



## The Widening Gap between Rhetoric and Reality in EU Policy towards the Israeli-Palestinian Conflict

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### Abstract

Over the decades, the EU's declaratory diplomacy towards the Israeli-Palestinian conflict crystallised in its support for a two-state solution and the respect for human rights and international law. Yet a closer look at the EU's relations with Israel and the Palestinian Authority highlights an increasing divergence between rhetorical goals and conduct in practice. This working paper shows how the nature of the EU's credibility problem in the Middle East stems neither from inadequate instruments nor from its internal divisions. Rather, it derives from the manner in which the Union has chosen to deploy the instruments at its disposal. The paper then turns to possible ways ahead to achieve greater consistency and credibility in the EU's role in the region.

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# THE WIDENING GAP BETWEEN RHETORIC AND REALITY IN EU POLICY TOWARDS THE ISRAELI-PALESTINIAN CONFLICT

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The EU's declaratory diplomacy towards the Israeli-Palestinian conflict has evolved consistently since the early days of European Political Cooperation (EPC). Over time, it has crystallised into a well-defined position. On the one hand, the Union has supported the rights of both Israelis and Palestinians to security and self-determination. On the other hand, it has clearly and repeatedly condemned all violations of human rights and international law, viewed as an impediment to a just peace in the region.

To pursue these goals, the Union has deployed an important array of policy instruments, ranging from diplomatic resources, to aid, trade and cooperation measures, articulated through the EU's contractual ties with the parties. Most recently, the EU has held out the promise of enhanced relations through the European Neighbourhood Policy (ENP).

However, a closer look at the EU's relations with Israel and Palestine highlights an increasing divergence between rhetorical goals and actual conduct. The spiralling situation on the ground, particularly since the eruption of the second intifada, could have been neither halted nor substantially ameliorated by the EU alone. But the focus of this article is not on the EU's overall influence on the conflict, reiterating the oft-heard arguments about the weakness of EU foreign policy instruments. The argument below shows how the nature of the EU's credibility problem in the Middle East stems neither from inadequate instruments nor from its internal divisions, but rather derives from the manner in which EU actors collectively have chosen to deploy the instruments at their disposal. The objective of this paper is that of exploring how these instruments have been used and pointing to possible ways ahead.

## **The Rhetoric: EU Goals in the Israeli-Palestinian Conflict**

The Middle East has always been a principal area of European concern. It was one of the two subjects dealt with at the first EPC meeting in November 1970. Since the October 1973 war, member state positions have increasingly converged. Common positions have been based on two interconnected pillars, which crystallised over the decades into a relatively well-defined view of the conflict and its resolution.

### ***The Two-State Solution***

The first pillar of the EU's goals has been the need to respect the collective rights of the Israeli and Palestinian peoples. The EC/EU has historically recognised Israel's right to statehood, living in peace with its neighbours within secure and internationally recognised borders. The European position towards the Palestinians instead has been defined progressively over the decades. In 1973, without adding any specification, the nine member states affirmed their support for the 'legitimate rights of the Palestinians'.<sup>1</sup> By 1977, the definition of these legitimate rights acquired an explicit collective and territorial character, as the member states acknowledged the 'national identity' of the Palestinians,

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<sup>1</sup> Statement of the Nine Foreign Ministers on the Situation in the Middle East, Brussels, 6 November 1973.

deserving ‘a homeland’.<sup>2</sup> Greater clarity came in 1980, when the Venice Declaration declared its support for the Palestinian right to self-determination.<sup>3</sup> In the years that followed, European positions crystallised on the Venice Declaration.

In the 1990s, in view of the Oslo Process, member states refrained from specifying further what a solution should entail. They rather limited themselves to supporting the peace process and the emerging Palestinian Authority. It was only with the deterioration of the process in 1997-98 that the Union resumed its statements on the desirable end point. Initially, the European Council did not venture beyond suggesting that a solution should not exclude the option of a Palestinian state.<sup>4</sup> The 1999 European Council in Berlin went a qualitative step further, stating that ‘the EU is convinced that the creation of a democratic, viable and peaceful sovereign Palestinian state...would be the best guarantee of Israel’s security’.<sup>5</sup>

With the dramatic collapse of the Oslo Process, the resumption of violence and the end of negotiations, the Union felt emboldened to articulate further its vision for a peaceful Middle East. This entailed the creation of two states, Israel and Palestine, living in peace and security within internationally recognised borders.<sup>6</sup> The state of Palestine would be viable, independent, sovereign, peaceful and democratic, and it would entail the end of Israel’s occupation.<sup>7</sup> It would be established along the 1967 borders, with minor adjustments agreed by the parties.<sup>8</sup> The means to achieve a two-state solution would be through negotiations.<sup>9</sup> In line with these views, EU statements have supported various Israeli-Palestinian track-two initiatives, and most notably the 2003 Geneva Accords.<sup>10</sup>

### ***Human Rights, Democracy and International Law***

The second pillar of EU goals has been the importance of respecting human rights and international humanitarian law (IHL). The majority of European declarations on the Middle East conflict since the 1970s have condemned Palestinian violence and terrorism pointing to the violations of rights and law that such acts entailed. Since 1973, member states have repeatedly condemned the acquisition of territory by force and have called on Israel to end the occupation of the territories it conquered in 1967.<sup>11</sup> In 1979, the member states made their first joint pronouncements condemning Israeli settlements in the occupied territories (OTs).<sup>12</sup> The 1980 Venice Declaration went further, specifying that settlements are not only a “serious obstacle to peace”, but that any modification in population and property in the OTs is illegal under international law.<sup>13</sup> The 1989 European Council elaborated on this, expressly stating that the 4<sup>th</sup> Geneva Convention is applicable to the OTs.<sup>14</sup> The 1990 European

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<sup>2</sup> Statement by the European Council on the Middle East, London, 29 June 1977.

<sup>3</sup> Declaration by the European Council on the Situation in the Middle East, Venice, 12-13 June 1980, point 7.

<sup>4</sup> European Council in Amsterdam on 16 June 1997, Annex: EU Call for Peace in the Middle East; European Union Council in Cardiff on 15-16 June 1998, Presidency Conclusions (SN 150/1/98), point 84.

<sup>5</sup> Conclusions of the European Council in Berlin, 24-25 March 1999.

<sup>6</sup> European Council in Laeken on the 14-15 December 2001, Declaration on the Situation in the Middle East.

<sup>7</sup> The European Council, Presidency Conclusions, Seville, 25 June 2002.

<sup>8</sup> Council of the EU (2003), Declaration of the EU for the Fourth Meeting of the EU-Israel Association Council, Brussels, 17-18 November 2003, point 4.

<sup>9</sup> The European Council in Seville 25 June 2002, Presidency Conclusions; European Council in Brussels on the 25-26 March 2004, Presidency Conclusions, 9048/04, point 54.

<sup>10</sup> Statement of the Presidency on behalf of the EU (2003), Initiatives by the Israeli and Palestinian Civil Societies, Brussels, 2 December 2003, 15584/03, Presse 358.

<sup>11</sup> Statement of the Nine Foreign Ministers on the Situation in the Middle East, Brussels, 6 November 1973.

<sup>12</sup> Statement by the Nine Foreign Ministers on the Egyptian-Israeli Peace Treaty, Paris, 26 March 1979.

<sup>13</sup> Declaration by the European Council on the Situation in the Middle East, Venice, 12-3 June 1980, point 9.

<sup>14</sup> Declaration of the European Council on the Middle East, Madrid, 26-27 June 1989.

Council in Dublin reiterated its call on Israel to adhere to the Geneva Conventions and acknowledged the member states' own legal obligations under those Conventions by calling for their 'further action' to ensure the protection of the human rights of the population under occupation.<sup>15</sup>

Also in this case, the Oslo years were marked by relative silence in EU criticisms and condemnations. Despite ongoing human rights and humanitarian law violations and the additional Palestinian shortcomings in the fields of democracy and good governance, the peace process and the imperative not to upset it were viewed as sufficient reason to refrain from any accusation towards the parties. Unsurprisingly, condemnations resurfaced following the collapse of the process. The Union intensified its calls to halt and reverse settlement construction, and condemned the whole array of human rights and humanitarian law violations, ranging from Palestinian suicide bombings, to Israeli incursions, extra-judicial killings and forms of collective punishment.<sup>16</sup> It repeatedly affirmed that Israeli security and Palestinian self-determination should be pursued only within the confines of international law.<sup>17</sup> Since 2002, EU actors also began speaking out against Israel's barrier within the OTs. The Union, repeatedly declared that, like settlements, the barrier both hinders peace and is illegal under international law. Its illegality stems from its confiscation of land and property, its hindrance to free movement and its deprivation of essential services to the civilian Palestinian population.<sup>18</sup>

Finally since the late 1990s, an area that has received increasing European attention has been that of democracy and good governance within the Palestinian Authority (PA). Beyond their support for a Palestinian state, European policy-makers became increasingly concerned with the nature of that future state. Since the 1999 Berlin European Council, all EU official statements advocating the establishment of a Palestinian state added that such a state should be democratic as well as independent, sovereign, peaceful and viable.<sup>19</sup> With the eruption of the intifada and the PA's inability or unwillingness to curb violence, the European Council stated that the reform of the PA is "essential" and would be supported by the Union. In other words, the Union implied that reform was necessary both to enhance Palestinian democracy and good governance and to secure an end of Palestinian violence and human rights abuses against Israel.

Hence since 1973, European declaratory diplomacy on the conflict developed consistently and progressively. By the turn of the century, and in particular since the collapse of the Oslo Process, common positions stipulated clearly both what the ultimate objective was and what the necessary means to achieve this were. The aim was that of a two-state solution on the basis of the 1967 borders. The means were negotiations on the one hand, and the respect for human rights, democracy and international law on the other. These positions have not only been formulated as an EU vision for the Middle East. Their attainment has been expressly recognised as forming an integral element of the

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<sup>15</sup> Declaration of the European Council on the Middle East, Dublin, 25-26 June 1990.

<sup>16</sup> Declaration of the Presidency on behalf of the EU (2001), Israeli settlement activities, 4 April 2001, 7590/01, Presse 134; General Affairs Council (2001), Draft Declaration of the EU for the Second Meeting of the EU-Israel Association Council, Brussels, 14 November 2001; European Council in Copenhagen on the 12-13 December 2002, Presidency Conclusions; Council of Ministers (2003), Conclusions on the Middle East, 29 September 2003.

<sup>17</sup> Council of the EU (2002), Declaration of the EU for the Third Meeting of the EU-Israel Association Council, Brussels, 15 October 2002, points 4 and 7.

<sup>18</sup> European Council in Seville on the 25 June 2002, Presidency Conclusions; European Council in Copenhagen on the 12-13 December, Declaration on the Middle East; Council of Ministers (2003), Conclusions on the Middle East, 21 July 2003; Council of Ministers (2003), Conclusions on the Middle East, 29 September 2003; European Council in Brussels on the 16-17 October 2003, Presidency Conclusions, (15188/03) and Minister Bernard Bot, speaking on behalf of the Council (2004), The ICJ Advisory Opinion, July 2004.

<sup>19</sup> European Council in Berlin on 24-25 March 1999, Presidency Conclusions; see also European Council in Laeken, 14-15 December 2001, Declaration on the Situation in the Middle East; European Council in Seville on 25 June 2002, Presidency Conclusions.

EU's own security interests. This was made clear in the 2003 EU Security Strategy, in which the Union articulated for the first time its perceived security aims and interests.<sup>20</sup>

## **The Instruments: Pursuing EU Aims and Interests**

The Union has deployed key instruments in the Middle East, under two main headings. The first has been diplomatic, directly linked to the peace process and primarily conducted in the context of the EU's second pillar (CFSP). The second has been based on the EU's bilateral contractual ties to the parties, and thus indirectly linked to the conflict and articulated in the context of the first Community pillar.

### ***Diplomatic Instruments***

Since 1991, the EU's diplomatic role in the Middle East has included multilateral, bilateral and transatlantic dimensions. Following the 1991 Madrid conference, EU multilateral diplomatic involvement took the form of chairing the Regional Economic Development Working Group and co-chairing several other working groups. In 1995, the EU launched the Euro-Mediterranean Partnership (EMP); a multilateral forum based on the logic of European integration, and intended to foster structural peace through an ongoing and diffuse process of functional cooperation and dialogue across the Mediterranean area. In 1996, the EU appointed a Special Envoy to the Peace Process, with the task of establishing contact with all parties, offering European good offices, and promoting compliance with interim agreements, as well as with basic norms of democracy, human rights and the rule of law. Finally, the EU's diplomatic role has had a transatlantic dimension. Given the US's prime mediation role, the EU has attempted to influence the peace process through its transatlantic ties. With the end of the peace process, deteriorating violence and the relative neglect of the Bush administration compared to that of its predecessor, the EU's diplomatic role acquired a more structured role. In April 2002, the EU, together with the US, Russia and the UN, formed the 'Quartet'. The Commission has been active in chairing the Quartet's Task Force on Palestinian Reform. The Quartet also sponsored the Road Map, initiated by the EU under the Danish Presidency in 2002.

### ***Contractual Relations***

But by far the most significant, albeit under-researched, channel of EU influence on the Middle East conflict has been through its bilateral contractual relations with Israel and the Palestinians. These relations have been progressively upgraded since the 1960s. They are in the process of being enhanced further through the ENP. The concept behind this mode of EU foreign policy is that of achieving varying degrees of economic, social and legal integration into the EU. When it comes to the Middle East conflict, the political relevance of these agreements may not be immediately obvious. But the manner in which EU contractual ties with neighbouring countries have been used has constituted the core of EU foreign policy. Other than degrees of integration per se, this form of foreign policy is intended to foster long-run structural change in the political, economic, legal and institutional spheres, both within and between third countries.<sup>21</sup> The deeper the level of integration into EU structures the greater is the Union's potential influence on a third country. Influence may be exerted either directly through political conditionality, or indirectly through diffuse forms of persuasion and socialisation into the EU's values and modes of operation.<sup>22</sup>

<sup>20</sup> European Council (2003), *A Secure Europe in a Better World: European Security Strategy*, Brussels, 12 December 2003.

<sup>21</sup> Stephan Keukeleire (2000), *The EU as a Diplomatic Actor*, University of Leicester, Discussion Paper No. 71.

<sup>22</sup> Tanja Borzel and Thomas Risse (2000), "When Europe Hits Home: Europeanisation and Domestic Change", *European Integration Online Papers*, Vol. 4, No. 15 (<http://eiop.or.at/eiop/texte/2000-015.htm>); and Johan P. Olsen (2001), *The Many Faces of Europeanisation*, Arena Working Papers, WP01/2.

The EU's legal basis for exerting political conditionality on the southern Mediterranean countries lies in the 'human rights clause', now included in all EMP association agreements. The clause contains two components. The 'essential elements' article establishes human rights and democratic principles as essential elements of the agreements (Article 2). The 'non-execution' article calls for 'appropriate measures' which 'least disturb the functioning' of the agreements, in the event of their material breach (Article 79). Under the 1969 Vienna Convention on the Law of Treaties (Article 60.3), a material breach is a violation of a 'provision essential to the accomplishment of the object and purpose of the agreement'.

In principle the violation of the 'human rights clause' could justify the suspension of the association agreements; in other words it could allow for the use of 'negative conditionality'. However, the legal conditions justifying negative conditionality are hard to meet. The violation of human rights could justify a partial or total suspension only if it represented a material breach of the agreements. But the 'object and purpose' of the association agreements are not the promotion of human rights and democracy per se (although these are essential elements of the agreements). It is rather that of promoting free trade, political dialogue and the dialogue between societies. Hence, only if a breach of human rights hindered these aims could it motivate negative conditionality.<sup>23</sup> In addition, negative conditionality would have to pass the legal tests of 'effectiveness' and 'proportionality'. Only if suspension constituted an effective and proportional remedy to a material breach could it be justified legally. Politically, there are also a plethora of reasons preventing the use of negative conditionality. The suspension of one association agreement could set a precedent justifying the suspension of all agreements, given that no country in the Barcelona Process has a glittering democracy and human rights record. This is an outcome that all member states want to avoid. The Union considers that maintaining and expanding relations with the Mediterranean is important both politically and economically. In addition, several member states have particular protégés in the south and are insistent on expanding their commercial and political ties with them.

In practice, the relevance of the 'human rights clause' has been more to engage in soft forms of 'positive conditionality'. This has been more in line with the EU's overall foreign policy ethos, preferring 'constructive partnership' based on dialogue, support and encouragement.<sup>24</sup> The Union has argued that positive conditionality is a more effective way to exert influence, not least because it retains open political channels with third countries. More specifically in the context of the Mediterranean, this has meant using the 'human rights clause' to legitimise discussions on sensitive political issues in the context of political dialogue and to direct and condition some aid to support human rights, democracy promotion and regional cooperation.

### *Bilateral Relations with Israel*

The first EC trade agreement with Israel dates back to 1964. In a further preferential agreement in 1970, the Community granted Israel industrial free trade access and substantial tariff cuts of horticultural exports. In 1975 Israel and the EC ratified a new Cooperation Agreement, which substantially improved Israeli trade access. In 1995 Israel and the Community signed an Association Agreement, which entered into force in 2000. The main components of the Agreement are political dialogue, free trade in industrial products, a gradual liberalisation in agricultural products, freedom of establishment, the option of liberalisation of services, free movement of capital, the harmonisation of competition rules and economic, social and cultural cooperation. The Community and Israel have also signed complementary agreements on procurement, the liberalisation of agriculture, Israel's inclusion in EU scientific and technical cooperation and Israel's inclusion in the European Global Navigation Satellite System (Galileo).

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<sup>23</sup> Susan Rockwell and Charles Shamas (2004), "A Human Rights Review of the EU and Israel- 2003-2004", EMHRN, Brussels, draft.

<sup>24</sup> European Commission, The EU's Role in Promoting Human Rights and Democratisation in Third Countries, Communication from the Commission to the Council and the European Parliament, COM(2001)252, final, p. 8.

But how could these extensive ties give the EU political influence on Israel? A first channel is through diffuse mechanisms of socialisation into European beliefs, values and modes of operation. Israel's inclusion in a wide array of EU activities and programmes, its developed trade links with Europe, its visa-free travel to Europe and the high proportion of Israelis holding EU citizenship could have cumulative effects on Israeli society, filtering to the highest political levels. These could entail increasing levels of exposure to and absorption of European values and 'ways of doing things'. Assessing the relative effectiveness of channels of 'socialisation' is an empirically complex undertaking.

A second more tangible channel of EU influence concerns the use of political conditionality. The potential effectiveness of conditionality on any third country depends on a number of variables.<sup>25</sup> One pivotal variable is the value ascribed to relations with the EU by the third country in question. In this respect, the first evident observation when it comes to Israel concerns its strong economic and political ties to Europe.

Israel is a small country where exports and imports exceed 80% of GNP. Its openness to international trade is thus key to its economic survival. The EU is Israel's largest trading partner. In 2002, the total value of Israeli trade with the EU amounted to €22bn, with 40% of Israeli imports and 30% of its exports coming and going to the EU. The political dependence of Israel on Europe is far more controversial. In recent years, Israelis have frequently referred to the 'crisis' in EU-Israel relations. Israel's strategic relationship with the US has also overshadowed the murkier political ties with the EU. However, Israel lives at the EU's doorstep, it is surrounded by real and perceived enemies and the US remains on the other side of the Atlantic. As such, beyond the rhetoric, Israel's political links to Europe are valued highly, and the desire to find a place to belong to is deeply embedded in Israeli society. It is in this light that Israeli opinion polls on the question of EU membership should be read. Abstract as these results may be, the fact that 85% of Israelis would support an application to EU membership stands as hard evidence of the political ties Israeli society perceives or aspires to when it comes to Europe.<sup>26</sup> As one Commission official put it: 'Israel is separated from both Europe and the US by a lake. The lake separating it from the US is very deep, and covered by a smooth layer of thin ice. The lake separating Israel from Europe is very shallow, and the hard rock lying on its bed is covered by a thick layer of mud'.<sup>27</sup>

The EU is also in a process of extending further its already developed ties with Israel, thus enhancing its potential influence on the country. Together with Israel, discussions are ongoing concerning whether, how and when to extend the association agreement to allow for the free movement of services, the freedom of establishment as well as the pan-Euro-Mediterranean cumulation of the rules of origin. The replacement of the Protocol on Origin to allow for diagonal cumulation would be particularly beneficial to Israel, that given it would allow Israel both to implement Israeli-Jordanian and Egyptian cumulation with the EU, and to extend it to the new eastern EU members, with lower labour costs than in Israel.

Israel is also included in the ENP, an initiative that has been greeted with enthusiasm by Israeli officials and analysts. The ENP potentially offers two principal advantages to Israel. First, it offers the scope for greater socio-economic integration into the EU in areas such as free movement of labour, goods and services, as well as participation in European networks, programmes and agencies. The second and arguably more important advantage to Israel is political. For the first time since the 1994 Essen European Council, the ENP intends to promote bilateralism and differentiation beyond multi-lateralism and regional cooperation. The EU-Israel Action Plan indeed expressly states that one of its

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<sup>25</sup> See Gergana Noutcheva and Nathalie Tocci (2004), "Europeanization and Secessionist Conflicts: Concepts and Theories", in Bruno Coppieters, Michael Emerson et al., *Europeanization and Conflict Resolution*, Academia Press, Gent, pp.13-62.

<sup>26</sup> Poll conducted by the Dahaf Institute of the EC Delegation in Tel Aviv, February 2004, p.8.

<sup>27</sup> Remark made at a workshop held at the European University Institute, Florence, October 2004.



aims is that of fulfilling the promise set out in the Essen Declaration.<sup>28</sup> Irrespective of the EU's stated objectives concerning the complementarity between the ENP and the Barcelona Process, Israel has viewed the former as the means to escape (*de facto* rather than *de jure*) the latter.

### *Bilateral Relations with the Palestinians*

Due to the absence of a state and the humanitarian and economic conditions in the OTs, bilateral relations with the Palestinians evolved later and with a greater emphasis of aid over trade. In 1986, the member states allowed preferential trade access to specific Palestinian products. Since 1971, Community assistance has been channelled to Palestinian refugees through UNRWA (the UN Relief Works Agency). In 1987, this was complemented by direct assistance to Palestinian civil society. In the context of the Oslo process, the member states, through a joint action, stepped up their economic support to the Palestinians, this time directed primarily to the PA, the embryo of a future Palestinian state. In 1994, a further joint action was undertaken to monitor the first Palestinian elections. In 1997, in the context of the Barcelona Process, the Community signed an Interim Association Agreement with the Palestinians, underlying which was the Community's anticipation of Palestinian statehood. The aim was to further trade liberalisation and to establish a framework for political dialogue with the PA. Like Israel, the PA is also included in the ENP.

Sources of EU influence on the Palestinians exist primarily through EU conditionality. Due to the thinner relationship they enjoy with Europe and the severe restrictions on movement imposed by their status, the likelihood of socialisation into EU structures and society is low. The prospect of EU influence through conditionality is much higher. Not only does the Interim Agreement include a 'human rights clause' and provisions for political dialogue, but the disbursement of financial assistance has been made increasingly conditional on Palestinian reform.

The potential for EU influence through conditionality is high because of Palestinian dependence on Europe. In economic terms, the EU (including member states) represents by far the largest aid donor to the Palestinians. Community assistance, linked to different budget lines, has risen progressively since the 1990s. In 1994-98, the EU committed Ecu 400m in grants. It committed a further €600m in 1998-2002. In view of the intifada, assistance has increased exponentially. The Palestinian humanitarian crisis and Israel's withholding of tax revenues to the PA in 2000-03 led to a rise in EU assistance of over €300m per year in 2000-03, including monthly budgetary support. Without EU aid since 2000, the PA may well have collapsed.

#### *EU aid to the Palestinian Authority*

	2000	2001	2002	2003
Total aid €m	215	144	317	256
Direct budgetary support €m	90	101	97	16

Palestinian political dependence on Europe has also been high. Like Israelis, Palestinians frequently accuse Europe of playing an inadequate political role in the Middle East. However, they would warmly welcome a stronger European involvement in the conflict. Given their view of the increasingly one-sided American policy in favour of Israel and their appreciation of the weakness of the Arab world, Palestinians look to Europe as the international actor that could best support their cause.

### **The Evolution of the Conflict Since 2000**

Before assessing the effectiveness of the EU's role, let us take a step back to the region and review the major trends since the collapse of the Oslo Process. Ariel Sharon's visit to the Haram el-Sharif/Temple Mount on 28 September 2000, marked the beginning of the second intifada, and with it, the end of the

<sup>28</sup> European Commission (2004), "Proposed EU-Israel Action Plan", Brussels, 9 December, p. 1 ([www.europa.eu.int](http://www.europa.eu.int)).

peace process. The ensuing cycle of violence has entailed both mounting violations of human rights, democracy and international law, and a steady reversal from the accomplishment of a viable two-state solution. As such, the EU's rhetorical goals have become ever more distant chimeras. All the international diplomatic activity that has taken place since 2000, has at best done nothing to halt the ongoing trends, and at worst distracted attention from the fundamental developments on the ground.

### ***The Violation of Human Rights and Humanitarian Law***

The second intifada has witnessed Israel's reoccupation (in all but administrative terms) of the Palestinian territories. Israeli reoccupation has entailed mounting human rights and humanitarian law violations, resulting in an ever-rising number of Palestinian casualties.<sup>29</sup> As a result of a long list of violations, the Palestinian population has suffered from a deepening humanitarian crisis, leading to over 40% unemployment and a poverty rate over 60%, as reported by the World Bank. Israel has been held responsible by the international community for the use of excessive force, targeted assassinations and for sweeping restrictions on movement through closures, checkpoints, and curfews. Restrictions on movement have impaired the right to work, the right to education and the right to proper medical treatment. Restrictions have also applied to goods and humanitarian aid. The nature of these restrictions has shown that their objective has not been strictly security-related, but has been dictated by the aim of imposing collective punishment on the Palestinians.

In addition, Israeli settlement construction has accelerated during the second intifada, including an expanding network of settlement blocs and highways connecting them particularly in the West Bank. In densely populated areas such as the Gaza Strip, settlement construction and the razing of wide bands of scarce agricultural land around them have contributed to an ever-deepening humanitarian crisis. Israel's confiscation and/or razing of land and property for the purpose of establishing settlements to be populated by Israeli nationals violate the Fourth Geneva Convention.<sup>30</sup>

The Gaza Strip has already been completely enclosed and segmented by fences, security zones and militarily controlled corridors, inviting its definition as the world's largest prison.<sup>31</sup> Following this model, in June 2002, the Israeli government approved the construction of a barrier in the West Bank. The barrier takes many shapes and forms. In the northern West Bank, it is an eight-metre-high concrete wall. In other areas it takes or will take the form of walls, trenches, electrified and razor wire and military roads. In addition, Israel has built electrified fences around major Palestinian population centres, subdividing the West Bank into 54 separated enclaves.<sup>32</sup>

Israeli authorities have dubbed the barrier a 'separation' or 'security' fence. As the names suggest, Israel has justified its construction as a necessary means to separate Israelis and Palestinians, thereby providing security to the former. However, as the details reveal, 'separation' and 'security' are not the wall's sole purposes. This is principally because the barrier is not being built on the 1967 borders, but cuts deep into the West Bank (see Annex 1). The initial maps provided for the annexation of approximately 10% of the West Bank, and the separation of East Jerusalem from the rest of the West Bank. This entailed the violation of the human rights of over 300,000 Palestinians, by either restricting or denying their access to agricultural land, other economic activity, water resources and basic services.<sup>33</sup> In addition, an Israeli military order established a Closed Zone between the barrier and the

<sup>29</sup> See reports by Palestinian NGOs such as LAW ([www.lawsociety.org](http://www.lawsociety.org)) and the Palestinian Centre for Human Rights ([www.pchrgaza.org](http://www.pchrgaza.org)), Israeli NGO B'stelem ([www.btselem.org](http://www.btselem.org)) and international NGOs Human Rights Watch (<http://hrw.org/reports/world/is-ot-pa-pubs.php>) and Amnesty International (<http://web.amnesty.org>).

<sup>30</sup> Article 49, paragraph 6 of the Fourth Geneva Convention states that "the occupying power shall not deport or transfer parts of its own civilian population into the territories it occupies".

<sup>31</sup> Quote from the British Ambassador to Israel during a meeting with Israeli officials, *The Palestine Chronicle*, 14 October 2002.

<sup>32</sup> See PLO Negotiations Affairs Department (2003), *Bad Fences Make Bad Neighbours*, December, Ramallah.

<sup>33</sup> Ibid.

green line, enclaving over 12,000 Palestinians who cannot enter or exit without special permits.<sup>34</sup> Due to its route within the OTs as well as its human rights effects, the International Court of Justice has deemed the barrier illegal in July 2004. In June 2004, the Israeli Supreme Court, concentrating on the barrier's effects instead called for its rerouting. In response to the Supreme Court's judgement, new routes are currently being proposed, and may reduce the barrier's human rights effects. However, as stated in the ICJ ruling, the barrier in itself will continue to represent a violation of the Geneva Convention so long as it is built within the OTs.

Palestinian groups have also perpetrated grave human rights violations, which according to international NGOs have amounted to or approached war crimes.<sup>35</sup> These have primarily taken the form of suicide bombings, principally targeting Israeli civilians within the State of Israel. Israelis have viewed these attacks as confirmation that the Palestinians remain committed to the destruction of their state.<sup>36</sup>

The identified responsible groups have been Hamas, Islamic Jihad, the Popular Front for the Liberation of Palestine and the al-Aqsa Martyrs Brigade. Suicide bombings and other attacks aimed at civilians are prohibited by the Geneva Conventions.<sup>37</sup> However, the criminal provisions of IHL are based on the doctrine of command responsibility, according to which people in positions of authority who fail to take adequate preventive measures are also held accountable. An issue therefore is to what extent the PA, as a state-like actor, has been and should be held responsible for attacks against Israeli civilians. Human Rights Watch did not find evidence that the PA planned, ordered or carried out suicide bombings or other attacks on Israeli civilians.<sup>38</sup> However the PA leadership was criticised for failing to take adequate action to prosecute those responsible for the attacks. The PA has argued that its actions are contingent on Israel's own behaviour, given that Israel's violation of IHL reduces the PA's ability to repress crimes perpetrated by groups not acting under its instructions. The proportionality between empowerment and responsibility to repress the criminal acts of private actors is a key premise of international law. However, it has been difficult to pinpoint the line separating the PA's effective capability from its political willingness to repress violence.

This does not impinge upon the fact that under IHL suicide bombings constitute criminal acts and that states and non-state actors alike should exercise all lawful means at their disposal to repress them. Hence, both Israel and the PA, within the limits of their ability and control, and within the confines of international law, should do their utmost to repress the violations and thereby assure security and public safety.

### ***Pre-empting a Viable-Two State Solution***

Two major trends have been set in motion or accelerated over the last four years, reducing the prospects of a viable two-state solution. On the Israeli side, this has been the ongoing policy of 'cantonisation' including settlement expansion, the construction of the barrier/wall, the weakening of Palestinian institutions and most recently the disengagement plan. On the Palestinian side, this has been the progressive fragmentation of the PA and the mounting polarisation and tensions between factions, both within the PLO and between the secular and the Islamic camps.

Settlement construction has been a permanent feature of all Israeli administrations since the 1967 war. The result so far has been a sub-division of the West Bank in over fifty enclaves. In the Greater

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<sup>34</sup> UN Office for the Coordination of Humanitarian Affairs (UNOCHA), Update 01/09-15/10/03.

<sup>35</sup> Human Rights Watch (2002), *Erased in a Moment: Suicide Bombing Attacks Against Israeli Citizens*, October.

<sup>36</sup> Daniel Levy (2002), *Strategies of Regional Actors in the Middle East Conflict-Israel*, Middle East and Euro-Med Working Paper Series, CEPS, Brussels.

<sup>37</sup> Protocol 1 of the Geneva Conventions governs the laws of national liberation. These expressly prohibit attacks against civilians, and attacks whose primary purpose is that of spreading terror.

<sup>38</sup> Human Rights Watch (2002), *op. cit.*

Jerusalem area, East Jerusalem is being separated from the rest of the West Bank through the expansion of settlements reaching the Bethlehem area, and with the construction of a ring road around the Israeli-determined municipal borders. Settlement expansion within the Jerusalem outer-ring is separating both East Jerusalem from the West Bank and the northern from the southern sections of the West Bank. The apparent strategy has been to achieve a de facto a reversal of facts on the ground. Initially West Bank settlements were isolated enclaves in Palestinian territory. Now Palestinian towns have become isolated enclaves in Israeli territory.

The construction of the West Bank barrier forms part of the same logic. Israeli officials point to the success of the fence encircling Gaza, arguing that no suicide attacks have come from the Strip (although this has not stopped Gazan militants from firing Qassam rockets into Israel). Yet, unlike Gaza, the West Bank barrier consolidates the annexation of approximately 60% of the settlements and 90% of the settler population.<sup>39</sup> Beyond security justifications, the barrier's revealed intent, as in the case of settlements, appears to be that of annexation by force.

A third element of the policy of cantonisation has been the weakening of the PA and Israel's preconditions of Palestinian reform and democracy prior to negotiations. The weakening of the PA has occurred through the physical destruction of PA infrastructure and the myriad of restrictions on movement, which have impeded the central authority's effective control over its population. The progressive chaos within the OTs has in turn discredited the aim of an independent and sovereign Palestinian state and has supported the thesis that there is no Palestinian 'partner for peace'. Palestinian violence and the PA's failure to curb it have also legitimised Israeli claims that Palestinian reform should precede negotiations. This has constituted a major argument to avoid a resumption of talks, to secure a viable two-state solution and to proceed with unilateral actions. It remains to be seen whether and how this policy will alter with the death of Yasser Arafat in November 2004.

The last and most recent element in Israel's strategy has been the 'disengagement plan', first outlined by Prime Minister Sharon in December 2003. The plan foresees Israeli troop and settlement withdrawal from the Gaza Strip and four settlements in the northern West Bank (see Annex 2). Although Israel has been seeking 'creative' legal channels to divest itself of its legal responsibilities, disengagement would not legally entail the end of occupation. This is because it would not alone give rise to a Palestinian state, and Israel would continue to control borders, airspace and coastal waters and it would retain the freedom to make incursions into the territories.

At its heart, the plan has a double rationale. First, the Israeli right has become increasingly sensitive to the 'demographic threat' that has historically formed the core rationale underlying the views of the Zionist left. This entails the growing realisation that according to demographic trends, Israeli Jews will become a decreasing minority of the population from the Jordan River to the Mediterranean Sea.<sup>40</sup> Given the desire to retain democratic elections while securing a Jewish dominated political system, as well as the awareness of most (albeit not all) decision-makers that in the 21<sup>st</sup> century that a mass transfer of the Palestinians is not a viable option, the need to withdraw from some territories is viewed as an increasingly pressing priority. The disengagement plan represents a formula to maximise Israeli annexation of territory while minimising the number of Palestinians included in it.

The second rationale is time contingent and related to the need to propose an alternative to a negotiated and internationally mediated two-state solution. Until late 2003, Sharon rejected negotiations and called for an interim Palestinian entity with temporary borders on approximately 50% of the West Bank. This interim status would prevail until Israel deemed that the PA had reached sufficient standards of democracy, good governance and most important, until it succeeded in quelling violence.<sup>41</sup> However by late 2003, with the effective abandonment of the Roadmap, the government

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<sup>39</sup> PLO Negotiations Affairs Department (2002), *Israel's Pre-emption of a Viable Two State Solution*, Ramallah.

<sup>40</sup> By 2020 there will be 15 million people between the Jordan and the Sea and only 45% will be Jewish. The rest will be Palestinian citizens of Israel or residents in the Occupied Territories, as well as foreign workers in Israel.

<sup>41</sup> Ariel Sharon, "The Way Forward in the Middle East", *The New York Times*, 9 June 2002.

felt under increasing international isolation due to its lack of a peace strategy. Moreover, the government was being challenged internally by civil society initiatives from the Israeli centre-left (i.e. the 'People's Voice' and the Geneva Accords). In response, Sharon announced the disengagement plan, as a means to provide an alternative to the Israeli public and the international community. To many Israelis, Sharon's plan was far more palatable than a negotiated two-state solution. It would take care (at least in part) of the 'demographic threat'. Its paradoxical 'yes' to peace and 'no' to Palestinians dovetailed with the widespread view of the absence of a Palestinian 'partner'.<sup>42</sup> It entailed a far smaller cessation of land and allowed for continuing Israeli control. And, it did not include compromise on the two most critical issues on the peace agenda, namely Jerusalem and refugees.

Indeed, in this respect the plan has been a success. Many in Israel, Palestine, Europe and the US have supported the plan. Even those supporting a viable Palestinian state hope to see a peaceful disengagement from Gaza triggering a domino effect of progressive dismantlement of West Bank settlements and a reengagement with the PA, particularly following Labour's inclusion in the Israeli coalition government.<sup>43</sup> The EU in particular has activated itself to transform the disengagement, together with the ongoing reform of the PA, into the second phase of the Roadmap. The plan was acclaimed by US President Bush, it has been conditionally supported by the EU, it was backed overwhelmingly by Israel's Labour Party in the Knesset vote in October 2004, and it has also been supported by key members of the PA.

Yet while disengagement could unleash positive spin-off political developments in Israel, the plan so far remains in line with the Israeli right's vision. As such, its more likely evolution is a disengagement from Gaza as a means to consolidate Israel's grip on large portions of the West Bank. The first critical signs of this were in April 2004, when for the first time an American President officially accepted that a solution would neither see the return of Palestinian refugees nor a return to the 1967 borders. The Prime Minister's aide, Dov Weisglass, lucidly elaborated the plan's rationale. His statements are worth quoting in full:

(T)he significance of the disengagement plan is the freezing of the peace process... and when you freeze that process, you prevent the establishment of a Palestinian state, and you prevent a discussion on the refugees, the borders and Jerusalem... Effectively, this whole package called the Palestinian state, with all that it entails, has been indefinitely removed from our agenda. And all this with authority and permission. All this with a Presidential blessing and ratification of both houses of Congress.<sup>44</sup>

Weisglass' words may have been pronounced for domestic political consumption (due to the aversion of Israel's extreme right to the idea of disengagement). Yet irrespective of their motivation, the cogency and consistency of these official statements unveil the plan's intent.

Finally, the fragmentation and polarisation within the Palestinian political scene have also lent support to Israeli strategies and arguments. Prior to and over the course of the intifada, criticism against the PA and its leadership had mounted from the inside. Segments of the population resented the leadership for having failed to deliver peace and better standards of living. They resented the widespread corruption, inefficiency and authoritarianism of the Authority. Palestinian analysts have argued that divisions emerged and exacerbated between the 'old guard', including the revolutionary PLO leadership from Tunis, and the 'young guard', including secular and Islamic groups, indigenous to the OTs and

<sup>42</sup> Ury Avineri, "Sharon's Speech: Decoded Version", 21 December 2003, Gush Shalom.

<sup>43</sup> For an exposition of the need to make a success of disengagement by transforming its original rationale see Daniel Levy, "Wanted: Minister for Re-engagement", *Haaretz*, 10 December 2004.

<sup>44</sup> Ari Shavit, "Top PM Aide: Gaza Plan Aims to Freeze the Peace Process", *Haaretz*, 6 October 2004.

connected to the grass-roots.<sup>45</sup> Other scholars have painted a more complex picture, identifying different and often opposing actors within the Palestinian political scene.<sup>46</sup>

The death of Yasser Arafat has opened the space for a reshaping of Palestinian politics, not least through elections and through an enhanced dialogue with the Islamic parties. The fact that Hamas has not instructed its voters to boycott the presidential elections and will participate in the municipal and probably in the legislative elections also indicates the possible progressive inclusion of the Islamic parties in PA structures and their ensuing commitment to a two-state solution. However, in the medium-term it remains unclear whether the post-Arafat era will see greater coherence and unity amongst Palestinian actors or increased chaos and fragmentation in the OTs.

In conclusion, the pre-emption of a viable two-state solution is relentlessly progressing. Beneath the day-to-day voices, events, hopes and despairs, the fundamental trends persist unabated. Without their radical overhaul, a worst case scenario in the medium-term could see Israel withdrawing its settlers and soldiers from selected territories and relocating them in large annexed areas of the West Bank. By withdrawing from some territories and divesting itself of all legal responsibilities vis-à-vis the Palestinians, Israel would account for its perceived demographic threat and it would avoid compromising over Jerusalem and refugees.<sup>47</sup> Beyond the barrier, Palestinians would be relegated in enclaves connected by tunnels and roads. A submissive Authority would be charged with providing services to its population. If the Palestinians and the international community so wished, these enclaves could also be called a 'state'. Yet Israel would continue to retain effective sovereignty, including border control and the freedom of intervention. This situation may well induce some Palestinians to emigrate. Some of those who remain would persist in attacks against Israel. The ensuing violence could demonstrate internationally the Palestinians' inability to peaceful self-determination. Yet Israeli military and economic superiority would enable Israel to impose sufficient order. This sufficient level of stability would entail a decreasing attention of the international community, including that of Europe.

Naturally this tragic scenario has many pitfalls. It would require Israel's ability to evacuate peacefully some of its settlers, without an internationally sponsored peace process. Most fundamentally, it would entail that the Palestinians would stay put with approximately 10% of mandatory Palestine. The unlikelihood of these conditions prevailing suggests that violence and instability would persist, and continue to spill over into Europe in increasingly complex and dangerous ways. The EU's interests in promoting a 'ring of well-governed countries' along its southern borders would thus become an increasingly distant goal.

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<sup>45</sup> Khalil Shikaki, "Palestinians Divided", *Foreign Affairs*, Vol. 81.1, p. 92, January/February.

<sup>46</sup> These have included members of the Fatah Central Committee, the Fatah Higher Committee including younger generations forming the backbone of the Fatah-Tanzim apparatus, members of the Palestinian Legislative Council, the PLO Revolutionary Council, the senior echelons of the security forces, the Islamic camp (including parties, armed groups and civil society actors), other militias and militant parties (PFLP and the Al-Aqsa Martyrs Brigades) and independent intellectuals and NGOs. See Salim Tamari (2002), "Who Rules Palestine?", *Journal of Palestine Studies*, Vol. 31, No. 4, pp. 102-113. On questions of control and capability within the Palestinians political scene see also Jean-François Legrain (2003), "Les Phalanges des Martyrs d'Al-Aqsa en Mal de Leadership National", *Maghreb-Machrek*, Vol. 176, pp. 11-34.

<sup>47</sup> An interesting point in this respect was raised by Meron Benvenisti. Referring to the Palestinian elections in East Jerusalem, Benvenisti argues that a precedent is being set (and accepted by the Palestinians and the international community), whereby tens of thousands of Palestinians are being granted the right to vote by Israel though not within Israel's borders. Benvenisti argues that this precedent could be extended to other areas of the West Bank that would be annexed in future to Israel under Sharon's cantonisation Plan. In effect, this would allow Israel to annex West Bank land, without the Palestinians living on it. See Meron Benvenisti, "Democracy but not Here", *Ha'aretz*, 2 December 2004.

## The Deployment of EU Instruments in Practice

The dramatic developments in the region in the last four years have contrasted sharply with the EU's declared aims and interests. Ongoing developments are primarily determined by the parties themselves as well as by the major international power in the region, namely the US. However, irrespective of its power, status and resources, Europe is also a major external actor in the Middle East. This section assesses and explains how the EU has put to use its instruments in the Israeli-Palestinian conflict.

### *EU Diplomacy: The Quartet, the Barcelona Process and the Special Envoy*

During the Oslo years, the Israeli Labour government under late Yitzhak Rabin had accepted a European involvement in the economic aspects of the peace process. When the Union (for example at the 1996 Dublin European Council) had called for a more direct political role, its ambitions were met by outright Israeli hostility and American bemusement. With the end of the peace process, it seemed that the era of exclusive US ownership had given way to a greater internationalisation of mediation activity through the Quartet. However, so far the Quartet has failed to substantively alter the dynamics of international involvement. Rather, it has predominantly provided a multilateral cover for persisting unilateral US action (or inaction).

Even more meagre results can be reported when it comes to the Euro-Mediterranean Partnership and the peace process. EU officials champion the fact that with the collapse of the peace process, the EMP has remained the only multilateral diplomatic forum in which Israel and the Arab countries regularly meet. Yet far from fostering structural peace in the region, the Barcelona Process has been yet another victim of conflict. When it comes to Israel and Palestine its major practical results have been the development or upgrading of bilateral ties through the association agreements, which were the main reason (and the quid pro quo) inducing the sceptical Israel to enter the process in the first place.

Some results have been achieved by the EU Special Envoy and other member state and EU Council activities. Former Envoy Migel Moratinos and his successor Marc Otte, have conducted useful day-to-day crisis management activities, helping diffuse the myriad of micro-security crises on the ground. The work of the Special Envoy has been complemented by other initiatives. The British for example have been playing an important role in promoting security reform in Gaza as well as in supporting intra-factional ceasefire talks. In his efforts to revamp the Roadmap alongside Israel's disengagement, Solana has also revealed plans to train Palestinian security forces in Gaza in cooperation with Egypt.<sup>48</sup> Yet none of these activities has allowed the EU to play a key mediating role in the conflict.

Overall the EU has thus not acquired a significant, let alone dominant role in the peace process through its diplomatic instruments. An oft-cited reason for this is Israel's non-acceptance of European mediation in view of its perceptions of Europe's pro-Palestinian bias. According to 60% of Israelis, Europe rarely or never condemns Palestinian violence.<sup>49</sup> Israel also has repeatedly accused the EU of funding Palestinian terrorism. In reality, this has not been the case. The vast majority of EU statements have balanced condemnations of Israeli policies and of Palestinian violence. The Commission has also investigated the use of EU funds (by initiating an independent OLAF enquiry) and has concluded that funds have been subject to careful monitoring.<sup>50</sup> Yet irrespective of what the EU says and does, Israeli scepticism prevails. An explanation of this scepticism relates to the EU's 'relative' bias against Israel compared to that of the US. It is widely recognised that since 1967, the US has been far more supportive of Israel than has Europe. The US has had also stronger hard security instruments to deploy in the region. As such, many Israelis understandably prefer a continuation of exclusive American

<sup>48</sup> Javier Solana, EU High Representative for the CFSP, "Outline of Presentation on Proposals to Revitalise the Roadmap", Meeting of EU Foreign Ministers, Brussels, 2 November 2004.

<sup>49</sup> Gisella Dachs and Joel Peters (2004), "Israel and Europe, the Troubled Relationship: Between Perceptions and Reality", paper presented at the IEPN meeting, 14 October, Berlin.

<sup>50</sup> Chris Patten, Letter to the Jerusalem Post, 18 July 2002; European Commission, Statement to the EP's Foreign Affairs Committee on EU Budgetary assistance to the PA, 19/06/2002, Doc. SPEECH/02/293.

mediation, and feel no need for a more active European role. At most, Israel is happy to see Europe's continued humanitarian support for the Palestinians (support that Israel, as occupying power, should provide itself) and possibly its more active engagement in the governance and security of the territories it will disengage from.

Yet Israel's views of Europe cannot, alone, provide an explanation. Europe does not necessarily need an Israeli invitation to play a role in the Middle East. The Arab world certainly does not view the US as an impartial mediator in the Middle East. But it has little choice as to whether and what role the Americans should and do play. Another major reason explaining Europe's diplomatic ineffectiveness is US power and Europe's limited influence on it. Overwhelming US power in the Middle East is an undisputed reality. However, at least in part, the Union has reinforced this reality by presuming that the only feasible peace strategy in the region requires US leadership.

Since 2001, most EU activities have been tailored to encouraging the Bush administration's engagement in the peace process. EU policy-makers proactively pushed the dossier of Palestinian reform (and agreed to insert references to reform in the Quartet's roadmap process), hoping that this would remove any reason (or excuse) for persisting US passivity. Likewise, the EU initiated the Roadmap itself, as a means to give former Secretary of State Powell (viewed as closer to European positions) a tool to reengage the President in the region. Currently, EU High Representative Javier Solana is working both on transforming the Israeli disengagement plan into a revamped Roadmap process, and on re-engaging the second Bush administration in it. Alongside him, British Prime Minister Tony Blair attempted to persuade the re-elected US President into holding a major peace conference, which then, in the light of Israeli resistance, was scaled down into a conference on Palestinian governance post-disengagement.

US involvement may well be necessary. However, US foreign policy towards the conflict, being so deeply entangled in the domestic politics of the country, is not easily amenable to European cajoling (beyond the rhetoric). Indeed, despite the efforts of the Quartet in 2002-03, the Roadmap was shelved and in April 2004, President Bush accepted Sharon's positions on refugees and on borders. An American reengagement in the peace process may be possible during George W. Bush's second term in office. Yet there are no indications that this would move beyond an active support for Sharon's disengagement plan. There are certainly very few signs that irrespective of its re-engagement, a future US role will be more receptive to European (including UK) influence. In other words, when it comes to the EU's diplomatic role, ineffectiveness may be explained partly by Israel's reluctance to see a more active European role. Yet another, arguably more important reason is the EU's own perceptions of the need for US leadership in the conflict and its limited ability to affect US policy in substance.

### ***Palestinian State-Building and Reform: Aid, Trade and the Limits of Conditionality***

Supporting Palestinian state-building and economic development has been a key pillar of EU policy in the region since the late 1980s. In the field of trade and development, despite having established direct trade links with Palestinians, EU efforts have systematically faced Israeli obstructionism. Israel has justified its stance on the grounds that it considers the OTs as part of its own customs territory. Its ability to obstruct derives from the fact that all Palestinian trade must pass through Israeli ports and customs. In the 1990s, Israel did not recognise the EC-PLO Interim Association Agreement. This has entailed a grossly ineffective implementation of the Agreement. At times, Israeli customs have removed EC origin certificates from European exports to the OTs, and more often they have removed Palestinian origin certificates replacing them with Israeli certificates. This problem has received little EU attention and the Union has made no systematic attempt to persuade Israel to alter its stance. Under this status quo, it seems unlikely that the ENP Action Plan with the PA will succeed in providing enhanced trade ties with the Palestinians. At best, the Union, through its Action Plans with both Israel and the PA, can push for a more effective implementation of the trade aspects in the existing Interim Palestinian Agreement.



During the Oslo process and more so after its demise, the EU supported state-building and development in the OTs through the disbursement of aid. The EU has financed key infrastructure projects including the Gaza airport and seaport. It has also provided increasing humanitarian assistance since 2000. However, many EU-financed projects have been destroyed by Israeli raids during the second intifada. In addition, the costs of disbursing humanitarian aid have increased by 20% due to the mobility and bureaucratic restrictions imposed by Israel.<sup>51</sup> EU institutions argue that they reserve a right to claim reparations and compensation from Israel.<sup>52</sup> However, no attempt has been made to do so. In other words, the Union (and other donors) have not required Israel to fulfil the legal and financial responsibilities assigned to it under international law. By failing to hold Israel accountable, donors have paradoxically distorted incentives in the persisting conflict.

The most critical EU success has been in its financial and technical support to the PA. The original objective of such support was that of fostering state-building and development in Palestine. In view of the intifada, this maximalist objective has given way to the minimal task of preventing the outright collapse of the Palestinian institutions and economy.

Since the late 1990s, EU assistance has not simply aimed at the sheer survival of Palestinian institutions. Through positive aid conditionality, the Union has attempted to shape the development of those institutions. In doing so, the EU's objectives have been threefold. The first and primary objective has been that of supporting democracy and good governance within the embryonic state. Since 2000, two corollary aims have been to quell Palestinian violence and to remove any US and Israeli reason or excuse to reject negotiations with the Palestinians. The questions of reform and violence are clearly distinct. Palestinian violence erupted primarily in response to the failing peace process, although many of the actors perpetrating violent acts also criticised the PA for its domestic shortcomings. The PA leadership in turn may have initially ridden on the wave of violence as a means to regain its lost legitimacy; but it is unlikely that better governance and democracy alone could have prevented the intifada. In other words, the link between violence and reform is tenuous at best, making the primary realistic objective of EU reform conditionality that of seeking directly better Palestinian governance and democracy.

The Commission in particular began focusing on Palestinian reform well before the widespread Israeli and American interest in the question. The first EU-sponsored attempt to highlight the deficiencies of the PA requiring urgent reform came in 1999, with the publication of the Rocard-Siegmán Report.<sup>53</sup> More stringent conditionality was imposed since 2001. In particular, with Israel's withholding of revenue transfers to the PA, the EU provided the PA approximately €10m per month in direct budgetary assistance in 2000-03. These funds, critical to the survival of the Authority, were disbursed under strict conditions and IMF monitoring. In addition to the recommendations of the Rocard-Siegmán Report, EU conditions have focused on the reforms called for by the Palestinian Legislative Council in 2001, numerous Palestinian NGOs and PA officials. These have included ratifying and enacting the Basic Law and the Law on the Independence of the Judiciary, establishing a Constitutional Court and a High Judicial Council, abolishing State Security Courts, holding general elections, redistributing competences between the President and the Cabinet, ensuring transparency of public finances and restructuring municipalities, the civil service and most critically the security sector. These calls were supplemented by the 100-day reform plan, approved by President Arafat in June 2002, which focused on a selection of the above reforms. In particular, EU conditions called for greater transparency in PA public finances through the consolidation of all revenues in a single

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<sup>51</sup> Poul Nielson, "Give Relief Agencies the Space to do their Job", *Financial Times*, 17 June 2004.

<sup>52</sup> European Commission, Response to the EP Questions by Erik Meijer on EU measures against colonisation, destruction and eviction activities by Israel on 30 September 2002 on the basis of article 2; and by Emilio Menendez del Valle on 25 January 2002 concerning the destruction of Palestinian infrastructure financed by the EU.

<sup>53</sup> Yezid Sayigh and Khalil Shikaki (1999), *Strengthening Palestinian Public Institutions*, Task Force Report, Council of Foreign Relations, New York.

account monitored by the IMF and under the full responsibility of the Finance Ministry, a freeze on public sector hiring, the adoption on a Law on the Independence of the Judiciary and the passing and preliminary application of the Basic Law.

As Israel partially resumed revenue transfers in 2003, the EU cut direct budgetary support and established a new Reform Instrument. The new Instrument included €80m for the targeted support of SMEs, municipalities and social services, and €10m in technical assistance for the ongoing fiscal sector reform. The Commission has also financed the preparation for new elections, the institutional reform of the judiciary and the security services and counter-terrorism measures. In view of the January 2005 presidential elections, the Union committed over €3m to finance an observer mission.

Several EU-demanded reforms have been implemented. In 2002 the Palestinian Basic Law was adopted, and it was revised in 2003 to allow for a Prime Ministerial post (pushed for strongly by the US and Israel). In October 2002, the Cabinet was restructured and reshuffled. A Law on the Independence of the Judiciary was passed. Significant progress was made in the management of the PA's finances, thus curbing the potential for corruption. PA revenues were included into a single transparent account, the President's budget was cut and work has been ongoing on an effective audit system. In 2003, the security sector was partly restructured, as the former twelve (poorly coordinated) apparatuses were streamlined into six sectors, although three remained under the President's direct authority.<sup>54</sup> Particularly in the areas of judicial and financial reform, EU conditionality has been pivotal. At specific moments in 2002-03, EU threats to withhold budgetary assistance generated the necessary incentives to pursue the reform agenda.

There have been also clear limits in the effectiveness of EU conditionality. At times reforms have been superficial and implemented for the sole objective of pleasing EU (and US) interests. The creation of the Prime Minister's post did not come with its effective empowerment, as most control remained in the President's hands. The Cabinet was reshuffled in 2002, but apart from a few exceptions, the changes were largely cosmetic. Despite the passing of the Law on the Independence of the Judiciary, this was immediately followed by amendments introduced by the President, diminishing its effective independence. In the security sector, the bulk of the reform has yet to be undertaken.<sup>55</sup> In the fiscal sector, Arafat retained approximately 8% of the budget, i.e. enough to persist in the nepotism that lay at the fore of the corruption and concentration of powers in the President's hands. Despite the announcement of elections in early 2003, presidential elections took place only in January 2005 due to the imperative to replace late President Arafat.

The reasons underlying the limits of EU conditionality are manifold. The most critical reasons are those linked to the deteriorating status quo. The persisting and deepening Israeli occupation erected two sets of obstacles to Palestinian reform and the end of violence. First are the objective problems posed by the restrictions on movement and Israel's withholding PA tax revenues to the accomplishment of reform as an aim in itself. In order to strengthen and empower different institutions, to hold successful elections and to reform the security sector, legislators, civil servants and police forces need to dispose of the necessary resources and need to move freely across Palestinian territories. However, as put by a Palestinian minister, 'how can we speak of a separation of powers when we don't have any?'<sup>56</sup> Put differently, how can reformist domestic actors be empowered to pursue reform under the status quo? Second, and linked to the corollary aim of reforming the PA in order to promote an end of violence (bearing in mind the proviso mentioned above on the tenuous link

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<sup>54</sup> Security apparatuses under the President :1) National Security Force, 2) General Intelligence, 3) Military Intelligence. Security Apparatuses under the Interior Ministry: 4) Civil Police, 5) Preventive Security, 6) Civil Defence.

<sup>55</sup> Apart from more effective streamlining and coordination between the different departments, security reform also foresaw the downsizing of forces, a separation of powers, training and technical assistance, the establishment of a National Security Council, a real budget and oversight committees with financial and budgetary powers.

<sup>56</sup> Interview in Ramallah, November 2002.

between these two objectives), is the limited political ability of any Palestinian leader to quell violence. The extent to which any moderate PA leader can use his (limited) powers to quell Palestinian violence is directly linked to Israel's conduct. It has often been argued that without Israel's easing of the situation in the OTs, no Palestinian leader could repress violence without causing internal chaos or civil war.

The Palestinian reform movement was also weakened domestically by the blunt approach adopted by the US and Israel to the question. So long as the peace process continued, the international community (including the EU) refrained from heavy criticism of the Authority concerning its corruption, lack of accountability and human right abuses.<sup>57</sup> Yet, during the entire Oslo period, internal Palestinian calls for reform mounted from several and often opposing directions. With the eruption of the intifada, additional calls for reform stemmed from the desire to refocus Palestinian resistance and to rebuild ties with the Israeli 'peace camp'. In early 2002, Israel, following the US, began focusing on the question of Palestinian reform. Yet their discourse was framed in terms of 'regime change' and focused on particular personalities (and most notably the demonisation of Arafat). The frontal attack on the Palestinian leadership strengthened the waning legitimacy of the late President, hindered his succession, weakened Palestinian voices that had long called for reform and at most triggered merely ostensible reform.

Finally, internal Palestinian political dynamics constitute another key reason for the limited success of EU conditionality. The Palestinian political scene is highly complex, with many actors interacting in continuously evolving ways. When it comes to EU conditionality aimed at curbing Palestinian violence, the principal problem has been that the targets of conditionality were not the direct authors of most violent acts perpetrated against Israel. The EU has had no direct official contact with and thus leverage on Palestinian actors such as Hamas (Hamas was included in the EU's terrorist list in 2003). Its conditionality has targeted the PA, in direct opposition to the Islamic camp. Could EU conditionality have been indirectly effective by inducing the PA and Fatah (the dominant party in the PLO) to repress violence orchestrated by others? It has been difficult to ascertain to what extent this could have happened. The degree to which late President Arafat could have curbed violence, had he so wished, will be determined in the period following his death. Yet as aptly put by Henry Siegman, Arafat's principal problem was that, by representing the symbol of the Palestinian cause and embodying the Palestinian consensus, he was paradoxically a follower unable to live up the autocratic image he had cultivated worldwide. Hence, his inability to confront his people with difficult choices and to face internal resistance or even defeat by curbing violence.<sup>58</sup>

While the ability/willingness of the late President to curb violence can at most provide a limited explanation of the status quo, the hindrance posed by the late President becomes more evident when it comes to wider questions of reform. The reshuffling of Palestinian politics after November 2004 could allow for more effective reform and use of EU conditionality. Greater empowerment of the Prime Minister is largely expected, with Prime Minister Qureia and PLO Secretary General and President Mahmoud Abbas, already sharing powers between them. Dialogue between the Palestinian factions has enhanced and improved in the run-up to the elections and is expected to persist under Abbas' presidency. The security sector, having now come fully under the Prime Minister's control is undergoing a more systematic process of reform with British and Egyptian support. The 'death squad' unit under the Preventive Security Force in Gaza has been officially disbanded and there appears to be a greater willingness to disarm all those not belonging to the Palestinian security apparatuses. A legislative and administrative process is currently underway to create a twelve-member Palestinian National Security Council, under the Prime Minister's chairmanship. The Council would include the three streamlined branches of the reformed security services, namely general security (including

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<sup>57</sup> Amira Haas, "Two Government Crises", *Haaretz*, 30 October 2002. See for example the letter written by Human Rights Watch to the US President concerning the functioning of Palestinian State Security Courts: HRW, A Letter to President William Jefferson Clinton, 19 March 1999 ([www.hrw.org](http://www.hrw.org)).

<sup>58</sup> Henry Siegman (2003), "Partners for War", *New York Review of Books*, 16 January.

policing functions), general intelligence and national security (i.e. the embryo of a future Palestinian defence force). Greater transparency in PA public finances through the control of the President's funds, could serve to counter nepotism and corruption.

Equally important has been the shift of Israel and the US in response to Arafat's death, in particular by allowing presidential elections in January 2005 (blocked since 2001 due to the expectation of Arafat's re-election) and by partially relaxing restrictions on movement. Even more important for the overall legitimacy and accountability of the Authority, legislative elections have been scheduled for July 2005 (municipal elections began in December 2004 and will take place until late 2005). The Islamic parties have indicated their likely participation in these elections, signalling the move towards greater coherence and unity in the Palestinian movement. Finally and perhaps most importantly, the sixth Fatah Congress, the first held in sixteen years, is set to take place in August 2005. The Congress will likely see the rise of young Fatah activists with strong backing from the public. The Congress will determine whether Fatah should transform itself into a political party (Arafat was adamantly against the idea), and it will shape the overall Palestinian liberation strategy.

### ***EU-Israel Relations: Firm in Rhetoric, Compromising in Practice***

In the declaratory aspects of its bilateral relations with Israel, irrespective of harsh Israeli criticisms over the decades, the EU has remained firm. This firmness in rhetoric has had some tangible success. Most importantly, it has transformed the concept of a Palestinian state led by the PLO from heresy in the 1970s to the accepted rhetorical goal of the international community by 2000.<sup>59</sup> The latest evidence of EU firmness has been in the negotiation of the Israeli ENP Action Plan, where despite strong Israeli resistance, the Union insisted on references to the Roadmap (and weapons proliferation) in the 'priorities for action' section of the Plan.<sup>60</sup> Yet beyond the rhetoric, the Union has been uncharacteristically compromising in practice. Not only has it refrained from any conditionality (either negative or positive) on Israel, but it has compromised itself to the extent of bending its own norms and rules to accommodate illegal Israeli practice. As such, Israel has had little incentive to modify its behaviour in line with European rhetorical wishes.

Despite the grave human rights and international law violations documented above, no attempt has been made to impose negative conditionality, let alone arms embargoes or sanctions, on Israel.<sup>61</sup> However, as discussed above, despite widespread human rights and democracy violations, the EU has never applied negative conditionality on any southern Mediterranean country. Negative conditionality in general is uncharacteristic of the EU's foreign policy's ethos. The Union has made clear its preference for the concept of 'constructive engagement' with Israel.<sup>62</sup>

Yet typical of the EU's concept of 'constructive engagement' with third countries has been the idea of positive conditionality, i.e., the 'dangling carrot'.<sup>63</sup> In other words, EU contractual relations have offered specific benefits in principle, but have delivered on them on the basis of the specific conduct of the third country in question. This approach has not been applied to Israel. Carrots have been rarely dangled, and normally simply given. Apart from a few exceptions, such as the European Parliament's

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<sup>59</sup> Elena Aoun (2003), "European Foreign Policy and the Arab-Israeli Dispute: Much Ado About Nothing?", *European Foreign Affairs Review*, Vol. 8, pp. 289-312, p. 293. See also Martin Ortega (2003), "Conclusion: Peace Lies in Their Hands", in M. Ortega (ed.), *The EU and the Crisis in the Middle East* Chaillot Paper, EUISS, Paris, pp. 52-63.

<sup>60</sup> European Commission (2004), "Proposed EU-Israel Action Plan", 9 December, p. 3 ([www.europa.eu.int](http://www.europa.eu.int)).

<sup>61</sup> Question by Lousewies van der Laan, MEP, and others to the Commission on 17 June 2002 on Arms Embargo against Israel', Brussels ([www.cec.eu.int](http://www.cec.eu.int)).

<sup>62</sup> See Commission of the EC (2004), "Sanctions on Israel?" ([www.europa.eu.int/comm/external\\_relations/mepp/faq/index.htm](http://www.europa.eu.int/comm/external_relations/mepp/faq/index.htm)); FCO (2004), "Imposition of Trade Sanctions and Breaking off relations with Israel" ([www.fco.gov.uk](http://www.fco.gov.uk)).

<sup>63</sup> Conversation with Commission official, Brussels, September 2004.

delayed ratification of EC-Israel trade agreements in 1987-88 and in 1995-2000, the Union has never attempted to exert any form of positive conditionality on Israel. This has led to several paradoxical incidents damaging the EU's credibility. The most recent was in the autumn of 2004, when the Commission negotiated an ENP Action Plan with Israel following the ICJ ruling condemning Israel and the EU Council's own criticisms of the Israeli raids in Gaza. This atypical EU approach led a German official to question in reference to the ENP: "Imagine if disproportionate use of force is being condemned by everyone, and at the same time the EU offers this magic plan to move Israel and the EU closer to each other – a plan which benefits the Israelis... at the bottom of this is how we can use for the best our leverage with Israel. After all, they will get everything but institutions".<sup>64</sup>

In the EU-Israel Action Plan itself, there has been no effective attempt to formulate political conditionality. The Action Plan does mention the peace process, security, human rights and international law, but specific references are only included as subjects for discussion in reinforced political dialogue. In its obligations ("priorities for action"), only one in six bullet points refers to "facilitating efforts to resolve the Middle East conflict" and to "promoting the respect for human rights". However, the scope for positive conditionality is extremely weak. The Plan only loosely states that "progress in meeting these priorities will be monitored....On this basis, the EU and Israel, will review the content of the Action Plan".<sup>65</sup> In practice, Israel's only ENP obligations concerning conflict-related issues are likely to be their discussion within political dialogue. This is in clear contrast to the political conditionality developed in the EU-PA Action Plan, which goes as far as stating that the very *raison d'être* of the PA's inclusion in the Neighbourhood Policy is that of promoting the PA's political and economic reform agenda.<sup>66</sup>

However, by far the most serious and atypical way in which the EU has related to Israel has been its progressive bending to illegal Israeli policies, to the extent of risking a distortion to own law and practice. The dispute over the preferential export of Israeli goods produced in settlements has received sparse attention from academia and civil society. It has either been sidelined by pro-Palestinian NGOs that have been more enthusiastic about calling for sensationalist measures such as 'sanctions' against Israel. Likewise, it has been brushed off by EU policy-makers, who have argued that the issue has been simply an irritant, amounting to a few hundred million euros per year, which has disturbed the EU's quest for improved political relations with Israel.

Yet scratching beneath the surface reveals that the problem lies at the very core of the conflict. This is not simply because it is connected settlements, which represent a major hindrance to a viable two-state solution. But also because the issue exemplifies a key reason underlying the status quo: the international community's decades-old acquiescence to Israel's insistence on the right to differ in its respect for international law.<sup>67</sup>

Since 1975, the territorial scope of all EC-Israeli agreements has been limited to the 'territory of the State of Israel'.<sup>68</sup> Based on international law, the EU has considered the 'territory of the State of Israel' to exclude the territories occupied in 1967. As such, the Community does not entitle preferential treatment to products, wholly produced or substantially processed in Israeli settlements.<sup>69</sup> Yet Israel

<sup>64</sup> Quoted in Sebastian Alison, "EU Faces Row over Neighbourhood Pact with Israel", 7 October 2004, Reuters.

<sup>65</sup> European Commission (2004), "Proposed EU-Israel Action Plan", Brussels, 9 December, p. 3 ([www.europa.eu.int](http://www.europa.eu.int)).

<sup>66</sup> *Ibid.*, p. 1.

<sup>67</sup> The following paragraphs draw heavily from conversations with Charles Shamas of the Mattin Group, Ramallah.

<sup>68</sup> Article 38 of the 1995 Interim Cooperation Agreement, Article 83 of the Association Agreement and Protocol 5 of the Association Agreement.

<sup>69</sup> Commissioner Chris Patten's Reply to Charles Tannock, MEP on 6 November 2003: 'The Commission's interpretation of the agreement is clear: products originating from the Israeli settlements are not entitled to benefit from preferential treatment...'

has determined the origin of its exports in a manner that does not distinguish between production carried out within its borders and in the OTs. It has done so arguing that Israel's territorial borders have not been defined yet and that until they are, Israel will include the OTs in its customs envelope. This has resulted in the illegal preferential treatment of Israeli settlement products. This illegality has put the member states, as High Contracting Parties, in violation of Article 1 of the Fourth Geneva Convention.<sup>70</sup> In addition, the violation of the territoriality clause represents a material breach of the Association Agreement. The failure to rectify the situation has also put the Commission, as Guardian of the Treaties, in contravention of its own obligations under EC Law.

The Commission and the member states have acknowledged the need to rectify the situation.<sup>71</sup> In 1997 the Commission issued a first Notice to Importers stating that there were grounds for doubt concerning the validity of all Israeli origin certificates and that importers could be liable to duty recovery.<sup>72</sup> It followed suit in September 1998 with a mission to Israel, which confirmed that the Government of Israel did not respect the origin rules. As the Commission could no longer deny it had proof of Israel's malpractice and in order to avoid the legal hazards of continued inaction ('estoppel'), EU institutions have attempted a series of remedies. All have been at best marginally effective and at worst legally dangerous by threatening to accommodate Community Law and practice to Israel's illegal policies.

In 2000, attempting to wash its hands from the affair, the Commission argued that there was a "difference in interpretation" of the agreement between Israel and the Community.<sup>73</sup> It argued that the 'difference' did not entail a material breach of the agreement (requiring unilateral Commission action), but rather called for arbitration under Article 75 of the Association Agreement. It then referred the issue to the Council. Member states Germany, the Netherlands and the UK vetoed the proposal for political reasons (not wishing to antagonise Israel). Yet unintentionally their decision was welcome. Arbitration would not only leave the issue pending in so far as any party could indefinitely hold up the appointment of the third arbitrator. Moreover, arbitration was not intended to adjudicate on issues that have already been settled under public international law. While a final settlement could see the extension of Israeli territory to the West Bank and Gaza, until and unless this happens, the territories have been clearly designated as 'occupied' rather than 'disputed' and the Geneva Convention is considered as applicable there.

Moving on to a second track, the Commission proceeded with a first round of verifications of Israeli consignments in August 2000. Unsurprisingly, Israel replied to the verification questions stating that the products originated from Israel. Having to rely on Israel's good faith, member state customs could not recover duties. In turn they asked for the Commission's political guidance, and the latter issued a second Notice to Importers. The second Notice stated that if verification replies either confirmed the non-originating status of the products, or contained insufficient information, member state customs should deny preferences.<sup>74</sup> On the basis of this new Notice, several member states proceeded with duty recovery in 2003-04. Yet the situation remained inadequate and duty recovery has been ad hoc, susceptible to importers' challenges, and it has relied on Israel's provision of 'insufficient' answers.

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<sup>70</sup> Article 1 of the 4<sup>th</sup> Geneva Convention prevents any state or their nationals from participating in, or facilitating, the Convention's violation.

<sup>71</sup> Council of the EU, Declaration of the EU for the First Meeting of the EU-Israel Association Council, Luxembourg 22 June 2000; Council of the EU, Draft Declaration of the EU for the Second Meeting of the EU-Israel Association Council, Brussels, 14 November 2001, paragraph 2; Council of the EU, Declaration of the EU for the Third Meeting of the EU-Israel Association Council, Brussels, 15 October 2002, paragraph 3; Council of the EU, Declaration of the EU for the Fourth Meeting of the EU-Israel Association Council, Brussels, 17-18 November, 2003, paragraph 15.

<sup>72</sup> Notice to Importers published on the 8 November 1997, *Importations from Israel into the Community*, OJ C338, p. 13.

<sup>73</sup> Plenary debate in the European Parliament on 2 March 2000.

<sup>74</sup> Notice to Importers published on the 23 November 2001, *Importations from Israel into the Community* OJ C3382001/C.

Paradoxically, if Israel provided sufficient information on the location of production (in the OTs) and specified that these products originated from Israel, member states customs would not be entitled to recover duties.

The last move in this ongoing saga has been the search for a ‘technical arrangement’ to ease the administrative burden of verifications on member state customs. Of all the attempted ‘solutions’, the arrangement and its possible consequences could compromise most the EU’s position towards the conflict. Based on an initial proposal by Israeli Trade Minister Ehud Olmert in November 2003, the Commission internally agreed on a ‘technical arrangement’ in November 2004. The arrangement would consist in Israel naming the locality of final substantial transformation on the origin certificates of Israeli exports. The Commission would then provide member state customs with a list of settlement localities. This would allow EU customs to deny preferences without verifications when the stated localities fall beyond Israel’s territorial scope. Verifications could still be carried out in other cases and preferences denied as provided for in the Commission’s Notice to Importers.

The Israeli side portrayed this move as a major concession on their part. Yet in reality, the arrangement entails at best a partial practical answer to the problem. The arrangement has the advantage of lightening the administrative burden on member state customs to carry out onerous verifications. However, if the arrangement only calls upon Israel to state the location of final substantial transformation, this will exclude the vast majority of settlement trade. Published estimates of the volume of Israeli exports to the Community that directly ‘come from’ settlements range between €150-200m annually. However, the volume of Israeli exports that have undergone critical working or processing in settlements is much larger, and could reach up to \$2bn.<sup>75</sup>

At worst the arrangement presents major legal hazards to the Union. Under the arrangement, the EU would entitle Israel to represent all localities as situated within the State of Israel, to issue proofs of origin on that basis, and thus to count and verify settlement trade as being entitled to preferential treatment. If the Community considered the arrangement as legally binding, its enactment would invert the legal meaning of the association agreement in international law. If the arrangement legally allows Israel to issue proofs of origin for settlement products, then these products’ preferential treatment would also become legal. No CFSP statement on the 4<sup>th</sup> Geneva Convention or on the illegality of settlements would alter this fact. Indeed, Israel’s occupation would have become enshrined in Community Law, which in turn, would have become inconsistent with the member states’ duties under public international law (i.e. those of not lending support to a third state’s violation of the Geneva Conventions).

Aware of these hazards, the Commission has insisted that the arrangement would not be legally binding and that its enactment would only ease rather than ‘solve’ the problem. However, the Commission has also wished to shelve the origin rule headache, which has poisoned its relations with Israel. It has thus called upon the Council to endorse the arrangement. Most problematic, the Commission has also considered that the arrangement would provide a sufficient solution to proceed with replacing the Protocol on Origin, to allow for Israel’s inclusion in the system of diagonal cumulation of origin rules, as mentioned in the EU-Israel Action Plan.<sup>76</sup> Yet replacing the Protocol on Origin prior to an effective solution would not only magnify exponentially the problem in practice (given the increased difficulty of detecting settlement cum Bulgarian, Romanian, Jordanian, Egyptian, etc., commingled products). The replacement of the Protocol on Origin prior to a solution could also poison the EU’s rights to arbitration and to suspension, as the only legal remedies it has left to halt

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<sup>75</sup> Reported on the New York Times on 22 May 2001. \$2 billion may be an excessive estimate. However, if only a fraction of that estimate represents ineligible imports that cannot be detected with the ‘technical arrangement’, it is only a matter of time before the verification burden on the member states customs services mounts again.

<sup>76</sup> The 2003 Council concluded that the Origin Protocol would be amended only after ‘solving the bilateral issue of rules of origin’, Council of the EU, Declaration of the EU for the Fourth Meeting of the EU-Israel Association Council, Brussels, 17-18 November, 2003, paragraph 15.

Israel's material breach of the Association Agreement.<sup>77</sup> Several concerned member states have acted to halt these developments. When made aware of these risks, the Customs Cooperation Committee simply 'noted' (rather than 'endorsed') the arrangement and concluded that the arrangement only indicated sufficient good faith to open the way for negotiations on diagonal cumulation. At the time of writing it remains unclear whether, how and when the Union, in the context of the ENP, will proceed to enhance its trade relations with Israel.

But what explains EU policies towards Israel? Why did the Union abdicate on the use of positive conditionality? Most importantly why has it accommodated Israel to the extent of bending its own system of law and harming its credibility in the region? As in the case of relations with the Palestinians, during the Oslo years, the EU refrained from exerting any pressure on Israel, including pressure to respect international law. It argued that it did not wish to "prejudice the positions of any of the parties". Indeed the entire peace process was conducted on the premise that, while Israel cooperated in the peace process, the international community would accept its 'right to differ' on the interpretation and application of international law. Yet, the continuation of this attitude following its demise, has cast doubt over the Union's rationale.

Some have argued that there would be little point in the EU's attempt to exert positive conditionality on Israel, given that the latter would never accept conditions that run counter to its perceived national interests and project. In other words, if Israel were faced with the choice of deepening its ties with the Union or persisting in its policies towards the OTs, it would certainly choose the latter. In line with this argument, others have argued that this is the case not least because the Union has already delivered many of its most valuable carrots to Israel, particularly in the area of trade.<sup>78</sup> A key EU incentive to Israel would be that of threatening to suspend aid to the PA, thus triggering its collapse. It has been repeatedly suggested that EU (and other donor) funds to the PA have effectively 'subsidised' the Israeli occupation in so far as they have lightened Israel's onerous legal responsibilities, as the occupying power, to provide basic services to the Palestinians. Yet due to the expected humanitarian crisis this would entail, the Union is unlikely proceed on this track.<sup>79</sup> And Israel is well aware of this, eliminating any credibility of a possible EU threat of this kind.

EU policies have also been influenced by Israeli strategies towards the EU. A first pillar of Israel's strategy has been that of criticising Europe for its alleged anti-Israeli bias and its anti-semitism. EU member states and particularly countries such as Germany and Austria, for evident historical reasons, have been highly sensitive to any criticism of this kind. When highlighting Europe's anti-Israeli bias, Israeli officials and analysts have carefully focused on the realm of EU rhetoric, where indeed the Union has been often critical of Israel. Rarely have Israelis criticised in the same terms the substance of the relationship, well aware that in practice, Israel enjoys a far closer relationship with Europe than any non-EU candidate country to the south or east of the Union.

To bolster and explain EU criticism, Israel has also used and manipulated the discourse of anti-semitism. While anti-semitism certainly exists in pockets of European society, this is far from widespread and cannot be conflated with common public sentiments critical of Israel's conduct towards the Palestinians. Yet Israeli officials have often merged the two. The controversy in the autumn of 2003 over the Eurobarometer poll, indicating that a majority of Europeans considered Israel as the greatest threat to world peace was an interesting case in point. Prime Minister Sharon responded

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<sup>77</sup> According to Article 45 of the Vienna Convention of the Law of Treaties (1969), if the parties proceed to amend an agreement in the light of a persisting malpractice, the right of suspension could be voided. This is because Article 31 states that an amendment in view of inaction to end an acknowledged malpractice could commit the parties to an interpretation of the agreement that renders the malpractice permissible for as long as the agreement persists.

<sup>78</sup> Conversation with Commission official, October 2004, Brussels.

<sup>79</sup> See Muriel Asseburg, "From Declarations to Implementation: The Three Dimensions of European Policy towards the Conflict", in M. Ortega (ed.), *The EU and the Crisis in the Middle East*, Chaillot Paper, EUISS, Paris, 2003, pp.11-26.



to the results by stating: “Today there is no separation. We are talking about collective anti-semitism. The State of Israel is a Jewish State and the attitude towards Israel runs accordingly...I would say, in my opinion, EU governments are not doing enough to tackle anti-semitism”.<sup>80</sup> The logical conclusion of this line of argument was that Europe should make up for its sins to Israel. In policy terms, this would entail refraining from recurrent criticism of Israel and compensating Israel with forms of virtual membership in the Union.

A second major line of Israeli reasoning has been that of separating ‘politics’ from ‘economics’. This argument has had three major strands. The first has highlighted the need to ‘compartmentalise’ the Arab-Israel conflict and not allow it to poison EU-Israel relations.<sup>81</sup> This argument appears intuitively correct. However, the close enmeshment of the conflict with issues concerning international law entails that compartmentalising the conflict in reality means accepting Israel’s reading of it. The dispute over the rules of origin highlights this point. The origin rules issue concerns a technical trade question, which has been affected by one party’s disrespect for IHL. In this case, ‘compartmentalising’ the conflict and preventing it from affecting EU-Israel relations, would presumably entail accepting Israel’s positions.

The second strand of this argument has highlighted Israel’s level of economic development, which cannot be compared to the condition of the rest of the Middle East. Hence, Israel should not be relegated to the EMP where it is surrounded by poor and misgoverned Arab countries. As put by one Israeli analyst: ‘If Israel can compete with the Silicon Valley, why should it compete with the Nile Valley?’<sup>82</sup> Following this logic, Israeli analysts and policy-makers for years have attempted to reinvigorate the logic of the 1994 Essen European Council, which acknowledged that due to Israel’s high level of development, it should enjoy a ‘special status’ in its relations with the EU. Israeli scholars have researched in detail how Israel could upgrade its economic ties with Europe, by finding a *sui generis* blend modelled on the EU’s relations with developed yet non-member countries such as Norway or Switzerland.<sup>83</sup>

The third strand of this argument concerns Israel’s intimate knowledge of the EU system. Most Israeli analysts are well aware that full EU accession would not be in Israel’s political interests, in so far as it would require a radical transformation of the Zionist project (through the adoption of the Copenhagen political criteria). Far more interesting to Israel would be other forms of ‘virtual membership’. ‘Virtual membership’ would allow Israel to benefit economically and politically from close association with Europe, without the intrusive political conditionality that full accession entails. In elaborating ideas for ‘virtual membership’, Israeli officials and scholars have displayed an intimate understanding of the Community system. This has been most evident in the EU-Israel Action Plan negotiations. In clear contrast with other EU neighbours, with scant knowledge of what the EU has to offer, Israel’s cadre of professional officials and academics had the necessary knowledge to cherry-pick exactly what EU ‘carrots’ would be in Israel’s best interests.<sup>84</sup> The EU-Israel Action Plan is indeed a long list of EU benefits to Israel in many areas, ranging from reinforced political dialogue, to economic and social cooperation, trade and internal market integration, cooperation in justice and home affairs, cooperation and integration in the areas of transport, energy, environment, information society and research, and people-to-people contacts. While ‘political’ issues are discussed in the Plan, no effective conditions are attached to the receipt of these EU benefits.

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<sup>80</sup> Reuters, 24 November 2003.

<sup>81</sup> Mark Heller (2004), “Israel-EU Relations: The Political Dimension”, paper presented at the IEPN meeting, 14 October, Berlin.

<sup>82</sup> Conversation with Israeli analyst in Tel Aviv, June 2002.

<sup>83</sup> Alfred Tovias (2004), “The EU Models of External Relations with EEA Countries and Switzerland in Theory and Practice: How Relevant for Israel?”, paper presented at the IEPN meeting, 14 October, Berlin.

<sup>84</sup> Conversation with Commission official, Brussels, October 2004.

The arguments above go a long way towards explaining EU policies towards Israel in practice. A final reason explaining why the Union has largely bent to Israel has been the leverage that Israel can exert on Europe. In economic terms, close EU-Israeli trade ties have benefited Europe as well as Israel (the Union enjoys a strong trade surplus with Israel). Even more importantly, despite being a small country just over half the size of Belgium, Israel has been key to European security interests. Since the second World War, what Europe has needed most in the Middle East has been stability. Stability has always been key to European energy security. The stability and development of the Middle East has been also linked to other key issues facing Europe, such as rising immigration from Middle Eastern countries. Most recently, peace, stability and progressive development in the Middle East have been viewed as key to tackle the new threats facing Europe, first and foremost those of political extremism and terrorism. The ills of the Middle East by no means hinge exclusively on a resolution of the Arab-Israeli conflict. Yet a solution has been considered by European leaders and publics alike as a main ingredient to the stability, peace and prosperity of the region. As such, Israel, as a principal party to the conflict, has been a key to Middle East stability, entailing its significant relative leverage on Europe.

The EU's limited carrots on offer to Israel, its unwillingness to condition them politically, as well as Israel's political hold on Europe, add up to a complex explanation of the status quo. Which other third country at the EU's periphery could afford to boycott an EU Special Envoy and receive only rhetorical accusations in return?<sup>85</sup>

### **Policy Avenues in the Period Ahead**

Despite the rhetorical commitment to specific goals in the Middle East, EU policy has not only failed to meet its objectives (a task that could not be achieved by Europe alone), but has at times paradoxically worked against them. Unlike many other cases of EU foreign policy, EU shortcomings in the conflict have not derived from major incongruences between national aims and interests. To differing degrees and with minor exceptions, all member states have both endorsed EU goals and have shared similar views of how to formulate and implement EU policies towards the conflict. Neither has the principal problem lied in absolute shortcomings of EU instruments. With the sole exception of the US, the EU has been the external actor with the greatest potential influence on the parties. Potential EU influence has derived from the EU's structural and contractual ties with both Israel and the PA. The outcomes thus beg the question: should the Union revise its aims or/and should it alter the manner in which it deploys its instruments?

### **Revising EU Goals?**

Presumably a revision of EU objectives in the Middle East would not entail abandoning the commitment to human rights and international law. Not only are member states bound to international law through their own legal commitments, but the Union collectively has made the promotion of rights and law the cornerstone of its internal and external *raison d'être* in its Constitutional Treaty.<sup>86</sup>

Alternatively, the EU could abandon the goal of a two-state solution. Due to the development of the status quo, there has been a growing discussion in both Israel and Palestine on whether and how to revert to 'one-state solution' ideas. The substance of these ideas varies and stems from radically different political points of departure.<sup>87</sup> However, at the heart of this rationale is the growing awareness that time may be running out (or may have run out already) for a viable two-state solution.

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<sup>85</sup> In the autumn of 2003, Israel boycotted EU Special Envoy Marc Otte following his visit to Arafat.

<sup>86</sup> Article III-193(1) of the Constitutional Treaty states that the Union would be 'guided by, and designed to advance in the wider world, the principles which have inspired its own creation, development and enlargement'.

<sup>87</sup> Gary Sussman (2004), 'The Challenge to the Two-State Solution', *Middle East Report*, Summer 2004. See also Michael Emerson and Nathalie Tocci (2003), *The Rubik Cube of the Wider Middle East*, CEPS, Brussels, pp.28-29.

Indeed the European Council and the Council of Ministers have repeatedly acknowledged this possibility since 2002.<sup>88</sup>

There are equally pressing dangers both in retaining the goal and language of the two-state solution and in abandoning it, embracing one-state solutions instead. The risk of retaining the aim of a two-state solution is the increasing detachment from realities on the ground. One could imagine that in the period ahead, through a re-engagement of the second Bush administration aided by European support in the governance and security of Palestinian territories, Israel's unilateral disengagement plan would acquire international legitimacy. The result could be a set of largely-disconnected Palestinian entities, which could be declared a 'state', irrespective of their evident lack of viability.

Equally dangerous could be the formal abandonment of the two-state solution idea. Not only would this mean foregoing the long-sought recognition of Israeli and Palestinian rights to self-determination through statehood. Most critically, it could entail an acceptance and legalisation of the expanding Israeli hold over Palestinian territories.

In order to avoid both dangers, a possible way forward would be that of paying less attention to the formal constitutional end-point of one or two states, and to focus instead on the imperative of respecting rights and law, by all internal and external parties, both in the process yielding a final settlement and as part of the core parameters of that settlement. This would include first and foremost the respect for international humanitarian law, followed by the respect of wider civil, economic and political rights as and when a final settlement is reached. Other complementary principles, often applied in conflict and negotiation contexts could include:

- the equality of treatment of the parties, including the proportionality of the demands made of them relative to their capabilities;
- a single undertaking: nothing is agreed until everything is agreed, both in the process towards a settlement and in the parameters of the settlement itself;
- minimising path-dependent conditionality, whereby new pre-conditions demanded by either of the parties find their way into the international consensus determining the 'rules' governing the peace process.

This would mark a clear break both from the current status quo and from the premise underpinning the Oslo process. This exclusive focus of EU policy would not alone alter the ongoing realities. Yet, much like the Venice Declaration, viewed as anathema to many in 1980 and accepted by most by 2000, this shift in the EU's policy focus, could ultimately lead to the desired results.

### ***Seeking Greater Consistency in the Deployment of EU Instruments***

In order to do so, greater consistency should be sought between EU rhetorical goals and the deployment of EU instruments to meet them. This could be done in several ways, focusing primarily on the EU's bilateral relations with the Palestinians and the Israelis.

#### ***EU-Palestinian Relations***

The renewed international attention to internal Palestinian politics following the death of Yasser Arafat offers scope for enhanced EU action on Palestinian reform. The concomitant publication of the EU-PA Action Plan, largely focused on questions of reform, provides the avenue for revamped EU efforts in this direction.

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<sup>88</sup> European Council in Copenhagen on the 12-13 December 2002, Declaration on the Middle East; European Council in Thessaloniki on the 19-20 June 2003, Presidency Conclusions, (11638/03), point 86; Conclusions of the Council of Ministers on the Middle East, 20 June 2003; European Council in Brussels on the 16-17 October 2003, Presidency Conclusions, (15188/03); European Council in Brussels on 17-18 June 2004, Presidency Conclusions, (10679/2/04).

One of the major challenges stems from the Palestinian elections and the desirability to allow these to enhance the legitimacy and accountability of the PA. In order for desired effects to occur, competitive, free and fair presidential, legislative and municipal elections would be in order. The conduct of presidential elections on 9 January 2005 was largely considered a success story. The same effort should be devoted to securing successful legislative and municipal elections. The EU's commitments to support free and fair elections through its voice in the Quartet, through financial and technical assistance and through monitoring, are all welcome.

On longer-term questions of reform, the Union could pay greater attention to three key factors underlying the reform agenda; namely, domestic actors, incentives and capability. First, EU policies could focus more on local Palestinian actors and their interaction, in so far as these, rather than externally-imposed conditions, represent the driving force of any progress (or lack thereof) of reform. One step to support home-grown reform is to encourage greater involvement of Palestinian civil society. The Quartet set up a separate track on civil society. But the reform process could benefit if civil society actors were not simply part of a separate reform track but were included as stakeholders in the determination and implementation of the reform agenda.

Another key issue, which resurfaced in late 2004, is that of Palestinian intra-factional dialogue, particularly between the PLO and Islamic bloc. Ideas for dialogue or joint leadership with the Islamic (or rather Islamist) parties have been long sought by several key personalities on both sides. In November 2004, the interim PA leaders rejected the concept of a national unity leadership. However they supported strengthened dialogue with the Islamist parties. The purpose of dialogue would be that of providing greater clarity and unity in Palestinian national objectives as well as in the legitimate means to achieve them. Beyond the Islamist parties (and affiliated armed groups), dialogue with and participation of Islamic (rather than Islamist) groups, particularly those active in civil society, would also contribute to the effectiveness of humanitarian assistance and, beyond it, socio-economic development in Palestine. The merits of intra-factional dialogue should not overlook its potential draw-backs. These draw-backs are reflected also in other contexts, and relate to the general desirability of including 'anti-system' groups within the legal political system. The merits are those of enhancing moderation and receptiveness to the rule of law. The dangers lie in legitimising radicalism or violence. The same dilemmas certainly exist in the Palestinian context.

A greater understanding of the intricacies within the Islamic bloc and in particular the important distinctions which exist between groups operating in different sectors (i.e., between armed groups, political parties and civil society actors), would be a first place to start to resolve this dilemma. Greater European understanding of these distinctions could contribute to more effective humanitarian and development strategies towards the Palestinians. When it comes to political participation, whether and what dialogue will take place following elections will depend not only on Mahmoud Abbas' success in engaging with the Islamic parties, but also on the mode of participation of the Islamist parties in the legislative and municipal elections. In any event, irrespective of whether their full inclusion in the PLO is on the horizon, the need for dialogue is likely to persist. The Union, and in particular High Representative Solana, building on its former support for intra-Palestinian ceasefire talks, could contribute more actively in mediating strengthened dialogue, if and when needed.

Second, the EU could formulate more consistently the incentives in its conditionality policies towards the Palestinians. The EU-PA Action Plan goes far in specifying the 'priorities for action' in the areas of democracy, human rights, the judiciary, the legal system, the fiscal and security sectors, institutions and administrative capability.<sup>89</sup> Greater clarity in the reform objectives, to be followed through in political dialogue and monitored through joint EU-PA sub-committees, are all welcome developments. However, while rightly heavy on the obligations, the Action Plan is thin on the incentives. The only additional incentives mentioned in the Plan include efforts to implement the trade aspects of the association agreement and possible cooperation in the areas of transport, energy, research and people

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<sup>89</sup> European Commission (2004), "Proposed EU-PA Action Plan", Brussels, 9 December 2004, pp. 3-8 ([www.europa.eu.int](http://www.europa.eu.int)).

to people contacts. It is indeed hard to draw-up feasible ‘integration incentives’ for a non-state actor under occupation. Moreover, given that the overarching Palestinian preoccupation is that of liberation and state-building, the most valuable EU incentives would be those directly or indirectly related to these aims. As such, former EU commitments to persuade Israel both to facilitate Palestinian trade and development, as well as to respect human rights and international law in the OTs would be viewed as the most valuable incentives to the Palestinians. In this respect, it is interesting to note that while the EU-Israel Action Plan covers internal Palestinian questions (such as reform and terrorism), the EU-PA Action Plan makes no mention of Israeli policies towards the Palestinians. EU pledges geared towards increasing Palestine’s political and economic autonomy vis-à-vis Israel would also be valued highly by the Palestinians. High on the agenda would thus be aiding the PA to reach full fiscal autonomy through an amendment of the Paris Protocol and supporting early accession to the WTO.

Third, effective EU conditionality would factor-in the limited capability of the PA as a non-state actor. As such, in the context of the EU-PA Action Plan, EU policy-makers would need to distinguish between reform priorities that the PA can and should meet, priorities that require Israeli cooperation, and priorities that need external support. On the first, including fiscal, judicial, legal and education reform, the EU could strengthen targeted positive and negative conditionality, particularly following amendment of the Paris Protocol, granting the PA full fiscal autonomy. On the second, such as security sector reform, the Union would hold the PA responsible up to and not beyond its capabilities, lest it fuel unrealistic expectations. Beyond PA capability, EU policy-makers should make the most of the enhanced EU-Israel relations to encourage Israeli cooperation. On issues requiring external support, including administrative reform, institution-building, trade and development, the EU, and other donors, would continue to focus on targeted financial and technical assistance.

Making such distinctions in practice is no simple feat. Measuring relative capability is not only open to subjective interpretation, but it also requires continuous review, in so far as capability alters over time as circumstances change. Yet however imperfect, breaking down reform priorities along these categories would be a first necessary step for an effective EU policy of conditionality. This could be done by EU and PA officials together through an appropriate sub-committee under the existing EU-PA Joint Committee. One method to move forward on this issue would be that of projecting what conditionality benchmarks would look like under ‘normal’ circumstances of sovereign statehood, and then work backwards from this end-point to current circumstances.

One final dilemma epitomising the difficulties embedded in bridging rhetoric and reality concerns the overall desirability of international support for the PA. The danger of ongoing support is that rather than contributing to viable Palestinian statehood, it also eases and thus perpetuates Israel’s occupation. The dilemma arises because developments on the ground inevitably shape international assistance priorities. Hence, the growing international focus on Palestinian municipalities, given that ongoing ‘cantonisation’ has placed on them rising responsibilities for service provision. Yet when aid follows developments on the ground, developments which are also largely shaped by Israeli policies, the risk becomes that of simply acting to support spoiling strategies, viewed as incongruent with EU aims. The most recent example of this has been Prime Minister Sharon’s open-ended invitation to the EU and the UN to support governance and security in Gaza following disengagement. There seems no easy way out of this dilemma. The most effective way out could be that of strengthening conditionality and support to the PA on the one hand, but only if the Union holds Israel legally and thus financially responsible (in deed and not only in word) for its actions in the OTs. Without this double track approach, the Union would unintentionally add incentives to conflict continuation.

### *EU-Israel Relations*

Turning to EU-Israeli relations, the starting observation is that the EU is unwilling to forgo entirely its relations with neighbouring countries, first and foremost with Israel. Hence, expecting a radical policy shift to embrace muscular negative conditionality is unrealistic. A more fruitful and likely avenue is that of reshaping EU strategies towards Israel through a complementary policy of upgrading international law as the guiding principle of EU actions and of pursuing positive conditionality. In

practice, EU policy towards Israel has marginalised the importance of IHL and has shielded Israel from the consequences of its violations to the extent of bending the EU's own system of rules and laws. Strong political and legal rationales call for a reversal of this strategy. Politically, EU policies have added incentives to Israel to pursue actions which the Union views as counter to its interests. Recognising the validity of this concept in its general applications, the EU Security Strategy noted that there would be 'a price to be paid, including their relationship with the EU' for countries which 'persistently violate international norms'. Legally, the July 2004 ICJ ruling reaffirmed the responsibilities of the High Contracting Parties to the 4<sup>th</sup> Geneva Convention (including all member states) 'not to render aid or assistance' to Israeli policies which contravene IHL (paragraph 163).

What would reasserting IHL as a guiding principle of EU actions entail? Beginning with the origin rules problem, rather than seeking technical solutions that distract attention and fail to tackle the underlying issues, the Union could act by 'least disturbing the functioning of the agreement' by conducting broad verifications on all Israeli exports. In order to sustain such a policy legally, this would require an official Commission acknowledgement that Israel's policies on origin derive from its general public policy that contravenes international law. Without such an official acknowledgement, member state customs could not sustain this comprehensive method of duty recovery, and could face importers' challenges.<sup>90</sup> Such a solution would naturally entail high administrative and thus financial costs to EU customs, which could either be endorsed by the latter or passed on Israel by adjusting the terms of trade. A less onerous solution, which would however 'disturb' more the functioning of the agreement, would be that of partially suspending those elements of the agreement affected by Israel's material breach.

The same arguments are beginning to apply to other aspects of EU-Israel relations. A key area is that of research. As in the case of trade, only legal entities within the territory of the State of Israel are intended to benefit from funds available in EU Framework Programmes. Yet Israel, in line with its public policy, has considered as eligible Israeli entities within the OTs. An informal search of the Fifth Framework database has revealed that two settlement companies (one from the Golan Heights and one in the Jordan Valley) have benefited from EU funds.<sup>91</sup> As in the case of trade, the Union has taken no effective action to ensure Israel's respect with its rules and principles. Without special attention paid to the *sui generis* problems posed by Israel, there is little scope within the EU's Framework Programmes to exercise effective control. DG Research, in charge of managing research programmes, has stated that these problems are of a 'political' nature and thus fall under the competence of DG External Relations. Future problems are likely to emerge in other areas as well. In 1997, Israel signed an agreement on public procurement with the Union. But the Union has taken no precautionary action to prevent the possibility of European companies participating in Israeli tenders for the construction of infrastructure in the OTs (settlements or the barrier). Another example is in the area of grants and loans. As of 2007, Israel will be eligible for EIB loans. Israel will also be eligible for funds under the European Neighbourhood Instrument. But how can and will the Union ensure that these funds will not be directed to support Israeli policies in the OTs?

These examples highlight a general dilemma, which, far from simply representing an irritant to a deeper relationship between the Union and Israel, lies at the heart of the EU's role in the Middle East conflict: how can the Union relate to a third country whose public policy contravenes international law, without itself acquiescing to the ensuing malpractices? How and what kind of precautionary action would be necessary for the Union to protect itself legally and to pursue a foreign policy whose in-built incentives (however small these may be) would encourage a veritable commitment to law and rights?

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<sup>90</sup> In 2002, Italian customs had attempted this solution, withholding guarantees on all products pending broad verification (and then offering preferential treatment only for products where effective verification demonstrated veritable Israeli origin). Italy had to abandon this practice due to its legal vulnerability without clear Commission guidance supporting it.

<sup>91</sup> Susan Rockwell and Charles Shamas (2004), op. cit., pp. 22-24.

One avenue would be that of basing all bilateral ties with Israel on a clear and shared acknowledgement of the parties' respective duties under international law.<sup>92</sup> This could create the basis for the establishment of a technical dialogue on the respect for human rights and IHL in the OTs. Such a dialogue could take place through the formation of a human rights sub-committee in the context of the current Association Council and any future institutional mechanism established under the ENP. In line with the format of the ENP joint review mechanism, the objective of such dialogue would be to seek agreement on human rights and international law benchmarks as well as to monitor the respect for such benchmarks. In the event of disagreements, conditioning present and future agreements on the shared acknowledgement of the parties' international law obligations would provide the Union with additional legal and political ammunition to prevent the possible acquiescence to Israel's violations.

It would be grossly mistaken to view these measures as 'punishments' or 'sanctions' on Israel. Far from constituting negative conditionality, these measures would represent minimalist readings of the implementation of a customary norm of general international law, which states that the non-compliance by one party negates the obligation of compliance by the other.<sup>93</sup> It would indeed entail a price to the third party, a price, which as mentioned by the EU Security Strategy, inevitably comes with the systematic disrespect for international norms.

Yet the Union need not stop at corrective measures. Through a more effective use of positive conditionality, it could deepen its relationship with Israel, yet careful of doing so in a manner that would not accommodate illegal Israeli policies. Most of the steps envisaged in the EU-Israel Action Plan would benefit the State of Israel and Israeli citizens, without extending benefits and thus supporting Israeli policies in the OTs. In the ensuing implementation of the Plan, the EU and Israel could pursue all measures of cooperation and integration that would not put Israel in the condition of violating international law (and the Community in the danger of accepting Israel's violation). Other issues, which would instead necessitate a comprehensive solution to Israel's interpretation of the territoriality clause, could instead be left pending.

Concerning integration measures that could be pursued immediately without generating mounting violations of international law, the EU could develop further the concept of positive conditionality. The option to pursue positive conditionality exists in the Action Plan, but its current formulation is extremely vague. This is not to say that the Union should specify in minute detail how economic and social benefits should be conditioned to political obligations. For example, strictly conditioning the liberalisation of services to Israel's human and minority rights policy would be neither logical nor effective. But neither the opposite extreme of abandoning the option of conditionality and merely discussing the peace process and human rights within political dialogue would be an effective way forward. Between these two extremes, there is wide room for manoeuvre, in which the Union, both formally and informally, could generally condition economic, social and institutional benefits to political and legal conditions.

EU credibility in the region would be greatly enhanced were the Union to pursue vigorously its substantive bilateral relations with the parties through a more effective use of positive conditionality and the upgrading of IHL as the guiding principle of its external policies. By doing so, the EU could not, alone, reverse the ongoing developments on the ground. Let alone could it achieve a just and viable solution to the conflict. Yet the EU would contribute, far more than it has done so far, to bridging that glaring gap between rhetoric and reality that has increasingly besieged the Israeli-Palestinian conflict.

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<sup>92</sup> Ibid., pp. 10-11.

<sup>93</sup> The principle of '*inadimplenti non est adimplendum*' has been codified in the Vienna Convention on the Law of Treaties.

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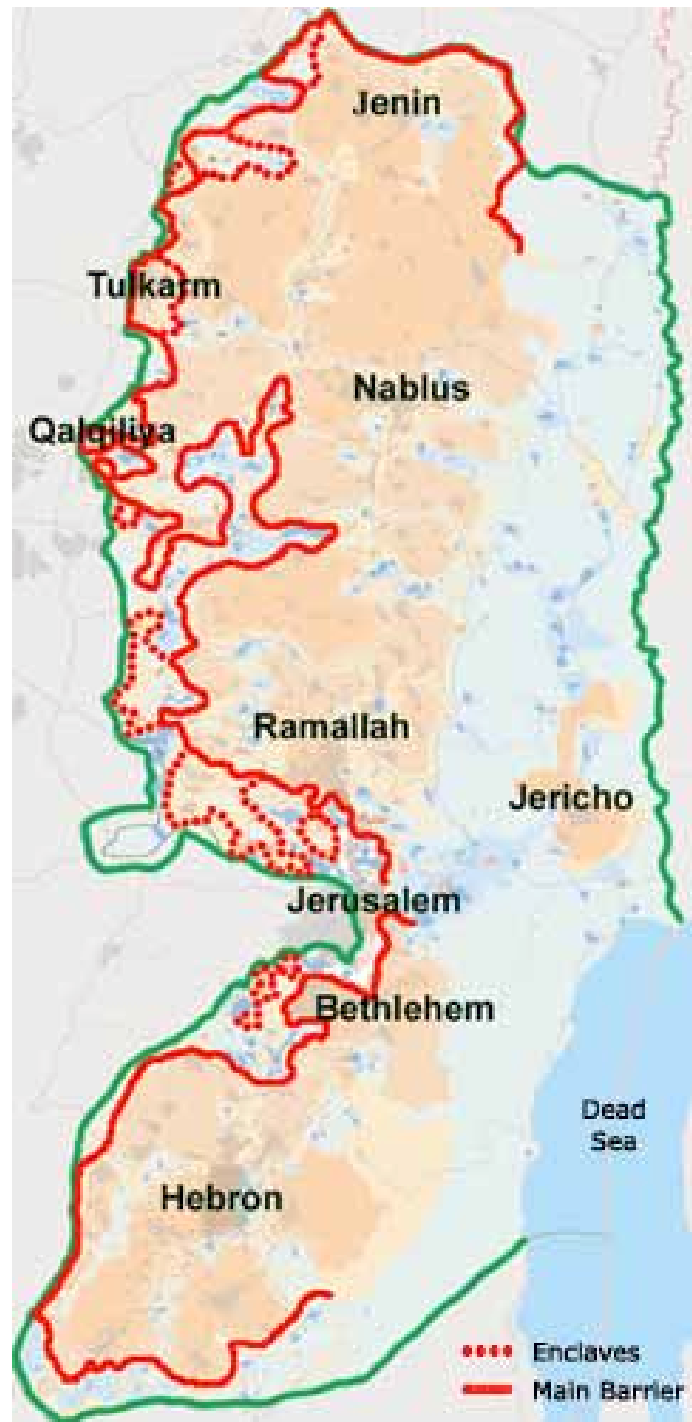
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## Annex 1: Israel's Barrier/Wall

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Source: <http://www.palestine-pmc.com/maps/route.jpg>.

## Annex 2: Israel's Disengagement Plan



SOURCES: UNOCHA; B'Tselem; MSNBC

Source: <http://www.palestine-pmc.com/maps/15-9-04.gif>

## StrataGen - Strategic Agenda for the Greater European Neighbourhood

### *A Programme of the Centre for European Policy Studies (CEPS), for 2005-2010*

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#### StrataGen Mission Statement

- To define a vision for a Wider European order and the relationship between the enlarged EU and its Arab/Muslim neighbourhood;
- To develop these proposals in-depth and in policy-operational terms;
- To combine in-house research capacity with networks of individuals from leading research institutes in the EU and the neighbourhood, and to disseminate and advocate proposals throughout the region;
- To work independently from the EU institutions but in close interaction with them; and
- To decide on the sequencing and selection of priority topics with core stakeholders.

Over the last five years, CEPS has developed an exceptional expertise in European Union policies in the area often called the Wider Europe. This has been reflected in publications that have been both regional and thematic: *CEPS Plan for the Balkans* (1999), *Stability Pact for the Caucasus* (2000), *The Elephant and the Bear – EU, Russia and their Near Abroads* (2001), *Cyprus as Lighthouse of the East Mediterranean* (2002), *Norway, the European Economic Area and the European Union* (2002), *Europe's Black Sea Dimension* (2002), *The Rubic Cube of the Greater Middle East* (2003), *The Wider Europe Matrix* (2004), *Economic Transition in Central and Eastern Europe* (2004), *Europeanisation and Conflict Resolution* (2004), *Readings in European Security*, Vols. I (2002) and II (2004). These publications and related working papers are available from the CEPS' on-line bookshop, at <http://shop.ceps.be>

CEPS has decided to build on and strengthen its work in this broad area through the **StrataGen** programme over the five-year period 2005-2010. The rationale for this initiative follows from both the EU's historic enlargement on 1 May 2004, which now leads the EU to define a new neighbourhood policy, and the unprecedented turmoil in the Middle East in the aftermath of September 11<sup>th</sup> and the Iraq war, with its consequences for transatlantic relations.

The **StrataGen** programme will be organised under the following broad geographic areas:

- Northern neighbourhood policy, covering CIS states targeted by EU neighbourhood policy
- EU-Russian relations
- Southern neighbourhood policy, covering Mediterranean states, but reaching also into what is now officially called the Broader Middle East and North Africa (BMENA)
- Implications for transatlantic relations will be considered for all three regions above.

The analytical methodology will be multi-disciplinary: political science, international relations and European studies, economics and law.

The programme is led by Michael Emerson, CEPS Senior Research Fellow, together with Daniel Gros, CEPS Director. CEPS gratefully acknowledges financial support for the **StrataGen** programme from the Open Society Institute and the Compagnia di San Paolo.

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### Goals

- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the European policy process.
- To build collaborative networks of researchers, policy-makers and business across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

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- Complete independence to set its own priorities and freedom from any outside influence.
- Authoritative research by an international staff with a demonstrated capability to analyse policy questions and anticipate trends well before they become topics of general public discussion.
- Formation of seven different research networks, comprising some 140 research institutes from throughout Europe and beyond, to complement and consolidate our research expertise and to greatly extend our reach in a wide range of areas from agricultural and security policy to climate change, JHA and economic analysis.
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 Energy, Environment & Climate Change  
 Agricultural Policy

#### Politics, Institutions and Security

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 Justice and Home Affairs  
 The Wider Europe  
 South East Europe  
 Caucasus & Black Sea  
 EU-Russian/Ukraine Relations  
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 CEPS-IISS European Security Forum

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