LAWYERS FOR PALESTINIAN HUMAN RIGHTS

LPHR Q&A on Ireland's Control of Economic Activity (Occupied Territories) Bill in the context of imminent formal annexation and ongoing settlement expansion

In the context of the imminent annexation of significant parts of the occupied West Bank from 1 July 2020, and ongoing settlement expansion, it is timely to provide specific focus on a ground-breaking bill progressing before the Irish parliament which has the very significant object of banning specific economic activity in relation to occupied territory.

The Irish Bill, if passed into legislation, would be a landmark moment in the domestic application of international law duties in the context of Israel's ongoing fifty-three-year military occupation of Palestinian territory. It will demonstrate that a state is willing and able to fully implement its international law duties to ensure that it is not directly, or indirectly, involved in providing economic support to illegal settlements in occupied territory.

What is the Control of Economic Activity (Occupied Territories) Bill?

The Control of Economic Activity (Occupied Territories) Bill 2018 (**the Bill**) is currently before the Irish parliament, having first been introduced in the Irish Senate in January 2018. The Bill makes a criminal offence of (i) the importation or sale of goods produced in settlements illegally established in an occupied territory; (ii) the provision of certain services; and (iii) the extraction of resources from an occupied territory.

For the purposes of the Bill, the 'relevant occupied territory' is defined under Section 3 as a territory which is occupied within the meaning of the Fourth Geneva Convention, and which has been confirmed as such by the International Court of Justice, the International Criminal Court, or an International Tribunal; or which has been designated as such for the purposes of the Act in a regulation made by the Irish Minister of Foreign Affairs & Trade, subject to the approval of both Houses of the Irish Parliament.

What offences are created under the Bill?

Sections 6 to 9 of the Bill provide for a range of criminal offences. Under Section 6, it is an offence for a person to import or attempt to import settlement goods or otherwise to assist another person in doing so. Section 7 provides for a ban on the sale or an attempt to sell settlement goods either directly or in assisting another person to do so. Section 8 makes it an offence to provide or attempt to provide a settlement service or to assist another in doing so. Finally, Section 9 makes it an offence for a person to engage or attempt to engage in the extraction of resources from a relevant occupied territory or its associated territorial waters, or otherwise to assist another in doing so.

Who does the Bill apply to?

Section 5 of the Bill provides that the Bill relates to acts or omissions outside the state, and that it 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; c) an unincorporated body whose centre of control is exercised in Ireland. A person or entity in one of these categories who commits an offence under the Bill is guilty of an offence and liable upon conviction to the relevant penalty.

What are the penalties imposed under the Bill and are there defences available?

Section 10 (1) provides for the penalties to which a person or corporate entity is liable.
A person who is found guilty of an offence under the Bill is liable (a) on summary conviction to a class A fine or to imprisonment for a term not exceeding 5 years or to both, and (b) on conviction on indictment to a fine not exceeding €250,000 or imprisonment for a term not exceeding 5 years or both.

Under Section 11 of the Bill, it shall be a defence for a person charged with an offence under the Bill where they can show that the alleged offence was carried out with the consent of an entity or form of authority recognised by the State as being the legitimate authority over the relevant occupied territory. Where it is possible to show that the goods or service in question were not produced within a relevant occupied territory or by an illegal settler, this shall also be considered a defence. Finally, it shall be a defence if it can be shown that the natural resources in question do not originate within a relevant occupied territory.

What stage is the Bill at presently?

The Bill has now passed eight out of ten stages required for the approval of legislation in the Oireachtas. It has passed by majorities in both the upper and lower house of Parliament. The Bill did lapse in the wake of the 2020 Irish general election. The agreement for the new Irish government on 15 June 2020 has no express commitment to the bill, but notably the language of the bill is not inconsistent with the resumption of the bill's progress. Irish Senator, Frances Black, who has led the bill, issued a positive statement following the agreement's publication.

Is the Bill compatible with EU law and international law?

Under the Treaty of the Functioning of the EU (**TFEU**), trade rules are generally uniform across all EU Member States: the EU is granted exclusive competence on trade policy. However, Article 36 of the TFEU provides for exceptions to "*prohibitions or restrictions on imports, exports or goods in tranist*" where they can be "*justified on grounds of public morality, public policy or public security, and the protection of health and life of humans.*" EU Regulation 2015/478, which specifically applies detailed regulations to EU Member States for imports of products originating in third countries, provides for the same range of exceptions at its Article 24.

One of the leading authorities on EU law, Professor Takis Tridimas of King's College London, has concluded 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. Accordingly, insofar as the Bill seeks to promote both of these objectives, it is compatible with this exceptional "public policy" basis provided by EU law for unilateral interference with trade by a Member State.

The legal basis of the bill was provided by two pre-existing legal opinions published in 2012: one by Michael Lynn, Senior Counsel in Ireland, and one by Professor James Crawford, currently a judge at the International Court of Justice. Both legal opinions assert it is legally permissible for a state to ban products originating from settlements. Michael Lynn SC has subsequently provided evidence to the Irish parliament in a submission dated 24 May 2019, concluding:

> *"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 [European] Court of Justice take a different view, finding the Bill incompatible with EU law, and the Government failed to take the necessary corrective action."*

Michael Lynn SC also materially addresses the significant interplay between international law obligations owed by States and permissible acts under EU law, quoting from his 2012 opinion:

> *"[…] 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 [...]*
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> *"[W]hilst 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."*

On the other hand, Ireland's Attorney General has provided legal advice to the government of Ireland that asserts the Bill is contrary to EU law. According to Foreign Minister, Simon Coveney, the Attorney General's legal advice anticipates that the legislation would be met by legal challenge by either the European Commission or a private legal action, and that the aforementioned 'Article 36 exception' will not be broadly interpreted by the European Court of Justice to permit encroachment on the European Commission's exclusive competence on trade.

What are the strengths and challenges of the Bill in regard to criminalising offences?

The Bill notably establishes criminal offences for the prohibited acts. No *mens rea* (mental element) is specified for any of the offences, suggesting that even the unintentional import of settlements goods will constitute a criminal offence.

Criminalising an offence has the effect of providing an important deterrent signal to the public that an act has sufficient gravity to merit strong punishment by the State. There can, however, be possible undesirable consequences from an enforceability perspective, that should be noted.

A criminal offence requires a higher standard of proof, "*beyond reasonable doubt*", than the civil offence standard of proof "*on the balance of probabilities*". It is possible that the higher standard of proof may inhibit maximal enforcement, due to the increased resources required by investigating authorities to bring a successful investigation and prosecution. It will be interesting to monitor whether or not this becomes an issue should the Bill pass into law.

The Bill is significantly one of few examples of legislative activity to emerge in the nascent area of *business and human rights*. The evolution of application of international human rights standards, such as the UN Guiding Principles on Business and Human Rights, has importantly began to prompt some examples worldwide of legislative implementation of civil measures, in contrast to criminal penalties, to achieve effective full compliance from corporate actors.

The French Corporate Duty of Vigilance Law, adopted in 2017, is one such recent example. The law imposes a civil penalty or civil liability action against companies that fail to identify and prevent adverse human rights and environmental impacts resulting from their activities (both direct and indirect). The French legislation thus adopts a civil law approach to achieve its objective of promoting effective corporate compliance with social responsibilities.

The Duty of Vigilance law is one of few examples that could be considered analogous to the Bill in so far as both aim to regulate conduct and enforce compliance in relation to fundamental standards. Notwithstanding whether a civil or criminal law approach is taken, it is extremely encouraging to observe that significant legislative action is increasingly being initiated to give effect to international law obligations in the critical area of human rights protection.

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