



Sadaka Second High-level Forum

*Israeli Apartheid: Developing Ireland's Strategy*

March 2022

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Session 3: Developing a Coherent International Response to Apartheid.

**Gerry Liston**

**The Occupied territories Bill:**

**Where to next?**

Chair: Caoimhe de Barra, CEO, Trócaire.

I imagine most people are very familiar with the Occupied Territories Bill, but I will just give a quick recap on the background to the Bill and the principles of international law on which it is based.

As you remember, it was introduced into the Seanad, that's our upper house, back in January 2018, by Senator Frances Black, with the support of her colleagues in the Civil Engagement Group of independent Senators (and, I should say, signed by Senator David Norris) and within a year it cleared all stages of the Seanad, passing its final stage on the 5<sup>th</sup> of December 2018.

All parties, bar Fine Gael, supported the Bill in the Seanad. You might also remember the final vote and the final debate in the Seanad to pass the Bill, which was attended by two Palestinian farmers, Muna and Fayez al-Taneeb, from the town of Tukaram in the northern West Bank, which I happened to visit myself in 2011, and saw the devastating the impact of settlements and the apartheid wall on the village and surrounding lands.

The Bill was then introduced in the Dáil by Fianna Fáil the following month, and on the 23<sup>rd</sup> of January 2019, it had passed its first debate, formally the second stage, by an overwhelming 78 votes to 45, and again, the only party that voted against was Fine Gael, and even three members of the Independent Alliance, three Ministers, who were in government with Fine Gael at the time, abstained. Later in 2019 the Bill passed a further important vote in the Committee on Foreign Affairs and Trade. The Bill hasn't progressed further since the calling of the general election in January 2021 and the subsequent formation of the current government.

It is a point to note, though, that the Bill remained an issue right to the very end of the negotiations of the programme for the current government. There is a late version of the programme for government, which was published online, and which continued to include the Occupied Territories Bill in square brackets and highlighted in yellow. This is an indication of how long it managed to hang in there. But ultimately it was not included as a result of the strong opposition, particularly of the current Minister for Foreign Affairs, Simon Coveney. But importantly, the Bill does remain on the Order Paper of the Dáil, and it could be enacted very easily by the current Dáil; all that is needed is political will. That is something I will return to towards the end.

But first, just a short overview of the principles of international law on which the Occupied Territories Bill is based, and then I'll just briefly turn to the main basis on which the government opposes the Bill.

In relation to the international law foundations of the Bill, I had the opportunity to work with Senator Frances Black in its drafting, and we made sure to tie the language very closely to one of the key violations of international law, which underpins the illegality of the Israeli settlements. That is the violation of the prohibition of population transfers by an occupying power onto occupied territory, and as Professor Michael Lynk wrote in his report in July 2021 to the UN General Assembly, the violation constitutes a grave breach of the Fourth Geneva Convention, and a war crime under the Rome Statute of the International Criminal Court. What is often not mentioned in the debate here, is that the transfer by Israel, or indeed by any occupying power, of civilian populations onto occupied territory, constitutes a serious offence under Irish criminal law. That is because the Geneva Conventions and the Rome Statute of the International Criminal Court have both been incorporated into Irish domestic criminal law by two separate pieces of legislation, both of which vest universal jurisdiction in Irish Courts in relation to the crime of transfer of civilian populations.

So, there is absolutely nothing legally controversial to say that every new building of a settlement constitutes a serious crime under Irish, as well as international, law.

Of course, it is not just the crime of transfer of civilian populations onto occupied territory that's at issue. Settlements are constructed on land which has been unlawfully appropriated which is also a grave breach of the Geneva Conventions, a war crime, and again a serious violation of Irish law.

One of the points we repeatedly made when campaigning for the Bill to be enacted, is that it was essentially a measure to prevent proceeds of criminal conduct entering Ireland. When you look at the definition of proceeds of crime under Irish law this is not just a point of political rhetoric. Section 1 of the Proceeds of Crime Act, 1996, defines proceeds of crime as "property obtained or received by, as a result of, or in connection with criminal conduct", and there is no doubt that if, to take a hypothetical example, a criminal organisation in Ireland were to illegally appropriate agricultural land and start farming that land, that not only the land itself but also the produce of the land, would meet the definition of proceeds of crime.

So why not the same treatment for goods and services produced on stolen Palestinian land?

The main argument, as many of you will know, which was advanced by the last government, and now sadly this one too, is that to adopt such a ban would be contrary to EU law. When the Bill was progressing through the Oireachtas, the government relied in support of this view on an Opinion of the then Attorney General, now Supreme Court Judge Séamus Woulfe. Senator Black and others, on the other hand, relied initially on written Opinions already in existence by Irish Senior Counsel, Michael Lynn, and the late Professor James Crawford, most recently a Judge of the International Court of Justice.

These Opinions state explicitly that Member States of the EU can unilaterally prohibit imports of settlement goods, precisely because of the illegality of the circumstances in which they are produced.

It is also worth mentioning that Senator Michael McDowell, himself a former Attorney General, said in the Seanad that he also believed the Bill was entirely compatible with EU law.

When the government continued to reject the Bill based on this argument, a further Opinion was obtained on the Occupied Territories Bill, this time from Professor Takis Tridimas of King's College, London, one of the most cited authorities on EU law, including by Irish Courts.

Professor Tridimas concluded unequivocally that the Bill is entirely compatible with EU law.

I won't go into the detail of the EU law argument. It's slightly boring, but, in essence, everybody agrees that the general rule is that only the EU, and not Member States, can regulate trade in goods and services originating outside the EU.

Everybody also agrees that there is an exception to this rule, which is called the public policy exception. The disagreement relates to whether the public policy exception applies to settlement goods.

To support his view that the Occupied Territories Bill is compatible with the public policy exception Professor Tridimas cited over twenty decisions of the EU Courts and one of those decisions, the Rosneft case, concerned EU trade restrictions imposed in connection with Russia's annexation of Crimea.

The Court of Justice's Advocate General, one of the formal legal advisors to the Court, whose Opinions are typically followed by the Court, stated explicitly that "trade restrictions adopted in response to breaches of international law are justified on grounds of public policy", and that's a direct quote.

About two years ago we obtained a copy of the Séamus Woulfe Opinion, and we discovered that it failed to engage with most of the key decisions that were relied on by Professor Tridimas, including the Rosneft Opinion, which is the most applicable authority.

So, to say that the government's position on EU law is on shaky foundations, is to put the government's position generously. But even more disingenuously, the government claimed, and Simon Coveney said this in the Dáil, that if Ireland were to adopt the Occupied Territories Bill, it would face tens of millions of euro (that's the amount he gave) in fines, because the European Commission would bring infringement proceedings and take Ireland to the European Courts for enacting the Occupied Territories Bill.

This argument is, quite simply, absolutely absurd, and not surprisingly, was not mentioned in the Attorney General's Opinion, because, as every undergraduate law student would be able to explain (and the European treaties are explicitly clear on this) if the Occupied Territories Bill was found to be in breach of EU law by the ECJ, Ireland would first have an opportunity to amend or repeal the law to comply with a judgment, before any question of a fine would arise.

This is something that could be done here by the government of the day with just the stroke of a pen. It could just pass a statutory instrument under the European Communities Act, without any need to go before the Dáil or the Seanad to amend the Bill. So that's why it was entirely correct for (the now) Minister Eamon Ryan, when he was speaking in support of the Bill in January 2019, to say as follows: "Sometimes it is right to seek a challenge, to go to the European Court of Justice and make the case, and let that Court decide. Sometimes laws are there to be changed, and the Dáil moved. That can only be done by testing the law, and that is what we will be doing here."

It is also fitting to note, given the theme of today's conference, that prior to Ireland's adoption in the 1980s of a ban on agricultural produce from apartheid South Africa, there was an Opinion from the then Attorney General, Peter Sutherland, that such a ban would be contrary to European law. However, as outlined in the autobiography of Ruairi Quinn, the former Labour Party Minister, he was undeterred by that advice and sought a further Opinion from the subsequent Attorney General, John Rogers. In the words of Ruairi Quinn, the advice was very much a case of the legal bottle being half full rather than half empty, and with that the ban on apartheid goods was enacted.

The legal bottle is obviously very much more than half full when it comes to the Occupied Territories Bill.

Turning then to the future, I do not think any of us can say when, exactly, the Occupied Territories Bill will be enacted, but I have absolutely no doubt, as I know many do in this room, that the Occupied Territories Bill will be enacted. A watermark was set by the passing of the Bill in the Seanad, and subsequently passing two major votes in the Dáil. There is huge popular momentum behind the Bill in Ireland, as so many of us witnessed when campaigning for the Bill prior to the pandemic, and sadly, with the ever-worsening violations of international law by Israel, the case for its enactment grows stronger by the day.

So, with the legal bottle so full, it is simply a matter of Irish political parties finding the political bottle!