

Re: Support for the Control of Economic Activity (Occupied Territories) Bill, and Ireland's Obligations under International Law

Date: 5 June 2020

Department of the Taoiseach,
Government Buildings,
Merrion Street Upper,
Dublin 2,
D02 R583,
Ireland.

An Taoiseach, Leo Varadkar,

We are writing to you in reference to the ongoing negotiations in formulating an Irish Government. I understand that in these negotiations the Control of Economic Activity (Occupied Territories) Bill has emerged as a sticking point; as such, and on behalf of Al-Haq, we are asking you to reconsider your party's position on the Bill.

The place of Ireland and the Irish people in the international sphere has been laudable: opposing apartheid in South Africa;¹ the introduction of the Nuclear Non-Proliferation Treaty;² unwavering contributions towards peace and peacekeeping, including in southern Lebanon (UNIFIL) and the occupied Syrian Golan (UNDOF);³ and a constant support for the Palestinian people.⁴ Ireland's commitment to combatting global "injustice, oppression or want",⁵ its championing of international law and human rights in the face of the ongoing annexation of East Jerusalem, and the impending annexation of vast swaths of the occupied West Bank,⁶ and

¹ Embassy of Ireland, South Africa, South Africa & Irish Relations, available at: <https://www.dfa.ie/irish-embassy/south-africa/our-role/irish-relations/>; TheJournal.ie, 'This day 30 years ago the Dunnes Stores anti-apartheid strike began' (19 July 2014), available at: <https://www.thejournal.ie/30-years-dunnes-stores-strike-1579724-Jul2014/>.

² Permanent Mission of Ireland to the UN, Disarmament and Non-Proliferation, available at: [https://www.dfa.ie/pm/un/newyork/peace-and-security/disarmament-and-non-proliferation/#:~:text=Ireland%20was%20part%20of%20a,and%20possession%20of%20nuclear%20weapons.](https://www.dfa.ie/pm/un/newyork/peace-and-security/disarmament-and-non-proliferation/#:~:text=Ireland%20was%20part%20of%20a,and%20possession%20of%20nuclear%20weapons.;); Irish Times, 'How Ireland sowed seeds for nuclear disarmament' (14 April 2010), available at: <https://www.irishtimes.com/opinion/how-ireland-sowed-seeds-for-nuclear-disarmament-1.652042>.

³ See throughout, the "Symposium Issue on Law and Peacekeeping" in Siobhán Mullaly and Fiona de Londras (eds) *The Irish Yearbook of International Law, Volume 13, 2018* (Hart Publishing, 2020); Irish Times, 'The Irish Times view of Ireland's peacekeeping work: a record to be proud of' (10 January 2019), available at: <https://www.irishtimes.com/opinion/editorial/the-irish-times-view-on-ireland-s-peacekeeping-work-a-record-to-be-proud-of-1.3752737>.

⁴ Foreign Affairs, 'Why the Irish Support Palestine' (23 June 2010), available at: <https://foreignpolicy.com/2010/06/23/why-the-irish-support-palestine-2/>.

⁵ Department of Foreign Affairs, *Challenges and Opportunities Abroad: White Paper on Foreign Policy 1996*, 15-17.

⁶ TheJournal.ie, 'Simon Coveney condemns Israeli deal to approve Trump's plan for annexation of parts of West Bank' (23 April 2020), available at: <https://www.thejournal.ie/israel-west-bank-ireland-5082062-Apr2020/>.



its support for basic rights for Palestinians,⁷ which for have too long been denied, has made it clear that Ireland stands as a friend to the Palestinian people.

We also note Ireland's ongoing campaign for membership to the United Nations Security Council during its 2021-22 term;⁸ as the international body with primary responsibility for the maintenance of international peace and security, including in Palestine.⁹ The Security Council has condemned, in resolution 2334 (2016) "all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including *inter alia*, the construction and expansion of settlements, transfer of Israeli settlers ... in violation of international humanitarian law and relevant resolution",¹⁰ and has moreover called "upon all States ... to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967".¹¹ The Occupied Territories Bill represents precisely the courageous and innovative leadership necessary, and unfortunately solely absent, from the Council. Should Fine Gael support, and allow for, the enactment of the Bill by the next government, in line with its obligations under resolution 2334 (2016) and general international law, Ireland would signal to the international community that it is willing to give action to the otherwise empty promises and platitudes of support for Palestinian rights, and self-determination, which too often supplant positive and effective steps.

We are also aware of certain legal concerns regarding the Bill.¹² On the question of compatibility with European Union law, we would direct you to the legal opinion of Professor James Crawford, currently serving as a Judge of the International Court of Justice, who notes that "A full ban [on products originating from illegal Israeli settlements], however, could only be based on EC Regulation 260/2009 and considerations of public policy, *which remain within the purview of the individual EC Member States: thus the decision to extend such a ban would need to be made by each Member individually*" (emphasis added).¹³ Professor Crawford further noted that "There do not appear to be any EC laws which could be breached by a Member State taking the decision to ban the import of settlement produce on public policy grounds."¹⁴ This

⁷ RTÉ, 'Tánaiste announces €8.8m water plant investment in Gaza' (3 December 2019), available at: <https://www.rte.ie/news/world/2019/1203/1096778-tanaiste-gaza/>; Irish Times, 'Coveney announces increase in Irish funding for Palestinians' (3 December 2019), available at: <https://www.irishtimes.com/news/politics/coveney-announces-increase-in-irish-funding-for-palestinians-1.4103813>.

⁸ Department of Foreign Affairs, *Ireland: United Nations Security Council 2021-2022* (2018).

⁹ See Al-Haq, Al-Haq's Open Letter to the UN Security Council on Israel's Plans to Annex the West Bank (23 April 2020), available at: <http://www.alhaq.org/advocacy/16769.html>.

¹⁰ UN Security Council Resolution 2334 (23 December 2016) UN Doc S/RES/2334, Preamble, para 1.

¹¹ *Ibid.*, para 5.

¹² Independent, "'Enforcing draft law on Israeli goods would be impractical," says AG' (4 June 2020), available at: <https://www.independent.ie/irish-news/politics/enforcing-draft-law-on-israeli-goods-would-be-impractical-says-ag-39258885.html>.

¹³ James Crawford, 'Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories' (24 January 2012) para 138, available at:

<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

¹⁴ *Ibid.*, para 125.



is consistent with the analysis of Professor Takis Tridimas, a leading scholar of EU law at King's College London.¹⁵

Similarly, there does not appear to be any challenge for the Bill within Ireland's constitutional framework. Mindful of the remarks of the Tánaiste in Dáil Éireann on 23 January 2019 regarding "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,"¹⁶ our legal team, which includes Irish members of staff, have identified no such issues in their analysis of the Bill.

Moreover, the Bill is appropriately precise and thus poses no issues under the principle of legal certainty; as noted by Kenny J in *King v Attorney General*, "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".¹⁷ In this regard it is necessary to stress that terms such as "resources", "settlement goods", and "settlement services" are explicitly defined within Article 2 of the Bill, whereas "relevant occupied territory" is defined within Article 3, with explicit reference to the authoritative assessments of the International Court of Justice and International Criminal Court, as well as other international tribunals where relevant, and the assessment of the Minister for Foreign Affairs and Trade.

Finally, it is necessary to underscore that, as a matter of law, the provisions of the Bill do not constitute a positive sanction upon the State of Israel; in line with the *Draft Articles on State Responsibility for Internationally Wrongful Acts*, which are of customary value, Ireland is under an obligation of non-recognition of unlawful situations, such as that of Israel's illegal settlement enterprise, and to ensure that it does not contribute towards its maintenance.¹⁸ As such, the Bill will, in effect, rectify an ongoing breach of Ireland's State obligations and so must be enacted as soon as possible.

We remain at your disposal should you have any further questions regarding Ireland's obligations under international law and urge you and your party to ensure that Ireland meets these obligations.

Yours sincerely,

¹⁵ See TheJournal.ie, 'New legal advice finds Occupied Territories Bill is "fully complaint with EU trade rules"' (23 November 2018), available at: <https://www.thejournal.ie/occupied-territories-bill-4354083-Nov2018/>.

¹⁶ Dáil Debates (23 January 2019), speech 254, available at: <https://www.oireachtas.ie/en/debates/debate/dail/2019-01-23/speech/254/>.

¹⁷ [1981] IR 233; quoted in Michael Forde and David Leonard, *Constitutional Law of Ireland* (Bloomsbury, 2013) 310.

¹⁸ Article 41(2), *Draft Articles on State Responsibility of States for Internationally Wrongful Acts* (2001).



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