LEGAL OPINION

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

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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)[1] 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[2] inter alia by the *de facto* acquisition of territory by the use of force (emphasized again in the UNSC Resolution 2334)[3]. The peremptory character of this norm was suggested by some states in the development of the ILC Articles on the Law of Treaties[4] and affirmed by the ILC when drafting the Articles on State Responsibility[5]. 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[6] in his separate *Wall Opinion.*

Second, the ILC[7] 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)[8]. Fundamental norms are argued (among others by Judge Nieto-Navia[9] and

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

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

3 SC Res. 2334, 23 December 2016.

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

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

6 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.

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

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

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

Hannikainen[10]) 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[11] - is referred to in the ICJ *Wall Opinion*[12], in numerous UNSC Resolutions[13], and by the ICRC[14]. 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[15], Judge Weeramantry[16] and Judge Koroma[17] 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[18]. Again, the draft ILC Articles on State Responsibility have noted the widespread agreement that the prohibition of Apartheid constitutes a *jus cogens* norm[19]. 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.

[10] Hannikainen, *Peremptory norms (jus cogens) in international law*, 1988, Finnish Lawyers Pub. Co., at 605-606.

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

[12] 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.

[13] 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.

[14] Conference of the High Contracting Parties to the Fourth Geneva Convention: statement by the International Committee of the Red Cross, 05 December 2001.

[15] Declaration of President Bedjaoui, *Legality of the threat or use of nuclear weapons*, ICJ, 8 July 1996, at para. 21.

[16] Dissenting Opinion of Judge Weeramantry, *Legality of the threat or use of nuclear weapons*, ICJ, 8 July 1996, at para 10.

[17] Dissenting Opinion of Judge Koroma, *Legality of the threat or use of nuclear weapons*, ICJ, 8 July 1996, at 574.

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

[19] 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*"[20]. Trading with illegal settlements gives those settlements economic support. This seems to constitute concrete help to the maintenance of the unlawful situation[21]. Indicative of the fact that trade helps to maintain Israeli violations is, for example, the UN Office of the High Commission for Human Rights' recognition of the encouragement of economic activity in settlements as a reason for settlement expansion[22]. This was also confirmed by the Human Right Council[23].

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*"[24]. 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[25]. 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*[26], the Supreme Court ruled that the security needs of the

[20] 1994 Marrakesh Agreement Establishing the World Trade Organization, no. 31874.

[21] Aust, *Complicity and the Law of State Responsibility*, 2011, Cambridge University Press, at 339.

[22] United Nations Human Rights Office of the High Commissioner, *Israeli Settlements in the Occupied Palestinian Territory*, 2016, at 3.

[23] 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.

[24] 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.

[25] 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.

[26] 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[27] 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.

[27] 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[28] 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[29] 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[30] had already called upon all states "*not to provide Israel with any assistance to be used specifically in connection with settlements in occupied territories"*.

[28] 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.

[29] SC Res. 2334, 23 December 2016.

[30] 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*"[31]. 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[32].

More strongly, in *Regulation 2015/478 of the European Parliament and of the Council*, the Union specifies common rules for imports[33]. 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[34] 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[35] 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[36] in US-Tyres. And third, a ban would not significantly impact imports or exports.

[31] Treaty on the Functioning of the European Union, 2012, at Article 207.1.

[32] Treaty on European Union, 2012, Article 21.

[33] European Parliament and Council, *Regulation on Common Rules for Imports,* 11 March 2015, Regulation 2015/478, L83/16.

[34] 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.

[35] 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.

[36] 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[37] 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[38], the Court of Justice of the European Union (CJEU) shall rule on actions brought by a member state. Under TEU Section 5 Article 253[39], 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[40] 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.

[37] Parliamentary questions: Answer given by Vice-President Katainen on behalf of the Commission, 05 March 2018.

[38] Treaty on European Union, 2012, Article 19.3.

[39] Treaty on European Union, 2012, Article 253.

[40] 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)[41].

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"[42]. An assessment of the negotiation history[43] 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[44] would include the safeguarding of public morals. Security exceptions under Article XXI[45] 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.

[41] 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.

[42] 1994 General Agreement on Tariffs and Trade, at Article XXVI:5.(a).

[43] 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.

[44] 1994 General Agreement on Tariffs and Trade, at Article XX.

[45] 1994 General Agreement on Tariffs and Trade, at Article XXI.