 2334)<sup>3</sup>. The peremptory character of this norm was suggested by some states in the development of the ILC Articles on the Law of Treaties<sup>4</sup> and affirmed by the ILC when drafting the Articles on State Responsibility<sup>5</sup>. In its discussion, the Commission emphasized the essence of this principle for contemporary international law. The centrality of this principle in international law was also relied upon by Judge Elaraby<sup>6</sup> in his separate *Wall Opinion*.

Second, the ILC<sup>7</sup> refers to fundamental norms of international humanitarian law as potential *jus cogens*. To do so, the Commission relies on the use of the term 'intransgressible' by the International Court of Justice (ICJ)<sup>8</sup>. Fundamental norms are argued (among others by Judge Nieto-Navia<sup>9</sup> and

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<sup>1</sup> 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, at Art. 41.

<sup>2</sup> Advisory Opinion, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ, 09 July 2004 at. 149.

<sup>3</sup> SC Res. 2334, 23 December 2016.

<sup>4</sup> International Law Commission, *Yearbook of the International Law Commission 1966 - Volume II* (1966), at 248.

<sup>5</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, at 85, 112, 113, 114, 115.

<sup>6</sup> Separate Opinion of Judge Elaraby, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ, 09 July 2004, at para. 31.

<sup>7</sup> International Law Commission, *Yearbook of the International Law Commission 1966 - Volume II* (1966), at 248.

<sup>8</sup> Advisory Opinion, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ, 09 July 2004, at para. 113.

<sup>9</sup> R. Nieto Navia, *International peremptory norms (jus cogens) and international humanitarian law* (2003), at 24.

Hannikainen<sup>10</sup>) to include the Fourth Geneva Convention. The applicability of the Convention to Israel's occupation and its settlements - including the transfer of population to occupied territories as a flagrant violation of the Fourth Geneva Convention<sup>11</sup> - is referred to in the ICJ *Wall Opinion*<sup>12</sup>, in numerous UNSC Resolutions<sup>13</sup>, and by the ICRC<sup>14</sup>. On several occasions, including in the *Wall Opinion*, the ICJ confirmed that fundamental humanitarian norms had an *erga omnes* character and were to "be observed by all States" because "they constitute intransgressible principles of international customary law", and are "fundamental to the respect of humanity" and "elementary considerations of humanity". ICJ judges such as Judge Bedjaoui<sup>15</sup>, Judge Weeramantry<sup>16</sup> and Judge Koroma<sup>17</sup> have explicitly concluded these norms are either *jus cogens in statu nascendi* or *jus cogens*.

Third, in the European Journal of International Law, Dugard and Reynolds scrupulously set forward the argumentation and legal evidence that the situation in the West Bank, including Israel's settlement enterprise, constitutes Apartheid<sup>18</sup>. Again, the draft ILC Articles on State Responsibility have noted the widespread agreement that the prohibition of Apartheid constitutes a *jus cogens* norm<sup>19</sup>. The three violations taken individually (1. the right to self-determination and the prohibition on the acquisition of territory by force; 2. the violation of core humanitarian norms; 3. the prohibition of Apartheid) constitute *jus cogens* violations in the case of Israel's settlement enterprise in Palestine. Also the combined violations represent a sufficient breach, exemplified by the conclusion of the ICJ on the applicability of the Duties of Non-recognition and Non-assistance.

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<sup>10</sup> Hannikainen, *Peremptory norms (jus cogens) in international law*, 1988, Finnish Lawyers Pub. Co., at 605-606.

<sup>11</sup> 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287, Article 49, (5).

<sup>12</sup> Advisory Opinion, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ, 09 July 2004, at para. 75, 101, 120, 126, 135.

<sup>13</sup> Among others: SC Res. 271, 15 September 1969; SC Res. 446, 22 March 1979; SC Res. 465, 01 March 1980; SC Res. 469, 20 May 1980; SC Res. 471, 05 June 1980; SC Res. 476, 30 June 1980; SC Res. 478, 20 August 1980; SC Res. 484, 19 December 1980; SC Res. 592, 08 December 1986; SC Res. 605, 22 December 1987; SC Res. 607, 08 January 1988; SC Res. 636 of 06 July 1989, SC Res. 641, 30 August 1989; SC Res. 672, 12 October 1990; SC Res. 681, 20 December 1990; SC Res. 694, 24 May 1991; SC Res. 726, 06 January 1992; SC Res. 799, 18 December 1992; SC Res. 904, 18 March 1994; SC Res. 1322, 07 October 2000; SC Res. 1435, 24 September 2002; SC Res. 2334, 23 December 2016.

<sup>14</sup> Conference of the High Contracting Parties to the Fourth Geneva Convention: statement by the International Committee of the Red Cross, 05 December 2001.

<sup>15</sup> Declaration of President Bedjaoui, *Legality of the threat or use of nuclear weapons*, ICJ, 8 July 1996, at para. 21.

<sup>16</sup> Dissenting Opinion of Judge Weeramantry, *Legality of the threat or use of nuclear weapons*, ICJ, 8 July 1996, at para 10.

<sup>17</sup> Dissenting Opinion of Judge Koroma, *Legality of the threat or use of nuclear weapons*, ICJ, 8 July 1996, at 574.

<sup>18</sup> Dugard and Reynolds, *Apartheid, international law, and the Occupied Palestinian Territory*, 2013, European Journal of International Law, Vol. 24, N. 3.

<sup>19</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, at 112.

### ***(C) Trade with settlements and the Duties of Non-recognition and Non-assistance***

Trading with settlements breaches the obligation of Non-assistance. The agreement establishing the World Trade Organization explicitly refers to the economic benefits of liberalized trade: “*raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services*”<sup>20</sup>. Trading with illegal settlements gives those settlements economic support. This seems to constitute concrete help to the maintenance of the unlawful situation<sup>21</sup>. Indicative of the fact that trade helps to maintain Israeli violations is, for example, the UN Office of the High Commissioner for Human Rights’ recognition of the encouragement of economic activity in settlements as a reason for settlement expansion<sup>22</sup>. This was also confirmed by the Human Right Council<sup>23</sup>.

Trading with settlements breaches the Duty of Non-recognition. The only legal text directly addressing the content of the Duty of Non-recognition is the ICJ Advisory Opinion on Namibia in which the ICJ addresses economic relations: “*the restraints which are implicit in the non-recognition of South Africa’s presence in Namibia [...] impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory*”<sup>24</sup>. The Hague Convention and the Fourth Geneva Convention confirm that the fundamental prohibition of the transfer of civilian population *ipso facto* implies an equally strong prohibition on the economic activity of transferred civilians for the benefit of the occupying state<sup>25</sup>. This prohibition is not only recognized in international law, but also in Israeli domestic law. In the *Beth El Case*, the Israeli Supreme Court argued that settlements were acceptable if they were temporary and served the military and security needs of the Israeli state. In the *Elon Moreh and Cooperative Society Case*<sup>26</sup>, the Supreme Court ruled that the security needs of the

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<sup>20</sup> 1994 Marrakesh Agreement Establishing the World Trade Organization, no. 31874.

<sup>21</sup> Aust, *Complicity and the Law of State Responsibility*, 2011, Cambridge University Press, at 339.

<sup>22</sup> United Nations Human Rights Office of the High Commissioner, *Israeli Settlements in the Occupied Palestinian Territory*, 2016, at 3.

<sup>23</sup> Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East-Jerusalem*, 07 February 2013, A/HRC/22/63, at para. 20.

<sup>24</sup> Advisory Opinion, *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, ICJ, 21 June 1971, para. 124-125.

<sup>25</sup> 1907, Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (The Hague Regulation), Article 55.;

Conference of the High Contracting Parties to the Fourth Geneva Convention: statement by the International Committee of the Red Cross, 05 December 2001, Article 49.;

Moerenhout, *The obligation to withhold from trading in order not to recognize and assist settlements and their economic activity in occupied territories*, 2012, *Journal of International Humanitarian Dispute Settlement*, Vol. 3, N. 2, at 349-352.

<sup>26</sup> Judgement, *Mustafe Dweikat et al., v the Government of Israel et al. (“the Elon Moreh Case”)*, H.C. 390/7934(1), 34(1), Israeli Supreme Court, 22 October 1979. English summary in: Y. Dinstein (ed.), *Israel Yearbook on Human Rights* (1979), at 345.

army in occupation (the main legitimization for the existence of settlements) could never include national, economic or social interests.

Trading with settlements also implicitly recognizes Israeli violations of peremptory norms of international law through its settlement activity. The EU explicitly<sup>27</sup> does not grant preferential access to settlement products because “it does not consider them to be part of Israel’s territory, irrespective of their status under domestic Israeli law”. It recognizes that settlements, in their trading activity, are regulated by domestic Israeli law, and it does not give them preferential access because the EU does not agree with this unlawful claim. Yet, the act of importation – whether or not with preferential access – remains a legal act, which requires the stamp of approval from the importing state. This is exactly what constitutes implicit recognition.

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<sup>27</sup> European Commission, *Interpretative notice on indication of origin of goods from the territories occupied by Israel since June 1967*, 11 November 2015, C(2015) 7834 final.

### **(3) THE OBLIGATION OF THE STATE OF IRELAND IS IN ACCORDANCE WITH EU LAW**

The Duties of Non-Recognition and Non-Assistance apply directly to the Irish Government and are in accordance with EU Law. While the European Commission holds the exclusive competence over the Union's Common Commercial Policy, withholding from trading with settlements is not a trade measure. It is a rectification of an error in international economic relations between the EU and its member states from one side, and an occupying state from the other side. Because of the Duties of Non-Recognition and Non-Assistance, trade with settlements should have never existed.

It is the result of non-compliance that the type of trade with settlements addressed in this legal opinion still exists. The fact that the European Commission has the exclusive competence over the Union's Common Commercial Policy puts it in the first place to abide by its Duties of Non-Recognition and Non-Assistance. That being said, the Duty of Non-recognition is a customary obligation, which does not require United Nations action to trigger it, and it is an *erga omnes* obligation, applying to all states, including EU member states and irrespective of the fact the Commission holds authority over trade policy.

By not acting, the European Commission violates international law. As a result, it is the international obligation of EU member states to make sure they do comply as individual, sovereign states. This obligation on EU member states has been recognized in an open letter by 40 legal experts<sup>28</sup> directed at the European institutions in 2015. The logic is simple: this measure is not about trade, but about a country's sovereign obligation to respond to the violation of peremptory norms of international law. Because of their status in international law, the obligations to not recognize or assist such violations trump other law, including the Treaty on the Functioning of the European Union (TFEU).

In addition, the recent UN Security Council Resolution 2334<sup>29</sup> also reaffirms that the establishment of Israeli settlements in the occupied Palestinian territory has no legal validity and that Israel's settlement enterprise is a flagrant violation of international law. The resolution calls upon all states "*to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967*". UN Security Council Resolution 465<sup>30</sup> had already called upon all states "*not to provide Israel with any assistance to be used specifically in connection with settlements in occupied territories*".

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<sup>28</sup> Letter by Legal Scholars to policy makers in the European Union and its Member States calling for compliance with international legal obligations related to withholding trade from and toward Israeli Settlements, 2015.

<sup>29</sup> SC Res. 2334, 23 December 2016.

<sup>30</sup> SC Res. 465, 1 March 1980.



#### **(4) EU LAW ALSO ALLOWS FOR A SETTLEMENT TRADE PROHIBITION**

It must be noted that the status of the Duties of Non-recognition and Non-assistance are themselves sufficient for Ireland to assume its obligation to withhold from trade with settlements.

That said, a *bona fide* reading of the provision on Common Commercial Policy in the TFEU does not exclude member state action. Article 207.1. emphasizes that “*the common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action*”<sup>31</sup>. As TFEU Article 5 notes, these principles are laid down in Chapter 1 of Title V of the Treaty on European Union (TEU). This Chapter confirms in Article 21 that the Union’s action on the international scene shall be guided by the principles of the United Nations Charter and international law<sup>32</sup>.

More strongly, in *Regulation 2015/478 of the European Parliament and of the Council*, the Union specifies common rules for imports<sup>33</sup>. This law can be considered as *lex specialis* to the TFEU. In Article 24.2 of the Regulation, it is confirmed that the regulation on imports “*shall not preclude the adoption or application by Member States of: (a) prohibitions, quantitative restrictions or surveillance measures on the ground of public morality, public policy or public security*”.

Stopping trade with settlements can be considered as a public morals exception. The strictest way of giving content to a public morals exception can be found in the law of the World Trade Organization (WTO). A reading of this law and associated case law confirms the applicability of the public morals exception to trade with settlements. In general, two requirements need to be met: First, are public morals at stake (the content)? And second, is an import ban necessary to protect them (the necessity test)?

First, it goes without question that public morals are at stake. In the WTO case *US-Gambling*, the Panel<sup>34</sup> clarified that public morals “denote standards of right and wrong conduct maintained by or on behalf of a community or nation”. International humanitarian law applies to the entire international community and denotes standards of right and wrong conduct through the rights and obligations laid out in the treaties.

Second, a prohibition on settlement trade also satisfies the necessity requirement. The necessity test<sup>35</sup> means weighing three factors: (1) the contribution made by the measure to the enforcement of the law or regulation at issue; (2) the importance of the common interests or values protected; and (3) the accompanying impact of the law or regulation on imports or exports. A trade ban would be the result of a breach of the highest norms of international law. A ban is furthermore accepted as being potentially necessary to protect public morals (as confirmed by the WTO Appellate Body<sup>36</sup> in *US-Tyres*. And third, a ban would not significantly impact imports or exports.

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<sup>31</sup> Treaty on the Functioning of the European Union, 2012, at Article 207.1.

<sup>32</sup> Treaty on European Union, 2012, Article 21.

<sup>33</sup> European Parliament and Council, Regulation on Common Rules for Imports, 11 March 2015, Regulation 2015/478, L83/16.

<sup>34</sup> Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, at 236-240.

<sup>35</sup> Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, 10 January 2001, at 50.

<sup>36</sup> Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 17 December 2007, at 52-63.

## **IRELAND CAN CONFIRM EU LACK OF COMPLIANCE WITH INTERNATIONAL LEGAL OBLIGATIONS VIA THE COURT OF JUSTICE OF THE EUROPEAN UNION**

The European Commission confirmed on 05 March 2018<sup>37</sup> in response to a parliamentary question that the current European Commission policy ‘*reflects the Commission’s understanding of the relevant EU legislation*’, but also that this is ‘*without prejudice to the interpretation which the Court of Justice may provide*’. When implementing a prohibition on trade with settlements, Ireland can easily challenge the lack of compliance of the European Commission and other EU member states with regards to their Duties of Non-recognition and Non-assistance.

Under TEU Title III Article 19.3<sup>38</sup>, the Court of Justice of the European Union (CJEU) shall rule on actions brought by a member state. Under TEU Section 5 Article 253<sup>39</sup>, the CJEU is competent to review the legality of acts of the Commission intended to provide legal effects vis-à-vis third parties. It is also competent to ‘review the legality of acts of bodies, offices, or agencies of the Union intended to produce legal effects vis-à-vis third parties’. The importation of settlement products is such an act that produces legal effects (i.e. implicit recognition) vis-à-vis third parties. Article 263<sup>40</sup> declares that the CJEU has jurisdiction in actions brought by a member state.

Furthermore, Section 5 Article 265 clearly states that “*Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established*”. Ireland is in a unique position to not only comply with its international legal obligations, but also to protect fundamental principles of international law by filing the Commission’s failure to act before the CJEU.

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<sup>37</sup> Parliamentary questions: Answer given by Vice-President Katainen on behalf of the Commission, 05 March 2018.

<sup>38</sup> Treaty on European Union, 2012, Article 19.3.

<sup>39</sup> Treaty on European Union, 2012, Article 253.

<sup>40</sup> Treaty on European Union, 2012, Article 263.

## **(5) THE OBLIGATION OF THE STATE OF IRELAND IS IN ACCORDANCE WITH WTO LAW**

Withholding from trade with settlements would not be illegal under WTO law. There are three possible defences based on public international law, described in detail by Moerenhout (2012)<sup>41</sup>.

First, the WTO would not have substantive jurisdiction over trade with settlements. Settlement products from Israeli producers in the Occupied Palestinian Territory are different from products that are made within the territory of Israel, as defined by the internationally recognized pre-1967 borders. GATT Article XXVI:5.(a) extends the territorial application of the treaty to "other territories for which it has international responsibility"<sup>42</sup>. An assessment of the negotiation history<sup>43</sup> of this article, however, makes it clear that GATT is not meant to apply to civilian or military settlements of a WTO member state that illegally occupies the territory of another state or people of whom the right to self-determination has been recognized. A WTO Panel or Appellate Body can also recognize other international obligations such as the Duties of Non-recognition and Non-assistance as *lex specialis* trumping WTO law at the stage of establishing jurisdiction. Even if a WTO Panel would not recognize the legal arguments given above, or it would decide not to include UN resolutions, ICJ opinions, international humanitarian law or even peremptory norms of international law as applicable law to assess its jurisdiction, it would still have to refrain from exercising jurisdiction. The question at hand is not primarily trade related, but rather comes down to the territorial status of settlements in the occupied Palestinian Territory. Accepting substantial jurisdiction over such a question by a WTO Panel would be legal overstretch.

Second, if a WTO Panel or Appellate Body would err and assume substantial jurisdiction, it can then incorporate the Duties of Non-recognition and Non-assistance as *lex specialis* trumping WTO law at the stage of merits. In its interpretation, it would rely on the above-mentioned law. It is undisputed that *jus cogens* norms are higher up in hierarchy than WTO rules and therefore have direct effect within WTO law. This would lead a Panel to the conclusion GATT Article XI is not violated.

Third, if for one reason or another, a Panel were to seriously err and rule that obligations within the WTO agreements were owed to Israeli settlements and that Israel thus had legal standing, an import ban would violate GATT Article XI.(1). If other public international law would not be accepted as an independent defense in the dispute, the defendant could have recourse to exceptions within GATT. It could refer both to general exceptions and security exceptions. General exceptions under Article XX<sup>44</sup> would include the safeguarding of public morals. Security exceptions under Article XXI<sup>45</sup> are intended to allow parties to take action in pursuance of their obligations under the United Nations Charter for the maintenance of international peace and security.

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<sup>41</sup> Moerenhout, *The obligation to withhold from trading in order not to recognize and assist settlements and their economic activity in occupied territories*, 2012, Journal of International Humanitarian Dispute Settlement, Vol. 3, N. 2, at 362-382.

<sup>42</sup> 1994 General Agreement on Tariffs and Trade, at Article XXVI:5.(a).

<sup>43</sup> Described in detail in: Moerenhout, *The obligation to withhold from trading in order not to recognize and assist settlements and their economic activity in occupied territories*, 2012, Journal of International Humanitarian Dispute Settlement, Vol. 3, N. 2, at 365-368.

<sup>44</sup> 1994 General Agreement on Tariffs and Trade, at Article XX.

<sup>45</sup> 1994 General Agreement on Tariffs and Trade, at Article XXI.

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Mr. Noel Murphy,  
Clerk to the Joint Committee of Foreign Affairs and Trade and Defence,  
Leinster House,  
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24<sup>th</sup> May 2019

**Re: THE JOINT COMMITTEE'S SCRUTINY OF THE CONTROL OF  
ECONOMIC ACTIVITIES (OCCUPIED TERRITORIES) BILL 2018**

Dear Mr. Murphy,

I refer to the above matter and thank you for your letter dated 23<sup>rd</sup> April 2019 inviting me to make a written submission to the Joint Committee.

I enclose my written submission which focuses on item 16 of the Schedule to your letter.

Thank you again.

Yours sincerely,

Michael Lynn

## THE CONTROL OF ECONOMIC ACTIVITIES (OCCUPIED TERRITORIES) BILL 2018

Submission by Michael Lynn S.C. to the Joint Committee on Foreign Affairs and Trade and Defence  
24<sup>th</sup> May 2019

### **Background**

1. In 2012 I was asked to provide an opinion for an NGO, via the Bar Council of Ireland's Voluntary Assistance Scheme (which provides *pro bono* assistance to NGOs). The question I was asked to address was whether it would be lawful, as a matter of European Union law, for the Irish government to ban unilaterally the import of produce into the State from illegal settlements established by Israel in the West Bank and east Jerusalem. A copy of my opinion is enclosed with this covering note. In it, I concluded as follows:

*[...] there is a duty in international law on Ireland, and all EU Member States, not to render aid or assistance in maintaining the illegal settlements.*

*the EU's commitment to the "strict observance" of international law is such that "public policy" [...] would permit the prohibition of the import of produce which originates from the illegal settlements. A Member State would be justified, as a consequence of its determination to uphold international law (to which the EU is committed) by not acquiescing in any way with the continuation of the illegal settlements, by banning the import of produce from there.*

In particular, I stated at paragraph 33:

*Whilst the Court of Justice has held that the "public policy" exception should be narrowly construed in respect of the free movement of goods within the Union, as permitted by Article 36 of the Treaty on the Functioning of the European Union, this relates to intra-Union movement which is one of the four great freedoms of the Union (the free movement of goods). I do not think such a restrictive interpretation would apply to Regulation 260/2009, which concerns imports from outside the Union but, in any event, even if a restrictive approach did apply, it would still, in my opinion, permit a ban on produce from illegal settlements because of the Member States' and the EU's commitment to the strict observance of international law.*

2. The Control of Economic Activity (Occupied Territories) Bill 2018 has been tabled in Seanad Éireann, and would implement such a ban. It has passed all stages in the Upper House, as well as Second Stage in Dáil Éireann, and is now before the Joint Committee for detailed scrutiny. I note that since the Bill was introduced in January 2018, much of the debate surrounding it has focused on the extent to which it is compatible with EU law. This submission focuses on that

question, as well as the related issue of whether the Bill could expose Ireland to fines and damages claims.

### **Compatibility with EU law**

3. In opposing the Bill in the Dáil in January of this year, the Tánaiste and Minister for Foreign Affairs & Trade, Simon Coveney, stated:

“The formal advice to the Government of the Attorney General on this matter has confirmed clearly that passage of the Bill would put Ireland in breach of EU law and would expose Ireland to legal action by the European Commission as guardian of the treaties. Some supporters of the Bill have put forward legal opinions which highlight a so-called public policy exemption, which states that provisions on free circulation of goods do not preclude “prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security”. However, I am strongly advised that the European Court of Justice has shown in previous cases that it will not allow this term to be interpreted broadly.”

4. Unfortunately, the opinion of the Attorney General has not, to date, been made public. In addition to my own written opinion from 2012, I have had the opportunity to consider the written opinion of Professor Takis Tridimas (a copy of which has been shared with Members of the Committee) which addresses the compatibility of the Bill itself with the public policy exemption under EU law.
5. Prior to drawing from Professor Tridimas’ opinion, it should be acknowledged that he is one of the leading authorities on EU law, and his knowledge of the area is way above mine. I strongly, and respectfully, urge the Joint Committee to consult his opinion as a highly authoritative one. Professor Tridimas’ academic work on EU law has been cited on a number of occasions by the Irish courts<sup>1</sup> and he is one of the most frequently quoted academic authors by Advocates General of the Court of Justice of the European Union.<sup>2</sup>

### **The Tridimas opinion**

6. Professor Tridimas concludes in his opinion on the Bill that both the promotion of respect for international law, and the protection of fundamental rights, fall within the concept of “public policy” as that term is understood in EU law and that, insofar as the Bill seeks to promote both of these objectives, it is compatible with this basis for unilateral interference with trade by a Member State.

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<sup>1</sup> Most recently, for example, by the High Court in *Okolie v. Minister for Justice and Equality* [2018] IEHC 490 and by the Supreme Court in *Blehein v. Minister for Health and Children* [2018].

<sup>2</sup> Hereafter, ‘the Court of Justice’.

7. It is worth noting, in particular, Professor Tridimas' reference to the opinion of Advocate General Wathelet in the recent *Rosneft* case.<sup>3</sup> That case involved a challenge to the UK's implementation of EU sanctions against Russian undertakings arising from Russia's breaches of international law in Ukraine. As Professor Tridimas notes:

*Advocate General Wathelet opined that the sanctions did not fall within the scope of application of the Partnership Agreement. Notably, he added that, in any event, even if the Court should find that the sanctions were a restriction covered by the Partnership Agreement, 'such a restriction would, as the Commission states, be justified on grounds of public policy and public security, in accordance with Article 19 of the Partnership Agreement.'*

*It is important that both the Advocate General and the Commission considered that the concept of public policy could justify the imposition of restrictions on imports of products from a third country on grounds of its occupation of a territory of another country. The same reasoning appears to me to apply in the present case.*<sup>4</sup>

8. While the Court of Justice did not ultimately address this question, the opinion of the Advocate General in *Rosneft* appears to me to provide the strongest indication yet that the public policy exemption allows for the adoption of restrictions on trade designed to ensure respect for international law, particularly involving products from a third country (i.e. from outside the EU). That the settlements are a clear violation of international law is outlined at length in the Tridimas opinion, and has been repeatedly reaffirmed by the European Union, the United Nations, and the Irish Government.

### **The question of fines and damages claims**

9. In opposing the Bill in the Dáil, the Tánaiste has also argued as follows:

“Should Ireland be found to have breached EU law, as we would expect, the State would be exposed to potentially very significant fines as well as legal costs. Fines recommended by the Commission in such cases can include lump sums of more than €1.5 million plus daily fines. Cumulative annual costs of these fines can range from hundreds of thousands of euros per year at the lower end of the scale, up to tens of millions of euros per year at the highest end. No Government, nor any responsible Opposition, could support intentionally breaking EU law and exposing the State to such significant penalties.

“The Bill could also be challenged by companies or individuals claiming to be adversely affected by it. In addition to legal costs arising in these circumstances, a finding against Ireland in favour of a private party could give rise to damages being awarded against the State.”

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<sup>3</sup> *The Queen, on the application of PJSC Rosneft Oil Company v. Her Majesty's Treasury* (C-72/15).

<sup>4</sup> See para. 65 and 66.



10. Arising from these assertions by the Tánaiste, it is worth explaining how Member States can be fined or become liable to compensate a private person or company for breaching EU law. With regard to fines, Article 260 of the Treaty on the Functioning of the European Union provides as follows:

*1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.*

*2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.*

*If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.*

11. Thus, if the Bill were found to be incompatible with EU law by the Court of Justice, Ireland would be exposed to a fine if it failed to amend or repeal the Bill, as necessary, to ensure compliance with the decision of the Court. It is if the Government failed to take the necessary corrective action to comply with an adverse finding of the Court of Justice that it could be brought back to the Court by the Commission and fined.
12. With regard to damages claims, according to well established principles of EU law a Member State will only be liable to compensate a person or company for any loss they suffered as a result of that State's breach of EU law if it "*manifestly and gravely disregarded the limits on its discretion*" under EU law.<sup>5</sup> Applying this test, the Supreme Court has recently held that where a provision of EU law gives rise to "*complex considerations that [are] not expressly covered by the terms of [the provision in question],*" the State cannot be liable in damages for breaching it.<sup>6</sup> It also held that while the good faith or otherwise of an organ of the State in acting in a way that breached EU law is not determinative of the State's liability to compensate, it is "*certainly relevant*".<sup>7</sup>
13. As such, even if the Court of Justice were to find in the future that the Bill is incompatible with EU law, it is the case, at this point in time, that the question of whether prohibiting trade with illegal settlements complies with the 'public policy' exemption has not been determined under EU law. For the reasons outlined above, there is good reason to believe that a prohibition of this kind is compatible with EU law. Therefore, according to the test outlined by the Supreme Court, were it to be held in the future that the Bill is not compatible with the public policy exemption, it seems very unlikely that this would give rise to an entitlement to compensation on the part of a person who was affected by its provisions. Also relevant would be the fact that the Oireachtas clearly acted in

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<sup>5</sup> *Brasserie du Pêcheur v. Federal Republic of Germany and R v. Secretary of State for Transport ex parte Factortame* (C-46/93 & C-48/93) [1996] E.C.R. I-1029, para. 55.

<sup>6</sup> *Ogieriakhi v. Minister for Justice & Equality and ors* [2017] IESC 52, para. 104.

<sup>7</sup> *Ibid.*, para. 101.

good faith with regard to the question of EU law raised by the Bill by obtaining and relying on several legal opinions on the relevant aspects of EU law.

### **Conclusion**

14. In summary, for the reasons outlined above and in my opinion attached, and drawing on the opinion of Professor Tridimas, in my view it would be permissible for the State to take the unilateral step of prohibiting the import of produce from the illegal settlements on the ground of 'public policy', in compliance with EU law. Similarly, were the Occupied Territories Bill 2018 to become law, the potential for fines and damages claims would only reasonably arise should the Court of Justice take a different view, finding the Bill incompatible with EU law, and the Government failed to take the necessary corrective action.

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24<sup>th</sup> May 2019

Select Committee on Foreign Affairs and Trade and Defence  
Leinster House  
Dublin 2

23<sup>rd</sup> May 2019

A Chathaoirleach,

Please find attached a submission prepared by Gerry Liston, Legal Officer with Sadaka which provides, among other things, the legal rationale as to why a Money Message should not be required to further the passage of the Control of Economic Activities (Occupied Territories) Bill through Dáil Éireann.

As you are aware, the Dáil voted on 24<sup>th</sup> January 2019 to support the Bill by an overwhelming majority of 78 votes to 45 (a vote which included the abstention of 3 Government Ministers). This, combined with its passage through Seanad Éireann, has unambiguously demonstrated that the political argument in support of this Bill has been won. It has the support of all the political parties (except Fine Gael) and the majority of Independent members of the Oireachtas. In political and democratic terms, the Bill should progress to the natural conclusion of being passed into law.

The Bill represents a relatively modest move in that it seeks to do no more than ensure Ireland's domestic law complies with Ireland's obligations under international law. However, in the current political vacuum and the absence of leadership from other sources in the international community, initiatives such as this Bill are essential to stimulate progress in the Middle East.

Sadaka has been working towards a ban on the import of settlement goods, alongside Trócaire, Christian Aid and the Irish Congress of Trade Unions since 2009. We were greatly encouraged when this was progressed, initially by Senator Frances Black, and subsequently by the majority of political parties in the Oireachtas. It has taken ten years to get to this stage. **In other words, the Occupied Territories Bill is a 'once in a generation' opportunity.** It has been described by Dr. Rima Khalaf Hunaidi<sup>1</sup> in these terms:

*'Future generations will remember this as the single, most courageous act, that started to change the trajectory in our region away from a brutal and dehumanizing occupation, towards a just and lasting peace.'*

This opportunity should not be compromised by a technicality, particularly one which, we argue, is being inappropriately applied. Instead, this Bill should be enabled to pass into law.

It will make a strong statement that Ireland is willing to act in defence of international law and in support of the human rights of the Palestinian people. Action from the global community, and action alone, will send a strong message to the state of Israel that it can no longer act with impunity for its sustained war crimes and persistent breaches of international law.

Yours sincerely,



Marie Crawley (Chair)

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<sup>1</sup> Former Under Secretary-General and Executive Secretary of the United Nations Economic and Social Commission for Western Asia (ESCWA) and former Deputy Prime Minister, Minister of Industry and Trade, Minister of Planning and former Senator in the Jordanian Parliament.

## **Submission to the Select Committee on Foreign Affairs and Trade and Defence**

### **Re: The Control of Economic Activity (Occupied Territories) Bill, 2018**

**23<sup>rd</sup> May, 2019**

A Chathaoirligh,

Please find below my submission, on behalf of Sadaka – the Ireland Palestine Alliance, in relation to the Control of Economic Activity (Occupied Territories) Bill, 2018 (“the Bill”). I am the legal officer with Sadaka and in this capacity have worked with Senator Frances Black on the drafting of the Bill and other legal issues relating to it. I am a qualified (although non-practising) solicitor in Ireland and also work as a legal officer with the Global Legal Action Network (‘GLAN’), a non-profit organisation based in the UK and Ireland which seeks to use law for the protection of human rights internationally.

This submission addresses the following areas referred to in the schedule enclosed with the letter of Mr Noel Murphy, inviting Sadaka to make a submission on the Bill:

- The Implementation of the Bill (Part A, 10);
- The financial implications of the Bill (Part A, 12 and 13);
- The compatibility of the Bill with the Constitution (Part B, 15);
- The extent to which there is ambiguity in the drafting of the Bill (Part B, 17);
- The administrative arrangements for the enforcement of the Bill (Part B, 20).

I have addressed these issues under two broad headings: One which addresses the extent to which the Bill requires a Money Message for the purposes of both Article 17.2 of the Constitution and Dáil Standing Order 179(2). And the other which addresses a number of legal issues raised by the Tánaiste and Minister for Foreign Affairs and Trade in relation to the Bill.

I am very grateful for the opportunity to make this submission and I would of course be happy to make myself available to the Committee should it decide to hold a hearing in relation to the Bill.

Kind regards,

Gerry Liston

## The extent to which the Bill requires a Money Message

### Introduction

The requirement that certain Bills be the subject of a Money Message signed by the Taoiseach authorising the payment of moneys necessary to give effect to a particular Bill has a basis in both the Constitution (Article 17.2) and the Standing Orders of the Dáil (Standing Order 179(2)). Insofar as the wording of the relevant provisions of the Constitution and the Standing Orders differ slightly, I propose to deal with them separately, beginning with Article 17.2 of the Constitution.

### Article 17.2 of the Constitution

Article 17.2 of the Constitution states: “Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach.” Whether or not the Bill requires a Money Message from the perspective of the Constitution therefore depends on whether it involves the “appropriation” of public moneys. It may be helpful to note that the Oxford English Dictionary defines the term “appropriation” as follows:

“The assignment of anything to a special purpose; *concrete* the thing so assigned, *esp.* a sum of money set apart for any purpose. **Appropriation Bill** *n.* a Bill in Parliament, allotting the revenue to the various purposes to which it is to be applied.”

The precise meaning of the term in Article 17.2 has not yet been considered by the courts. Nor has it been considered in any academic commentary. Nevertheless, even in the absence of any authority on the meaning of the term, there is in my view little doubt that it does not extend to the allocation of any resources that would be required to implement the Bill, on enactment. To explain why this is so it is necessary to first provide an overview of the following: the relationship between Article 17.2 and its corresponding provision in the Constitution, Article 11; the manner in which the Oireachtas provides for expenditure in law (in accordance with Article 11); and current practice in relation to Money Messages under Article 17.2.<sup>1</sup>

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<sup>1</sup> In preparing the overview which follows I have relied primarily on, David Gwynn Morgan, *Constitutional Law of Ireland* (Roundhall, 1990) and Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> Ed.) (Bloomsbury, 2018).

### The relationship between Article 17.2 and Article 11

Article 11 provides that “All revenues of the State [...] shall be *appropriated* for the purposes and in the manner and subject to the charges and liabilities determined and imposed *by law*.”<sup>2</sup> The Supreme Court in *Collins v Minister for Finance*<sup>3</sup> interpreted the relationship between Article 17.2 and Article 11 as follows:

“It might be said that the Constitution provides something of a double lock on expenditure. The Dáil is not permitted to require expenditure by vote or resolution, and the Oireachtas is not permitted to enact a law providing for public expenditure except on the formal recommendation of the Government and signed by the Taoiseach (Article 17.2). Likewise, the Government is not entitled to expend monies which are not authorised “by law”, both as to purpose and manner of expenditure (Article 11). That in turn requires that there be a lawful measure passed by the Oireachtas or a vote by the Dáil authorising the expenditure concerned. Neither the Government, nor the Dáil, nor the Oireachtas can, therefore, validly authorise the expenditure of public monies without the approval of the other branch.”<sup>4</sup>

It would seem to be implicit in the Supreme Court’s characterisation of both Articles 11 and 17.2 as operating as a “double lock” that they both apply to the same category of Bills; otherwise a particular Bill could be the subject of one “lock” but not the other. It therefore follows that only Bills which involve the appropriation of public moneys by law for the purpose of Article 11 require a Money Message under Article 17.2 and *vice versa*.

### The manner in which the Oireachtas provides for expenditure in law (Article 11)

The Members of the Committee will be familiar with the manner in which the Oireachtas fulfils its role in accordance with Article 11 i.e. how it ensures that expenditure is authorised by law. One way it does so is by passing, at the end of each year, the Appropriation Act. This Act authorises the “appropriation” of money from the Central Fund (i.e. the Exchequer) towards various “services and purposes” including the resourcing of all Government departments and various public bodies and other such entities.<sup>5</sup> By way of illustration, the Appropriation Act, 2018 provides for the appropriation of a certain sum of money towards, to take just one

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<sup>2</sup> Emphasis added.

<sup>3</sup> [2016] IESC 73.

<sup>4</sup> Ibid., para. 62.

<sup>5</sup> Because the Appropriation Act is passed at the end of every calendar year and provides in law for the appropriation of public moneys towards various purposes for that particular year, the Central Fund (Permanent Provisions) Act, 1965 exists to provide a lawful basis for the appropriation of moneys towards these purposes prior to the enactment of the Appropriation Act.

example, “the salaries and expenses of the Garda Síochána, including pensions, etc.; [and] for the payment of certain witnesses’ expenses, and for payment of certain grants.” Expenditure that is authorised annually pursuant to the Appropriation Act is called “voted expenditure.”

Alternatively, the Oireachtas can authorise expenditure out of the Central Fund by way of “non-voted” expenditure. It does this by providing in a specific Acts (other than the Appropriation Act) that a certain sum can be “paid out of the Central Fund or the growing produce thereof” towards a particular purpose.<sup>6</sup> As the Supreme Court explained in *Collins*:

“The classic example [of non-voted expenditure] is that of the payment of salaries of constitutional office holders, such as judges. It is an important manifestation of the constitutional independence of such officers that their salary is not subject to annual vote but rather is fixed by statute and paid from the Central Fund. Salary is fixed therefore by enactment and is thus in accordance with Article 11 provided for by law, but it is not subject to annual estimates and the vagaries of an annual vote.”<sup>7</sup>

Thus, in short, the Oireachtas provides in law (in accordance with Article 11 of the Constitution) for the “appropriation” of moneys from the Central Fund in one of two ways i.e. through the annual enactment of the Appropriation Act (i.e. “voted expenditure”) or through the once-off enactment of an Act which provides for the allocation of moneys from the Central Fund towards a specific purpose indefinitely (i.e. “non-voted expenditure”).

A further provision which routinely appears in legislation and which is of note for present purposes is that which states that expenses incurred in the administration of a particular Act “be paid out of moneys provided by the Oireachtas.” For example, Section 5 of the Data Protection Act, 2018 states: “The expenses incurred by the [Data Protection] Commission and any Minister of the Government in the administration of this Act shall, to such an extent as may be sanctioned by the Minister for Public Expenditure and Reform, be paid out of moneys provided by the Oireachtas.” What this language means is that funds required to defray any expenses associated with implementing, in this case, the Data Protection Act, 2018 ought to come out of the moneys that have been separately allocated to the various Government Departments and the Data Protection Commission by the

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<sup>6</sup> For example, Subparagraph 9(1) of the schedule to the Fiscal Responsibility Act, 2012 provides that “the expenditure incurred by the [Irish] Fiscal [Advisory] Council in the performance of its functions shall be charged on and paid out of the Central Fund or the growing produce thereof.”

<sup>7</sup> [2016] IESC 73, para. 59.



Appropriation Act (i.e. out of voted expenditure).<sup>8</sup>

A question arises as to whether this type of “expenses provision” is necessitated by Article 11 of the Constitution. In other words, is it necessary for the Oireachtas to provide in law for the “appropriation” of money towards the payment of such expenses out of a source of funding which it has already, in accordance with Article 11, “appropriated for the purposes...determined and imposed by” the Appropriation Act? The answer would seem to be that it is not. Because, if the “purposes” for which the Appropriation Act appropriates revenue from the Central Fund are sufficiently precise to satisfy the requirements of Article 11 of the Constitution then it is difficult to see why a provision such as Section 5 of the Data Protection Act, 2018 ought to be viewed as necessitated by Article 11. And there does not appear to be any doubt that the various “appropriations” of revenue provided for by the Appropriation Act suffice by themselves to satisfy the requirements of Article 11. As Casey notes, in his book entitled *Constitutional Law in Ireland*, the Appropriation Act has provided the sole basis in law for the purpose of Article 11 for the appropriation of public moneys towards a number of purposes.<sup>9</sup>

It would therefore seem that the function of an “expenses provision” such as Section 5 of the Data Protection Act, 2018 is to simply confirm that any expenses incurred in the administration of the Act in which it appears are to be defrayed out of “voted expenditure” and, conversely, that the Act in question is not one which provides for a new basis of non-voted expenditure. Thus, rather than providing “by law” for the defrayment of expenses for the purpose of Article 11, the effect of such a provision, from the perspective of the Constitution, would appear to be to confirm that it is not a Bill of the kind contemplated by that Article.

#### Current practice in relation to Money Messages under Article 17.2

The Oireachtas’ Library and Research Service’s note entitled “Private Members’ Bills (PMBs): Admissibility, Government messages and detailed scrutiny”<sup>10</sup> states as follows:

“There are three primary categories of Money Messages, as follows:

- ‘Oireachtas’ Money Messages: These refer to voted expenditure allocated to each Department. This type applies where the incidental expenditure proposed by the PMB would come out of a

<sup>8</sup> David Gwynn Morgan, *Constitutional Law of Ireland* (Roundhall, 1990), p. 112, 113.

<sup>9</sup> James Casey, *Constitutional Law in Ireland* (3<sup>rd</sup> Ed.) (Sweet & Maxwell, 2000), p. 236.

<sup>10</sup> Available at: [https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-06-15\\_l-rs-note-private-members-bills-pmb-admissibility-government-messages-and-detailed-scrutiny\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-06-15_l-rs-note-private-members-bills-pmb-admissibility-government-messages-and-detailed-scrutiny_en.pdf) (hereafter “L&RS Note”).

Department's voted expenditure (approved annually by the Dáil);

- 'Central Fund' Money Messages: These refer to non-voted (or Exchequer) funding. This applies if the expenditure proposed is from the central fund.
- A combination of both Oireachtas and Central Fund Messages may be sought for the same PMB."<sup>11</sup>

The note then goes on to explain as follows:

"Money Messages have a standard lead in followed by the long title of the Bill. There are 3 main categories of Money Messages, as follows:

Category 1: Oireachtas

Initial Text: For the purpose of Article 17.2 of the Constitution, the Government recommend that it is expedient to authorise such payments out of moneys provided by the Oireachtas as are necessary to give effect to any Act of the present session...

Category 2: Central Fund

Initial Text: For the purpose of Article 17.2 of the Constitution, the Government recommend that it is expedient to authorise such charges on and payments out of the Central Fund or the growing produce thereof as are necessary to give effect to any Act of the present session...

Category 3: Central Fund & Oireachtas

Initial Text: For the purpose of Article 17.2 of the Constitution, the Government recommend that it is expedient to authorise such charges on and payments out of the Central Fund or the growing produce thereof and such payments out of moneys provided by the Oireachtas as are necessary to give effect to any Act of the present session..."<sup>12</sup>

Of note from the above is the fact that it is current practice that a Money Message be sought from the Government in relation to Bills which provide for expenditure not only (directly) out of the Central Fund but also out of voted expenditure i.e. that which has been already appropriated by the Oireachtas pursuant to the Appropriation Act. The Appropriation Act will, of course, itself have also been the subject of a Money Message pursuant to Article 17.2. Thus, current practice is based on the view that a Money Message is required in respect

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<sup>11</sup> Ibid., p. 9.

<sup>12</sup> Ibid., p. 19.

of a Bill which entails expenditure from a source of funding the appropriation of which will have already been the subject of a Money Message.

I would respectfully submit, however, that there is no requirement under Article 17.2 for a Money Message in respect of Bills which fall to be implemented out of moneys provided by the Oireachtas under the Appropriation Act. This is because:

- (a) the Appropriation Act is itself sufficient for the purposes of Article 11 of the Constitution to provide a basis in law for the appropriation of moneys which it prescribes, and
- (b) Articles 11 and 17.2 mirror one another with regard to the scope of their application (as is implicit in the Supreme Court’s description of the Articles as creating a “double-lock”).

The view that a Money Message is required in such circumstances may well, therefore, be motivated by the reference in Standing Order 179(2) to a “Bill which involves the appropriation of revenue or other public moneys, *including incidental expenses*.”<sup>13</sup> The significance of the additional reference to “incidental expenses” in Standing Order 179(2) is considered below. First, however, the reason why the Bill ought not to be seen as requiring a Money Message purely from the perspective of Article 17.2 of the Constitution is outlined below.

#### *Why the Bill does not require a Money Message from the perspective of the Constitution*

The first point of note in relation to the Bill is that it does not create any new category of non-voted expenditure i.e. it does not provide that any expenses occurred in its implementation be “paid out of the Central Fund or the growing produce thereof.” Secondly, the bodies that would be responsible for its implementation, on enactment, are funded by way of voted expenditure (i.e. out of moneys provided by the Oireachtas under the Appropriation Act). These bodies are, primarily, the Revenue Commissioners (which, being ultimately responsible for the activities of customs officials in Ireland, would oversee the implementation of the prohibition on the importation of “settlement goods” prescribed by section 5 of the Bill) and An Garda Síochána (who would be responsible for implementing the offences provisions contained within the Bill). In addition, insofar as it contains offences provisions, the Bill could, also fall to be implemented by the Director of Public Prosecutions and the Irish Prison Service. Finally, the Department of Foreign Affairs is given a separate role under section 4 of

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<sup>13</sup> Emphasis added.

the Bill in relation to the adoption of regulations pursuant to that section.<sup>14</sup>

The Appropriation Act provides for the appropriation of public moneys towards the “salaries and expenses” of each of these bodies each year. Therefore, for the reasons outlined above, the only Money Message required for the purpose of Article 17.2 in relation to any resources required to implement the Bill is the Money Message provided by the Government in relation to the Appropriation Act.

### Standing Order 179

Standing Order 179 provides, in relevant part, as follows:

“179. (1) A Bill which involves the appropriation of revenue or other public moneys, other than incidental expenses, shall not be initiated by any member, save a member of the Government.

(2) The Committee Stage of a Bill which involves the appropriation of revenue or other public moneys, including incidental expenses, shall not be taken unless the purpose of the appropriation has been recommended to the Dáil by a Message from the Government. The text of any Message shall be printed on the Order Paper.<sup>51</sup>

[...]

<sup>51</sup> See Article 17.2 of the Constitution.”

As footnote 51 makes clear, it is paragraph (2) of Standing Order 179 which seeks to give effect to Article 17.2 of the Constitution. The clear difference between the two provisions, however, is that Standing Order 179(2) includes a reference to “incidental expenses” whereas Article 17.2 does not. The reference to “incidental expenses” therefore appears to make Standing Order 179(2) broader in scope than Article 17.2. As to the meaning of the term “incidental expenses,” the Library and Research Service’s note referred to above states that it “generally refer[s] to ‘ancillary’ expenditure or revenue which would arise from the implementation of the proposed legislation”<sup>15</sup> and “may include the research, consultation and development of a new policy, its implementation, monitoring, a subsequent review process and possible enforcement costs.”<sup>16</sup> The authors of *Kelly: The Irish Constitution* note in this context that “[t]he inclusion of incidental expenses in the standing

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<sup>14</sup> The Bills Office has determined that the Bill requires a Money Message for the purpose of Standing Order 179(2) in part on the basis of “the regulatory role ascribed to the Minister for Foreign Affairs and Trade under section 4.”

<sup>15</sup> L&RS Note, p. 7.

<sup>16</sup> *Ibid.*, p. 8.

orders makes the potential scope of this restriction [i.e. on Bills progressing to Committee Stage] very broad, insofar as almost any legislative proposal will have incidental expenditure associated with it.”<sup>17</sup> There is, however, nothing in the report of the Oireachtas Sub-Committee responsible for recommending the insertion of this language into the Standing Orders to suggest that it intended to confer on the Government an effective veto over “almost any” Dáil Bill.<sup>18</sup> Indeed, I would respectfully submit that to interpret Standing Order 179(2) in such a way would gravely undermine the law-making function vested in the Oireachtas by the Constitution.

At this point it is worth noting that according to the preliminary assessment of the Bills Office, the Bill requires a Money Message on the following grounds:

- “(1) The regulatory role ascribed to the Minister for Foreign Affairs and Trade under section 4 and
- (2) Enforcement of the new offences created within the Bill in sections 5 to 9, inclusive.”

As noted above, the Bill potentially falls to be implemented by a number of enforcement agencies as well as by the Department of Foreign Affairs and each of these bodies receive their funding under the Appropriation Act. Crucially, however, the Bill says nothing about how the funding which these bodies receive ought to be allocated. In other words, it leaves it entirely to the discretion of the bodies concerned to determine whether they allocate a portion of the resources made available to them (under the Appropriation Act) towards the implementation of the Bill. If the fact that a publicly funded body or organ of the State could *choose* to allocate resources towards the implementation of a particular Bill is sufficient to justify a Money Message then it must be the case that almost any Bill requires one. Indeed, by this logic, it is hard to imagine why any Bill at all would not require a Money Message. Every new piece of legislation gives rise to the possibility of litigation in relation to it and the judiciary and the Courts Service must make choices as to how they deploy the resources made available to them to address any increase in volume of litigation before the courts at any one time. In short, therefore, the view that the Bill requires a Money Message under Standing Order 179(2) is based on an understanding of that Standing Order that is so broad that it cannot, in my respectful submission, be reconciled with the “sole and exclusive power of making laws for the State” vested in the Oireachtas by Article 15.2.1<sup>o</sup> of the Constitution.

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<sup>17</sup> Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5<sup>th</sup> Ed.) (Bloomsbury, 2018), para. 4.3.81.

<sup>18</sup> *First report of the Sub-Committee of the Committee on Procedure and Privileges on Reform of Dáil Procedure* (Houses of the Oireachtas, 1996), pp. 69 and 89.

For completeness, it is worth noting that it is possible to envisage a Bill which might be captured by the “incidental expenses” language in Standing Order 179(2) but not by Article 17.2 of the Constitution, as understood above. In other words, it is possible to interpret “incidental expenses” as not applying to the Bill (and by extension to almost any if not every Bill) without rendering this additional language entirely redundant. Take, for example, the Data Protection Act, 1998 which originally established the office of the Data Protection Commissioner. It provided that “there shall be a person (referred to in this Act as the Commissioner) who shall be known as [...] the Data Protection Commissioner; the Commissioner shall perform the functions conferred on him by this Act.” As to the funding for the office, the Act provided that “there shall be paid to the Commissioner, out of moneys provided by the Oireachtas, such remuneration and allowances for expenses as the Minister, with the consent of the Minister for Finance, may from time to time determine.” Thus, according to the interpretation of Article 17.2 outlined above, this Act, when a Bill, would not have required a Money Message for the purpose of Article 17.2 as it provided for the funding of the Data Protection Commissioner’s office out of moneys separately provided by the Oireachtas i.e. pursuant to the Appropriation Act and therefore pursuant to an appropriation of public moneys which the Government would have separately approved with a Money Message. However, it might well be said to give rise to incidental expense on the basis that in making *mandatory* the establishment of the Data Protection Commissioners office, which inevitably involves expense, it *required* the direction of the resources provided for by the Oireachtas towards this purpose.<sup>19</sup> This is in contrast to the Bill which, as noted, does not itself require the direction of any resources towards its implementation.

#### Summary and conclusion

In short, I would respectfully submit that the Bill should not be understood as requiring a Money Message, either on the basis of Article 17.2 alone or on the basis of Standing Order 179(2). Furthermore, insofar as Standing Order 179(2) is being interpreted and applied in a manner that significantly undermines the core law-making function of the Oireachtas, I would respectfully suggest that the members of the Committee, and the Dáil generally, may wish to consider taking steps to defend the constitutional role vested in the Oireachtas. Indeed, as the Supreme Court recently held, the Oireachtas has an obligation to uphold the Constitution in

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<sup>19</sup> It is worth noting that even where a piece of legislation imposes on a public body a mandatory obligation to carry out a specific task (i.e. by providing that it “shall” carry out that task), the courts have shown a reluctance to compel the body in question to do so on the ground that the resourcing of that body is ultimately a matter for the Oireachtas and the Government. See *Brady v Cavan County Council* [1999] 4 IR 99.

relation to the conduct of its business.<sup>20</sup>

## **Other legal questions raised in relation to the Bill**

### **Introduction**

In his speech opposing the Bill in the Dáil on the 23<sup>rd</sup> January, the Tánaiste Simon Coveney stated as follows:

“I should also mention briefly some other legal and constitutional difficulties identified with the Bill, including the use of ministerial regulations to extend the scope of the Bill, aspects of the extraterritorial application of this Bill, and constitutional difficulties around the legal certainty and capability of enforcement of some criminal offences contained in the Bill.”

He also stated:

“[If the Bill is enacted,] US companies in Ireland and Irish companies in the US could be placed in an impossible conflict of jurisdictions. Legislation was under discussion in the United States Congress in 2018 to forbid companies based in the US from co-operating with trade bans on Israel and Israeli settlements. Such proposals have enjoyed strong cross-party support in the US, so such legislation may well be passed into law. Similar legislation exists at state level in many US states. Irish missions and State agencies in the US have received queries from companies concerned about this impact of the Bill and the lack of clarity on their legal obligations.

I will address these issues in turn. The main objection put forward by the Government to the Bill has of course been what the Government alleges is its incompatibility with EU law. I will not address this issue in my submission, however, as I am aware that the members of the Committee have already received the opinions of Professor James Crawford, Michael Lynn SC and Professor Takis Tridimas which address this issue.

### **Use of Ministerial regulations to extend the scope of the Bill**

It appears that in referring to “the use of ministerial regulations to extend the scope of the Bill,” the Tánaiste was referring to the fact that section 3 “delegates” to the international courts referred to in subsections 3(1)(a) to (c) and the Minister for Foreign Affairs in subsection 3(1)(d) the function of determining which territories are occupied for the purpose of section 3. Section 3(1) states as follows:

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<sup>20</sup> See *Kerins v McGuinness and Others* [2019] IESC 11, para. 14.4.

“In this Act, “relevant occupied territory” means a territory which is occupied within the meaning of the Fourth Geneva Convention, and which has been—

- (a) confirmed as such in a decision or advisory opinion of the International Court of Justice,
- (b) confirmed as such in a decision of the International Criminal Court,
- (c) confirmed as such in a decision of an international tribunal, or
- (d) designated as such for the purposes of this Act in a regulation made by the Minister pursuant to section 4.”

It would appear that the Tánaiste was suggesting that the delegation provided for by section 3 is in breach of what is known as the “non-delegation doctrine” of constitutional law. The non-delegation doctrine, in essence, prevents the Oireachtas from delegating its law-making function to another person or body beyond the limits allowed by the Constitution.

The rationale behind section 3 is in fact to ensure the compliance of the Bill with the Constitution by giving due recognition to the primacy of the Government in the area of foreign relations, as provided for by Article 29 of the Constitution. An alternative approach would have been to define the applicability of the Bill simply as a territory which is occupied as that term is understood in international law. However, this would, in effect, have ultimately left it to the courts to interpret whether a particular territory is occupied as a matter of international law. Insofar as the question of whether a particular territory is occupied can be a heavily contested one, such an approach would have given rise to the possibility of the courts deciding that the Bill applies to a particular territory which the Government does not consider to be occupied. Such a possibility would not appear to sit well with the constitutional primacy of the Government in matters of foreign relations.

At the same time, the Minister for Foreign Affairs does not have an unfettered discretion under section 3 to apply the Bill to any territory. The fact that it provides that the Bill can only apply to a territory “which is occupied within the meaning of the Fourth Geneva Convention” ensures that if the Minister were to apply it to a territory which was very evidently not occupied, this could be challenged as being outside of the powers conferred on the Minister by section 3. This means, in essence, that while section 3 would not allow an Irish court to interpret the Bill as applying to a territory which the Government does not consider to be occupied, it prevents the Government from applying the Bill to a territory which clearly is not occupied as a matter of international law. The function delegated to the Minister for Foreign Affairs by section 3(1)(d) would therefore appear to be consistent with the approach to the non-delegation doctrine adopted by the Supreme Court in



*Cityview Press Ltd. v An Comhairle Oiliúna* where it stated that “if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body there is no unauthorised delegation of legislative power.”<sup>21</sup> It is worth also noting in this context that section 4(2) of the Bill allows either House of the Oireachtas to annul a regulation adopted by the Minister extending the application of the Bill to a particular territory.

Finally, subsections 3(1)(a) to (c) effectively operate collectively as an exception to the general entitlement of the Minister for Foreign Affairs to decide whether a particular territory is occupied. The rationale for this exception is that there is no need to leave such a decision to the Minister where an international judicial body which is recognised by the Government as competent to decide upon the status of a particular territory has decided that a particular territory is occupied. Again, the manner in which section 3(1) effectively “delegates” to these international courts the function of determining whether the Bill applies to a particular territory would appear to be permissible according to the Supreme Court’s decision in *Cityview Press* insofar as it simply involves these courts in “filling in the detail” with regard to whether a territory is, for the purpose of section 3, “occupied within the meaning of the Fourth Geneva Convention.” It is also worth noting in this context that if, following a decision by the International Court of Justice (for example) that a particular territory was occupied, that territory ceased to be occupied, it would cease to be captured by section 3 as it would no longer be “a territory which is occupied within the meaning of the Fourth Geneva Convention.”

#### *The extraterritorial application of the Bill*

Section 5 of the Bill provides as follows:

“5. (1) This section applies to—

- (a) a person who is an Irish citizen or ordinarily resident in the State,
- (b) a company incorporated under the Companies Act 2014, and
- (c) an unincorporated body whose centre of control is exercised in Ireland.

(2) A person or entity to whom this section applies, whether through an act or omission outside the State, who commits an offence under this Act is guilty of an offence and liable upon conviction to the penalty attached to the offence as if committed in Ireland.”

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<sup>21</sup> [1980] I.R. 381, p. 398.

Article 29.8 of the Constitution states: “The State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law.” Under the nationality principle (also known as the “active personality principle”), a State is entitled to exercise jurisdiction over its nationals, even when they are found outside the territory of that State.<sup>22</sup> Insofar as section 5 is limited to Irish persons (legal or natural), it would appear to be perfectly compatible with the nationality principle of international law and therefore with Article 29.8 of the Constitution.

Section 5 was inserted into the Bill on the advice of the Office of the Parliamentary Legal Adviser to the Houses of the Oireachtas primarily to address the fact that the offence of extraction of resources from a relevant occupied territory under section 9 could only, in practice, be committed extraterritorially. Insofar as section 5 applies to all offences under the Bill, it has the effect of prohibiting, for example, the importation of settlement goods by an Irish company operating in France. The Committee may therefore wish to consider an amendment to section 5 to ensure that its extraterritorial application is limited to the offence created by section 9.

I would respectfully suggest, however, that a further provision be included to ensure that the Bill applies to a person ordinarily subject to the jurisdiction of an Irish court who aids or abets (etc.) a person who is not an Irish national to, for example, sell settlement goods. The default position under common law is that the jurisdiction of a court in relation to an accessory (i.e. an “aider or abetter”) depends on whether the person who committed the principal offence is within its jurisdiction.<sup>23</sup> With regard to the Bill and the type of activity it seeks to prohibit, a situation might arise where, for example, an Irish person aids the sale of a settlement good by a person who is not within the jurisdiction of the Irish courts because the sale takes place outside of Ireland and the seller is not an Irish national. Were the Bill understood to preserve the default common law position, this would mean that the Irish accessory in this example would not be within the jurisdiction of the Irish courts in relation to the act of aiding and abetting in question.

The Committee might therefore consider applying the approach taken by section 3(6) of the Criminal Law (Extraterritorial Jurisdiction) Act, 2019 in relation to the offences of murder and manslaughter to the offences created by the Bill. Section 3(6) of that Act provides:

“Where a person aids, abets, counsels or procures another person to engage in conduct in a place outside the State that would, if it occurred in the State, constitute murder or manslaughter, and such aiding,

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<sup>22</sup> Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008), p. 88.

<sup>23</sup> Hirst, M. *Suicide in Switzerland: complicity in England?* Crim. L.R. 2009, 5, 335-339 at p. 338.

abetting, counselling or procuring occurs—

(a) in the State,

(b) on board an Irish ship,

(c) on an aircraft registered in the State, or

(d) in a place other than a place specified in paragraphs (a) to (c) and the first-mentioned person is—

(i) an Irish citizen, or

(ii) ordinarily resident in the State,

the first-mentioned person shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of murder or manslaughter, as the case may be.”

*Legal certainty of criminal offences contained in the Bill*

It is well established that “a person may be convicted of a criminal offence only if the ingredients of, and the acts constituting, the offence are specified with precision and clarity.”<sup>24</sup> The offences created by the Bill relating to settlement goods and services (sections 6 to 8) are defined by reference to the international crime of transfer of civilian population onto occupied territory. Article 49 of the Fourth Geneva Convention states (in part): “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” Similarly Article 8 of the Rome Statute of the International Criminal Court defines this crime as a war crime in the following terms: “The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.” Both Article 49 of the Fourth Geneva Convention and Article 8 of the Rome Statute are crimes under Irish law by virtue of the Geneva Conventions Acts, 1962 and 1998 and the International Criminal Court Act, 2006 respectively. The offence of extraction of resources from an occupied territory under section 9 of the Bill reflects the fact that under international law an occupying power is prohibited from appropriating property in an occupied territory save in certain exceptional circumstances.<sup>25</sup>

The Committee may wish to consider amendments to the manner in which the offences in the Bill are defined.

<sup>24</sup> *King v Attorney General* [1981] 1 I.R. 233, p. 263.

<sup>25</sup> See, for example, the war crimes under Article 8(a)(iv) of the Rome Statute of “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” and under Article 8(b)(xvi) of “Pillaging a town or place, even when taken by assault.”

Since the publication of the Bill a number of lawyers have, for example, suggested the possibility that the definition of a settlement good or service might alternatively be defined as a good or service which has been produced on a part of an occupied territory which has been unlawfully appropriated by the occupying power.

#### *Enforceability of the Bill*

As noted above, there are two enforcement authorities with primary responsibility for the implementation of the Bill – customs officers (who fall under the authority of the Revenue Commissioners) and An Garda Síochána. The role of customs officers is confined to enforcing the prohibition on settlement goods. Under the Customs Act, 2015, they would be entitled to detain, seize and forfeit such goods. This applies whether or not the consignment in question is one which has cleared customs in another EU Member State (and is therefore in free circulation within the EU). Customs officers are also not limited to executing these powers at an Irish port; they can detain and seize goods anywhere in the country.

As to the practical enforceability of the prohibition on settlement goods, it is of note that, with regard to goods originating in Israeli settlements, Irish and other EU Member States are already under an obligation to distinguish such goods from goods originating in Israel and a mechanism is in place to enable them to do so. As European Commission Vice-President Federica Mogherini recently explained in an answer to a parliamentary question in the European Parliament:

“The European Union (EU) considers that Israeli settlements in territories occupied by Israel since 1967 are illegal under international law, which constitutes an obstacle to peace and threatens a two-state solution to the Israeli-Palestinian conflict.

Products produced in the Israeli settlements located within the territories occupied by Israel since June 1967 are not entitled to benefit from preferential custom tariff treatment under the EU-Israel Association Agreement. In practice, when the proof of origin indicates that the production conferring originating status has taken place in a location within the territories brought under Israeli administration since June 1967, those goods do not benefit from trade preferences when imported into the EU.

This is ensured through a ‘Technical arrangement’ between the EU and Israel, which identifies Israeli settlements by means of postal codes. EU Member States’ customs authorities check whether the postal codes appearing on Israeli proofs of origin correspond to any of the postal codes appearing on the list of non-

eligible locations made available to them by the European Commission.”<sup>26</sup>

While this mechanism for distinguishing between settlement and non-settlement goods is not perfect and has been subject to evasion, it makes clear that this Bill, at least insofar as it relates to Israeli settlement goods, is based on a distinction which already has a basis in the EU customs law applicable to Irish customs authorities. In addition, as of November 2015, Israeli settlement goods are, under EU law, required to be labelled as such.<sup>27</sup>

The Gardaí’s role arises in relation to the criminal offences contained within the Bill. A person would only be liable to be prosecuted for *knowingly* selling or importing a settlement good, providing a settlement service or extracting resources from occupied territory. This might happen where, for example, a retailer is notified of the fact that they are selling settlement goods but continues to do so regardless.

#### The position under U.S. federal and state “anti-boycott” laws

The extent to which U.S. federal and state “anti-boycott” laws could subject U.S. companies based in Ireland or Irish companies based in the U.S. to conflicting legal obligations is considered in detail in an opinion authored by Sari Bashi, Lecturer in Law and the Robina Foundation Visiting Human Rights Fellow at Yale Law School. A copy of Ms. Bashi’s opinion is attached to this submission. In short, the opinion concludes as follows. In relation to the relevant U.S. federal law, including the Anti-Boycott Act, 2018, it notes that:

1. There would have to be a positive refusal by a company to do business with a country covered by the relevant federal law to trigger its application;
2. A positive refusal by a company to trade with Israeli settlements in order to comply with the Bill is unlikely to fall within the conduct prohibited by the relevant federal law.
3. Israeli settlements, with the exception of the Golan Heights, are not considered to be part of Israel as a matter of U.S. federal law.
4. The relevant federal law in any event provides an exception relating to compliance with a ban on the importation of goods and services originating in a boycotted country.

With regard to the relevant U.S. state law, the opinion notes:

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<sup>26</sup> “Answer given by Vice-President Mogherini on behalf of the Commission,” (13<sup>th</sup> June, 2018) E-001203/2018 (ASW).

<sup>27</sup> “Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967,” (11<sup>th</sup> November, 2015) C(2015) 7834.

1. The anti-boycott laws in 17 of the 27 States which have adopted them apply to boycotts of Israeli-controlled territory as well as Israel.
2. There is no reason to believe that merely being subject to the Bill would constitute a “boycott” under the relevant U.S. state law,
3. It is not clear that positively refusing to trade with Israeli settlements to comply with the Bill would fall within the ambit of the conduct prohibited by the relevant U.S. state law.

Perhaps the most significant point with regard to U.S. law, both federal and state, is that it requires an active refusal to trade to trigger its application. With the exception of AirBnB, there is surely no U.S. multinational operating in Ireland which engages in any activity which would be prohibited by the Bill. Concerns about a conflict between U.S. law and the Bill would therefore seem to be largely academic.

With regard to AirBnB, in November, 2018 it announced its decision to withdraw listings of accommodation from Israeli settlements.<sup>28</sup> It was subsequently reported that it reversed this decision by way of a settlement of a law-suit brought against it in the U.S. Federal courts which argued that its withdrawal from the settlements violated U.S. housing discrimination law.<sup>29</sup> A group of Palestinians have counter-claimed in these proceedings on a number of grounds including that the existence of the settlements themselves constitute a war crime.<sup>30</sup> These proceedings remain ongoing.

## **Conclusion**

I hope that this submission is of assistance to the Select Committee on Foreign Affairs and Trade and Defence in its consideration of the legal and practical issues raised by the Bill. I am more than happy to make myself available to the Committee to address these issues in further detail. Finally, I would respectfully urge the Committee to support the Bill both as a modest measure which seeks to uphold international law and as a step towards ending the suffering of the Palestinian people brought about by the near fifty-two year occupation of their land by the State of Israel.

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<sup>28</sup> See AirBnB, “Listings in Disputed Regions” (19<sup>th</sup> November, 2018), available at <https://press.airbnb.com/listings-in-disputed-regions/>.

<sup>29</sup> Reuters, “Airbnb reverses on delisting Israeli settlements, won't profit off West Bank” (9<sup>th</sup> April, 2019), available at <https://www.reuters.com/article/us-israel-palestinians-airbnb/airbnb-reverses-on-delisting-israeli-settlements-wont-profit-off-west-bank-idUSKCN1RL2QM>.

<sup>30</sup> The Nation, “In a First, Palestinians Challenge Israel’s Settlement Enterprise – in a US Court” (18<sup>th</sup> March, 2019), available at <https://www.thenation.com/article/palestinians-legal-challenge-airbnb-settlers/>.