Opinion in relation to Control of Economic Activity (Occupied Territories) Bill, 2018

Introduction

This opinion relates primarily to the compatibility of the Control of Economic Activity (Occupied Territories) Bill, 2018 (the "Occupied Territories Bill"), and in particular sections 6, 7 and 8 thereof, with EU law. It is written as a supplement to the opinions of Michael Lynn SC and Professor James Crawford, both of which relate to the extent to which a Member State of the EU can, as a matter of EU law, unilaterally ban the importation of goods from Israeli settlements established on occupied Palestinian territory ('Israeli settlements').

It also addresses the practical enforceability of the provisions of the Occupied Territories Bill which relate to goods produced in Israeli settlements insofar as many, if not most, of these are likely to enter Ireland as goods in free circulation with the EU having already cleared customs in another Member State.

An Overview of the relevant EU law

Sections 6 and 7 of the Occupied Territories Bill

Sections 6 and 7 of the Occupied Territories Bill potentially relate to two categories of goods:

(a) goods which arrive in Ireland from a 'third country' i.e. a State that is not a member of the EU, or

(b) goods which clear customs in a Member State of the EU and then subsequently arrive in Ireland.

In relation to goods which arrive in Ireland from a third country, Article 1 of EU Regulation 2015/478 provides that such goods "shall be freely imported into the Union and accordingly […] shall not be subject to any quantitative restrictions." By way of exception to that general rule however, Article 24 of the same Regulation provides:

> "Without prejudice to other Union provisions, this Regulation shall not preclude the adoption or application by Member States of:
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> (a) prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property;"

In relation to goods which arrive in Ireland after having cleared customs in another Member State, Article 34 of the Treaty on the Functioning of the European ('TFEU') provides that "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." According to Article 29 TFEU:

> "Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges."

Thus, goods from 'third countries' within free circulation in the EU (by virtue of having cleared customs in a Member State) are covered by the prohibition on quantitative restrictions in Article 34 TFEU. That also means however that Article 36 TFEU applies in relation to such goods. Article 36 provides:

> "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security [and various other grounds not relevant for present purposes]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Section 8 of the Occupied Territories Bill

By virtue of Articles 52 and 61 TFEU, the EU freedoms of establishment and to provide services, which are relevant to the prohibition on providing or assisting the provision of a "settlement service" (as defined) in section 8 of the Occupied Territories Bill, may also be restricted on the grounds referred to above.[1]

Summary

It is possible for an EU Member State to unilaterally prohibit the importation of goods either from a third country or in free circulation within the EU provided such a prohibition can be justified on the various grounds identified in EU law. The same is true in relation to the restriction on the provision of services. The ground of relevance in relation to the Occupied Territories Bill is the 'public policy' ground.

The Public Policy Exemption in EU Law

General

It is well established that the 'public policy' exemption in EU law is construed as meaning something far narrower than the words 'public policy' might suggest. The European courts have interpreted this exemption as permitting only those measures which can be said to serve a fundamental interest of the State. For example in the leading case of *R v Thompson*,[2] the European Court of Justice held that a prohibition on the export (similar principles to those which apply to the prohibition of imports exports also apply to the prohibition of exports) of certain coins was justified on public policy grounds as it "stems from the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the State."[3] The question then is whether the Occupied Territories Bill can be said to serve a fundamental interest of the Irish State. Three possible fundamental State interests are considered below.

The Occupied Territories Bill and the fundamental interests of the Irish State

A. Compliance by Ireland with its obligations under international law

It is without doubt a fundamental interest of a State to be able to adopt measures it is required to adopt in order to ensure compliance with its obligations under international law. As noted by the

[1] See also Article 16 of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market.
[2] Case 7/78.
[3] Para. 34.

International Court of Justice in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory[4] ('Advisory Opinion on the Wall'), 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."[5]

Therefore, if it could be established that these twin duties require States to prohibit imports from Israeli settlements, this would clearly provide Ireland with a basis under EU law to enact the Occupied Territories Bill. There is however at least significant doubt as to whether the duties of non-recognition and non-assistance require States to take such action. In his opinion, Professor James Crawford concludes that they do not.

Citing Yaël Ronen, Professor Crawford further notes that "recognition (or non-recognition) is 'a largely legally unregulated discretion of State and ... a considerable degree of dealings can exist between a State and another authority without the recognition of the one by the other and without implying recognition either.'"[6] Later, in relation to the EU law public policy exemption he states that "The obligation to comply with the requirements of international law and the obligation of non-recognition are matters of executive prerogative which fall within the grounds of a 'public policy' decision."[7]

It would therefore appear that his view, in effect, is that it is open to a Member State of the EU to interpret the obligation of non-recognition as requiring a State not to trade with Israeli settlements and to justify action taken on foot of this interpretation on the basis that a State has a fundamental interest in complying with its obligations under international law (as it interprets them to be). Insofar as the Irish Government does not interpret the obligation of non-recognition (and the related obligation of non-assistance) as requiring it to prohibit the importation of products produced in Israeli settlements, this basis is of only academic significance.

B. The observance of international law by States other than Ireland

There is at least a strong argument to be made that States have a fundamental interest in the observance by *other* States of international law, or at least of those obligations under international law which are owed to the international community as a whole (which are known as 'erga omnes' obligations). In its Advisory Opinion on the Wall, the ICJ held that:

> The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." […] The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.[8]

[4] (2004) ICJ Rep 136.
[5] Para. 159.
[6] Para. 80, citing Yaël Ronen, 'Illegal Occupation and its Consequences' (2008) 41(1&2) Israeli Law Review 201, 570.
[7] Para. 125.
[8] Para. 155.

Small States like Ireland depend for their very survival on the observance by other States of the fundamental norms of international law. A breach of any of those norms by any one State, and particularly one which is carried out in flagrant contempt for the norm in question, undermines the integrity of the international legal system and in doing so poses a threat, albeit indirectly, to States which rely on international law for their survival.

Ireland could well take the view that, while not prohibited under international law, the provision of a market for products produced in Israeli settlements entails the provision of economic support for and (contrary to the State's explicit position on Israeli settlements) tacit approval of the ongoing breach of international law which the existence and continued expansion of these settlements involves. There is nothing in the case law of the Court of Justice of the EU (or that of its predecessor) to suggest that the Court would not accept this position and accordingly hold that the enactment of the Occupied Territories Bill "stems from" (to use the language of *R v Thompson*) the State's fundamental interest in the observance by its fellow members of the international community of the norms of international law which are of concern to all States.

This appears to be the basis on which Michael Lynn SC takes the view that a prohibition on the importation of goods produced in Israeli settlements would be lawful as a matter of EU law insofar as he states:

> "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."[9]

C. The observance of Ireland's domestic law

The transfer by an 'Occupying Power' of parts of its civilian population onto territory it occupies is not just a violation of international law. It amounts to a violation of Irish domestic criminal law, no matter where in the world it takes place and no matter by whom it is committed. In fact, it violates two separate pieces of Irish legislation.

Firstly, Section 3(1) of the Geneva Conventions Act, 1962 (the '1962 Act'), as amended by Section 3 of the Geneva Conventions (Amendment) Act, 1998 (the '1998 Act'), provides:

> "Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the Scheduled Conventions or Protocol I shall be guilty of an offence […]."

According to the definitions section in the 1962 Act (as inserted by section 2 of the 1998 Act), "'Protocol I' means the Protocol, additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted at Geneva on 8 June 1977, the text of which is set out in the Fifth Schedule to this Act." According to paragraph 4 of Article 84 of 'Protocol I',

> "4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

[9] Para. 32.

(a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies […] in violation of Article 49 of the Fourth Convention;"

The International Criminal Court Act, 2006 (the '2006 Act') contains a similar provision. According to section 7(1) of that Act,

> "Any person who commits genocide, a crime against humanity or a war crime is guilty of an offence."

According to section 6(1) of the 2006 Act, "'war crime' means any of the acts specified in Article 8.2 [of the Rome Statute of the International Criminal Court] (except subparagraph (b)(xx))." Among the acts specified in Article 8.2 of the Rome Statute of the International Criminal Court is that specified in subparagraph (b)(viii) of Article 8.2, namely:

> "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies."

According to section 12 of the 2006 Act,

> "(1) An Irish national who does an act outside the State that, if done within it, would constitute an ICC offence[10] or an offence under section 11 (1) is guilty of that offence and liable to the penalty provided for it.
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> (2) Subsection (1) also applies in relation to a person of any other nationality who does an act outside the State that, if done within it, would constitute both—
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> (a) a war crime under subparagraph (a) (grave breaches of the Geneva Conventions) or (b) (other specified serious violations of the laws and customs applicable in international armed conflict) of Article 8.2, and
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> (b) an offence under section 3 (grave breaches of the Geneva Conventions and Protocol I thereto) of the Geneva Conventions Act 1962."

Thus, the offence contained in Article 8.2(b)(viii) of the Rome Statute is covered by the more extensive universal jurisdiction provision contained section 12(2) of the 2006 Act.

The effect of section 3 of the 1962 Act and section 12 of the 2006 Act, is that those individuals who participate in the process of transferring Israeli civilians onto occupied Palestinian territory (by authorising settlement construction etc.) breach section 3 of the 1962 Act and sections 7 and 8 of the 2006 Act (section 8 of the 2006 Act relates to secondary criminal liability).

It is important in this context to emphasise the distinction between a State's 'prescriptive jurisdiction' and its 'enforcement jurisdiction'.[11] A State's prescriptive jurisdiction refers to its entitlement under public international law to legislate. The general rule is that a State's prescriptive jurisdiction is territorially limited. States, in other words, can only adopt laws which concern activity which takes place on their territory. There are, however, a number of exceptions to this general territorial principle of prescriptive jurisdiction. One of those exceptions is the principle of 'universal jurisdiction' which applies in relation to certain crimes under international law including war crimes, crimes against

[10] According to section 9(1) of the 2006 Act, the term "'ICC Offence' means genocide, a crime against humanity, a war crime or an ancillary offence."
[11] See generally Ryngaert, Cedric, "Jurisdiction in International Law" (Oxford University Press, 2008).

humanity, the crime of genocide and the crime of torture. In essence, the principle of universal jurisdiction, as the term suggests, entitles States to criminalise these acts no matter where in the world they take place and no matter by whom they are committed.

A State's enforcement jurisdiction on the other hand relates to the extent to which a State is permitted to enforce its own laws extraterritorially. The enforcement jurisdiction of a State and its prescriptive jurisdiction are not entirely coterminous. In the case of crimes to which the principle of universal (prescriptive) jurisdiction applies, the enforcement jurisdiction of a State remains territorial. In other words, hypothetically speaking, were Ireland to send members of An Garda Síochána to Israel-Palestine to attempt to enforce the ongoing breach being committed by Israel (or, more accurately, by various individual officials within the Israeli government) of the 1962 and 2006 Acts, this would amount to an overreach of Ireland's enforcement jurisdiction.

The fact remains however that Ireland is entitled, as a matter of international law, to apply its domestic criminal law in relation to the commission of war crimes by any persons anywhere in the world. It has chosen to do so by way of two separate pieces of legislation and therefore it is no more legally controversial to state that Israeli settlements breach Irish domestic law than it is to say that they breach international law. The fact that there are limitations (legal as well as practical) on the ability of the State to enforce this law does nothing to undermine this position.

It is without doubt the case that a State has a fundamental interest in enforcing its own domestic law. Legislating and enforcing legislation is indeed one of the core functions of a State. The Occupied Territories Bill could well be understood as an attempt by Ireland to take steps towards enforcing the 1962 and 2006 Acts and, at the very least, to ensure that there is no activity that takes place on Irish territory which in any way contributes to their breach. The fact that the Bill is not specific to any one situation and can be applied to any occupied territory only serves to reinforce this understanding of the Bill. In other words, it could well be understood by the Court of Justice of the EU as stemming from the Irish State's fundamental interest in enforcing its own domestic law.

Conclusion

In the absence of a decision of the European courts on the extent to which a Member State is entitled as a matter of EU law to unilaterally ban the importation of goods or the provision of services produced in or provided from settlements illegally established on occupied territory, it is simply not possible to state definitively whether a Member State can or cannot do so. There are however three separate bases (Grounds 'A,' 'B' and 'C' outlined above) on which, at the very least, a strong argument can be made that States are permitted to do so. Until the matter is decided by the Court of Justice of the EU, that is as much as can be said.

The Practical Enforceability of a Ban on Israeli Settlement Goods

Let it be assumed for present purposes that the vast majority of Israeli settlement goods arrive in Ireland having cleared customs in another Member State. Such goods would be within free circulation within the EU (as per Article 29 TFEU outlined above) and would not therefore be subject to customs checks. Practically speaking, therefore, section 6(3) of the Occupied Territories Bill, which in effect enables Irish customs officers to prevent the importation of "settlement goods," as defined, would be of limited practical application insofar as goods in free circulation within the EU are not subject to

customs checks. Sections 6(1) and (2) and section 7 of the Occupied Territories Bill would, however, remain effective in practice in relation to goods already within free circulation within the EU. Collectively, they make it an offence to import or sell "settlement goods" (or to assist someone in doing so or to attempt to do so). Their effectiveness is not conditional upon the involvement of Irish customs officers. Rather, these provisions would, in theory, be enforced by the Gardaí.

It should be emphasised that in practice nobody would ever likely be prosecuted under these provisions. It is a fundamental principle of criminal law that a person cannot commit a criminal offence without having the requisite criminal intent (or 'mens rea') and therefore a prosecution would only ever arise if there was evidence that a person consciously and deliberately, for example, sold settlement goods. If, say, a supermarket was (presumably inadvertently) selling settlement goods, the enforcement of sections 6 and 7 would, in practice, take place by an NGO like Sadaka approaching the supermarket in question and advising it that the goods in question are settlement goods for the purpose of the Occupied Territories Bill and asking that it cease to continue stocking these goods. If in the unlikely event that it refused to do so it would then be open to Sadaka to approach the Gardaí. There are a large number of criminal offences on the statute books which rarely if ever come before the Irish courts simply because they are effective in deterring the conduct which they prohibit. It is anticipated that this is what would happen in relation to the offences contained in the Occupied Territories Bill if it is enacted.

For the sake of completeness, it is worth noting that, insofar as it remains a possibility that Israeli settlement goods could be imported into Ireland without first clearing customs in another Member State, it is worth retaining section 6(3) of the Occupied Territories Bill.

If any queries arise in relation to any of the above, I am contactable at the below details.

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