Hugh Lovatt – speaking notes

ECFR will short be publishing a new report by Dr Valentina Azarova looking at the legal implications of Israel's prolonged occupation and its implications for third party actors.

She argues that Israel's prolonged occupation has created an unlawful situation and given rise to structural violations of international law. These include:

Violation of International Humanitarian Law (IHL) which are well documented: violation of the 1949 Fourth Geneva Convention and 1907 Hague Regulations – the obligation to safeguard the welfare of the population in the occupied territory, and protect its political and legal order from sweeping transformation by the occupying state. Settlements are the most egregious example of this.

Violation of International Human Rights Law (IHRL): Israel has established a system of racial discrimination in the occupied territory through the unlawful transfer of its civilian population and the operation of two spate systems of governance of Israeli settlers and Palestinians.

Violation of the right to self-determination. Israel's intent to permanently acquire the Palestinian territory has led to the denial of the Palestinian independence in their territory

Violation of jus ad bellum which sets out conditions in which states can use force (and enact an occupation): The use of force that Israel uses to maintain its control over the occupied Palestinian territory (OPT) is unlawful. Israel can no longer justify its occupation based on military necessity. Instead, Israeli institutional practices and actions over 50 years reveal its annexationist agenda: de facto annexation of over 60% of West Bank Territory in addition to the de jure annexation of East Jerusalem in 1980. (Cf 2004 ICJ ruling on the separation wall re annexation). Consequently, Israel's presence in the OPT is no longer lawful.

Based on this, Israel's occupation of Palestine has become unlawfully prolonged. Because Israel's prolonged occupation is unlawful, many of its actions in the administration of the territory are deemed unlawful under international law.

This impacts third party dealings with Israel and its settlements at the level of both interstate relations and private business dealings with the settlements.

Third party states are obligated under international law to refuse to recognise Israel's unlawful acts (as well as the rights and benefits they generate). This obligation is particularly acute for the EU and its member states, who have extensive interstate relations and private dealings with Israel, and whose own legal order depends on respect for international law.

Practically, this means ensuring non-recognition of Israeli settlements and settlement entities, non-recognition of its unlawful practices, and non-recognition of Israel sovereignty over the OPT.

To guarantee the integrity of their domestic legal order, states must therefore ensure that they effectively differentiate between Israel and the settlements in order to exclude settlement entities from within their bilateral relations**. This has become known as "differentiation".**

The need to differentiate between Israeli and occupied Palestinian territory is an imperative of EU law and policy that is needed to enable the full and effective implementation of EU and member states' domestic laws.

In addition, third party states have a duty to ensure that their businesses respect international law and domestic legislations when conducting private business dealings with Israeli entities.

Private companies that do not exclude Israeli settlement entities from their dealings risks exposing themselves to Israel's widespread violations of international law – including the violation of Palestinian human rights. They could also be in contravention of domestic legislation.

Crucially, this applies to any Israeli entities involved in supporting or maintaining settlement activities – including Israeli banks.

To minimise the legal, financial, and reputational risks of dealing with settlement-lined entities, private actors need to conduct appropriate due diligence.

The above process is already happening: @ EU & member state level (July 2013 financial guidelines, November 2015 labelling guidelines, 18 member state business advisories); @US and China level; @UN Security Council level (R 2334); @private level: banks and pension funds, and companies

In parallel though, there has been an active counter effort promoted by the settler dominated government of PM Netanyahu to intimidate, smear, and arm twist countries, organisations, and individuals, who differentiate between Israel and the settlements and seek to abide by their international law based duties. This campaign is also being fought though the US Congress and US States.

None of what has been described above constitute a boycott of Israel, or even the boycott of Israeli settlements demanded by Palestinians. It is not "BDS" but the correct implementation of domestic legislation and respect for international law.

Next Steps:

The EU should use the 50th anniversary of the occupation to spur a comprehensive assessment of its dealings with Israel and Israeli entities, in line with the imperative of non-recognition, based on the need to ensure the full and effective implementation of EU law and the EU's deep-seated commitment to respect international law.

The EU and its member states have not yet devised a coherent policy and process for proactively detecting and correcting dealings with Israeli entities that give effect to its unlawful acts.

While some 18 member states have issued advisories alerting EU-based companies of the risks of activities in relation to the settlements, they have yet to be coupled with appropriate domestic compliance measures to inform domestic regulatory authorities and domestic subjects, including public authorities and nationals.

A transparent process for the adoption of non-recognition measures would also minimise attempts to obstruct such measures through political pressure and undermine their significance for states' internal legal orders.

The EU is also well positioned to encourage other third states and international actors, including regional organisations and blocs such as the European Free Trade Association and Mercosur, whose member countries engage in relations and dealings with Israel and Israeli entities to review their dealings and correct them as necessary to ensure the non-recognition of Israel's internationally unlawful acts.