



A Human Rights Review on the EU and Israel

– Relating Commitments to Actions

2004-2005

EMHRN December 2005

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PROJECT BACKGROUND

The present report is the second in a series meant to assess the European Union's (EU) relations to third countries in the Barcelona process in terms of human rights. The report is published by the Euro-Mediterranean Human Rights Network (EMHRN), a network of more than 80 Arab, European, Israeli and Turkish human rights organisations, institutions, and individuals committed to universal human rights and based in more than 20 countries¹ of the Euro-Mediterranean region.

The EMHRN was established in 1997 as a civil society response to the Euro-Mediterranean Partnership. Its main objectives are to:

- Support and publicise in the Euro-Mediterranean and Arab regions the universal human rights principles as outlined in the international human rights instruments and the Barcelona Declaration.
- Strengthen, assist, and co-ordinate the efforts of its members to monitor States' compliance with the principles of the Barcelona Declaration in the fields of human rights and humanitarian concerns.
- Support the development of democratic institutions, promote the Rule of Law, Human Rights, Gender Equality and Human Rights Education, and to strengthen Civil Society in the Euro-Mediterranean region and beyond.

The EMHRN considers that human rights are universal, indivisible, interdependent and interrelated. They are closely linked with the respect for democratic principles and concern the whole of the Euro-Mediterranean and Middle East region. The EMHRN therefore promotes networking and cooperation between human rights NGOs and activists as well as the wider civil society in the whole region.

The EMHRN believes that the Euro-Mediterranean Partnership and the EU relations to the Arab world has provided the region with instruments that when efficiently implemented may enhance promotion and protection of human rights and democratic principles as well as strengthen civil society.

In this context the EMHRN established Working Groups on several human rights issues relevant to the Barcelona process and the region, one of these being the Working Group on Palestine.

Following the recommendations of the EMHRN's 6th General Assembly, the EMHRN Working Group on Palestine has engaged in a project that reviews the EU's human rights obligations and commitments in relation to Israel.

The review constitutes a further development of EMHRN's work to promote the implementation of human rights commitments in the Euro-Mediterranean Partnership and in bi-lateral association agreements².

1 Algeria, Tunisia, Morocco, Egypt, Jordan, Syria, Lebanon, Palestinian National Authorities, Israel, Turkey, Malta, Cyprus, Greece, Italy, France, Spain, France, Germany, UK, Denmark, Sweden, Norway, Ireland, Austria, Belgium, Finland.

2 Cf. Previous publications are: Promotion and Protection of Human Rights in the Euro-Mediterranean Region. Policy Paper on the Occasion of the Stuttgart Summit, April 1999, Copenhagen. The Role of Human Rights in the EU's Mediterranean Policy: Setting Article 2 in Motion. Report from the seminar in the EU

The project was outlined during meetings of the Working Group in the course of 2005 during which it was decided that the review should focus on the human rights situation in Israel and the Occupied Palestinian Territories in relation to the EU-Israel agreements. In this way it is meant to bring *added value* to current human rights work done in Israel and the Occupied Palestinian Territories by serving as a human rights guide to evaluate EU relations with Israel.

The human rights review may also be used proactively as a means to build capacity in understanding EU Human Rights mechanisms, sharing information, and as a means of advocacy.

Susan Rockwell and Charles Shamas of the MATTIN Group are the co-authors of the draft text. The review is based on research, case studies and interviews with European Community officials. The time frame of the review is October 2004 to October 2005.

The Working Group consists of competent and experienced human rights activists from the following organisations:

- Adalah – The Legal Centre for Arab Minority Rights in Israel (Israel)
- Al-Haq (The West Bank, Palestine)
- Arab Association for Human Rights (Israel)
- B'Tselem – The Israeli Information Centre for Human Rights in the Occupied Territories (Israel)
- Bruno Kreisky Foundation (Austria)
- Cairo Institute for Human Rights Studies (Egypt)
- Swedish member of the International Commission of Jurists (Sweden)
- Palestinian Centre for Human Rights (Gaza, Palestine)
- Palestinian Human Rights Organisation (Lebanon)
- Public Committee Against Torture in Israel (Israel)
- Swedish Refugee Aid (Sweden)

The project was steered by:

- Randa Siniora, Al-Haq (the West Bank, Palestine)
- Per Stadig, International Commission of Jurists (Sweden)
- Rachel Greenspahn, B'Tselem (Israel)
- Mohammed Zeidan, Arab Association for Human Rights (Israel)

parliament. Copenhagen 2000. The MEDA Democracy Programme. Recommendations to the EU Institutions. Copenhagen 2000. Guide to Human Rights in the Barcelona Process. Handbook on the EMP, Copenhagen 2000. The Human Rights Implications of the MEDA Programs, EMHRN 2002. Integrating Women's Rights from the Middle East and North Africa into the Euro-Mediterranean Partnership, EMHRN 2003; Justice in the South and East Mediterranean Region, EMHRN 2004. *A Human Rights Review on the EU and Israel: Relating Commitments to Actions (2003-2004)*, EMHRN, Copenhagen 2004. Letters and statements published on the occasion of Association Council meeting between the EU and Egypt, Jordan, Israel, Morocco, and Tunisia.

in close cooperation with EMHRN Secretariat Staff and Susan Rockwell (Mattin Group) who conducted research, case studies and interviews with European Community officials.

The project is kindly supported by DanChurch Aid (Denmark), Novib (the Netherlands), ICCO (the Netherlands), and the Church of Sweden (Sweden).

EXECUTIVE SUMMARY

Introduction

A Human Rights Review on the EU and Israel (2004-2005) is the second EMHRN annual assessment of European Union (EU) compliance with its own human rights commitments in its relations to Israel.³ It examines EU and Member State positions and responses to Israeli violations of international human rights and humanitarian law in the occupied Palestinian territories and in Israel.

Behind the report is a coalition of Palestinian, Israeli, Arab and European NGOs.

Conclusions

This review concludes in particular that:

- The remarkable lack of coherence between the EU's legally correct declarative diplomacy⁴ and its operative diplomacy⁵ in its relations with Israel continues.
- Israel continues to violate the human rights of Palestinians in the occupied Palestinian territories and discriminate against the Palestinian Arab minority in Israel, and the EU's operative diplomacy continues to accommodate many of Israel's illegal policies.
- The EU's political priority is the implementation of the Quartet's "roadmap". For that, the EU prefers relying on forging new "understandings" and "practical arrangements" with Israel and the Palestinian Authority that disregard international humanitarian and human rights law and facilitate their disregard by Israel.
- The political echelon of the EU overlooks the necessity of ensuring respect for the rules of international humanitarian law to the construction of a viable and successful Palestinian state, and the achievement of respect for fundamental human rights throughout the region. The harm to security and stability caused by such lack of respect for international humanitarian law is also overlooked.
- During 2004-2005, the EU has concluded at least two "practical arrangements" with Israel in order to make it possible for Israel to maintain its internationally unlawful practices while enjoying the benefits of EU-Israel cooperation:
 - 1) a technical arrangement on customs cooperation that aims to avoid the need for a lawful "solution to the EU-Israel bilateral issue of rules of origin"; and
 - 2) an informal arrangement to eliminate the *visible* participation of Israeli settlement-based research enterprises in the EU's Framework Programme for Research and Technological Development.
- In relation to Israel's "disengagement plan" the EU has been silent on the applicability of international humanitarian law, despite Israel's self-declared intention to improperly release itself from its responsibilities as occupying power on the basis of measures implemented with the help of, among others, the EU.

³ The review is published by the Euro-Mediterranean Human Rights Network (EMHRN), a network of 84 Arab, European, Israeli and Turkish human rights organisations, institutions, and individuals committed to universal human rights and based in 28 countries of the Euro-Mediterranean region.

⁴ Declarative diplomacy sets out commitments without attaching them to any actual or potential consequence.

⁵ Operative diplomacy consists of actions taken in the bilateral or multilateral spheres that influence the decisions of a third state.

- As the previous review showed, the EU may actually have facilitated Israel's violations of international human rights and humanitarian law by deferring to them in its own dealings with Israel.
- For Israel to begin to respect its obligations under international law, the EU and other third states must begin to respect theirs. The existing climate of general disrespect for the law by states has helped engender the growing problems of human insecurity, lawlessness and unregulated political violence observed within the occupied Palestinian territories, and may soon make the establishment of a fully sovereign and viable Palestinian state impossible.
- In the Action Plan concluded by Israel and the EU under the European Neighbourhood Policy, implementing respect for human rights is not recognised as an objective for action, an area for cooperation or even an objective to be achieved through implementing other elements of the plan. While the need to apply benchmarks to monitor progress in the performance of obligations under the ENP has been acknowledged by the EU in its 2003 Communication on a Wider Europe – Neighbourhood, no acknowledgement of any obligation to respect human rights, as set out in Article 2 of the EU-Israel Association Agreement, nor any benchmarks applicable to that obligation, exist in the EU/Israel Action Plan.

Just as its predecessor one year ago did, the second EMHRN *Human Rights Review on the EU and Israel (2004-05)* presents several instances where Israel implements its agreements with the EU, based on its rejection of its key international obligations as an occupying power, and as a state of all its citizens. The EU can not knowingly allow its contractual relations with any third country to operate in this manner without itself violating EU law and international humanitarian law. The EMHRN therefore presents the following recommendations.

RECOMMENDATIONS

The report's recommendations remain largely unchanged from those reached in the 2003-2004 report, but are updated to reflect recent developments:

Based on the conclusions of this review the EMHRN again recommends the following:

1. The EU should establish a public review mechanism with clear measurable benchmarks that will enable it to assess how its agreements with third countries are being implemented and applied with regard to respect for human rights.
2. Members of the European Parliament should pursue dialogue with the European Commission promoting the establishment of clear and transparently applied benchmarks for assessing third country human rights practice in light of the Union's own commitments to human rights. The establishment of such benchmarks would additionally provide an opportunity for parliamentarians to address well-targeted questions to the Commission and the Council regarding Israel's human rights practices and the EU's responses.
3. The implementation of the Action Plan with Israel under the European Neighbourhood Policy (ENP) should be based on a clear acknowledgement by Israel of its status and duties as an Occupying Power. When reviewing the Action Plan, a provision for technical dialogue and practical cooperation aimed at promoting the implementation of international human rights and humanitarian law in occupied Palestinian territory should be added. Also the current items listed in the Plan should be translated and sequenced into concrete actions and/or programmes.
4. The EU should press again for the establishment of a human rights sub-committee under the EU-Israel Association Agreement. Human rights NGOs should systematically be consulted and informed about the work of such a committee.
5. The European Commission should consult relevant civil society organisations when carrying out periodic human rights reviews of the implementation of the Action Plan and the EU-Israel Association Agreement.
6. Israel considers the territories occupied in 1967, including East Jerusalem, to fall under its treaty-making authority. This interpretation stands in clear contrast to the EU-Israel agreements' stated territorial scope of applicability. The External Relations Directorate General and the Commission at the highest level should therefore ensure that *all* Directorate Generals are notified of Israel's treaty breaking interpretation and are obliged to take proper action ensuring the agreements' lawful application and implementation, in keeping with the principle of human rights mainstreaming.

In addition the EU should ensure that:

- a. Assistance funds directed through implementing agencies working in the occupied Palestinian territories are not used in contravention to the International Court of Justice's injunction that states not render aid or assistance in maintaining the situation created by the construction of the barrier/wall.
- b. Entities participating in the illegal construction of infrastructure in occupied territory are not allowed to participate in any EU-Israel cooperation instrument.

- c. Entities established in illegal Israeli settlements do not participate in any way in the EU's bilateral and regional cooperation instruments provided for in the EU's agreements with Israel or with the Palestinian Authority.
 - d. All EU public procurement tenders stipulate that entities located in Israeli settlements, or entities with branches or subsidiaries in settlements, are not qualified to participate.
7. The EU should make increased and regular public reference to illegal actions carried out by the armed forces of Israel that are causing the humanitarian crisis in the occupied Palestinian territory. The EU should call on Israel to stop these illegal actions, reverse their effects to the fullest extent possible, and make correct reparation for the harm they have wrongfully caused.
 8. The EU should also make it clear to Israel that the EU's provision of humanitarian assistance is within the rules of international humanitarian law and does not release Israel of its responsibilities as an Occupying Power. The EU should demand reimbursement from Israel for all additional costs incurred on the provision of humanitarian relief deliveries as a consequence of access and mobility restrictions imposed unlawfully by Israel's military authorities.
 9. In light of the effects of Israel's systematic discriminatory treatment of its Arab citizens on their opportunities for participation in the range of EU-Israel cooperation instruments, the EU should take steps to ensure that its cooperation with Israel is conditioned on concrete and effective steps to end all discriminatory state practice and rectify its effects.
 10. Should Israel request a loan facility from the European Investment Bank or any other Community financing instrument, the relevant EU financial institution should make a clear and determined effort to enable minority access to the new lending opportunities. In the case of Community grants, the EU should earmark a substantial share of the funds for minority use.
 11. As recommended in the 2003-2004 report, the 'Olmert Arrangement' for implementing the EU-Israel protocol on origin was not formally accepted by the EU nor endorsed by the EU-Israel Association bodies, as this would have entitled Israel to continue applying the Association Agreement to the occupied territories. For this same reason, the European Union should not act to bring Israel into the Pan-Euro-Mediterranean free trade area while Israel continues to apply the Agreement to the occupied territories and continues to certify products from illegal settlements as originating in Israel.

Based on the new developments reviewed in this report, and its updated conclusions, the EMHRN makes the following additional recommendations:

Structural and Institutional

European Neighbourhood Policy Instrument

The "safeguard amendments" to the ENPI currently being considered in the European Parliament, should be adopted, and incorporated into all other EU external financial instruments. The proposed amendments would ensure that all agreements and measures taken under the ENPI will be implemented in accordance with the requirements of general international law and the *aquis communautaire*.

European Initiative for Democracy and Human Rights

A new successor financial instrument to the EIDHR should be prepared and adopted to ensure continued and expanded EU support for civil society human rights promotion efforts throughout the Neighbourhood, and world-wide, independently of the politically managed ENPI.

The European Agency for Human Rights

The European Union Agency for Fundamental Rights should be given a role in reviewing implementation of the human rights clauses in all Association Agreements by both sides. It should monitor and promote coherence between the Union's general policy commitments and statements on the one hand, and third country human rights-related practice and the EU's own operative diplomacy on the other. It should perform this role with full political independence.

Political

- The EU should develop and implement a strategy to place respect for human rights and international humanitarian law by all parties involved in the Middle East peace process at the centre of efforts to put that process back on track. It should be applied to the EU-Israel dialogue, and all elements of EU-Israel relations across all EU policies.
- The EU should develop and articulate legally correct positions setting out the responsibilities that the EU will itself respect in implementing and further developing EU-Israel relations, specifically taking into account Israel's policies and practices as an occupying power, the measures being taken in connection with the "disengagement plan", and the discriminatory policies and practices that continue to operate in Israel.
- The EU should set appropriate self-enforced conditions and limits on EU involvement in the disengagement process, and ensure that the conclusion of new 'soft law' or 'practical arrangements' involving Israel are consistent with the above.

INTRODUCTION AND OVERVIEW

The 2003-2004 EMHRN Review

The EMHRN's previous report, entitled "A Human Rights review on the EU and Israel - Relating Commitments to Actions" (2003-2004),⁶ examined several elements of the EU's diplomacy vis-à-vis Israel with a view to clarifying the manner and extent to which the EU has managed to implement its commitments to respect human rights and promote their respect in third countries in the context of its relations with Israel.

That 2003-2004 report noted that within the territories occupied by Israel since 1967 the most systematic and serious violations of human rights by Israel involve violations of a number of the compulsory rules of international humanitarian law.

Within Israel, the report noted the persistence of systematic human rights violations against the Palestinian Arab minority, resulting from discriminatory state policies, and from administrative measures that disadvantage, impoverish, disturb and displace established Arab communities.⁷

Both were observed to entail the violation of non-derogable obligations and rights established in international humanitarian law and international human rights law. The policies that underlie such violations are, moreover, the source of a conflict that further harms the human rights of all Palestinian and Israeli affected persons.

Several elements of the EU's declarative and operative diplomacy⁸ involving Israel were then profiled and subjected to the following common sense tests of judgment and intent that also appear to capture the essence of the hard legal obligations concerning "respect for human rights" that are recognised by the EU as applicable to its external relations:⁹

Could the actions in question reasonably be expected to contribute to increasing the likelihood, frequency or severity of human rights violations resulting from Israel's application of internationally unlawful public policies and national legislation, both domestically, and in the territories it has occupied since 1967?

Could they reasonably be expected to contribute to reducing the likelihood, frequency or severity of those human rights violations?

In a number of instances, including the EU's handling of Israel's internationally unlawful implementation of its agreements with the EU, the EU's operative diplomacy was found to

⁶ *A Human Rights Review on the EU and Israel – Relating Commitment to Actions (2003-2004)*, EMHRN Copenhagen 2004.

⁷ See for example the Arab Association for Human Rights' reports
http://www.arabhra.org/publications/reports/PDF/RacismReport_%20Report_English.pdf
http://www.arabhra.org/publications/reports/PDF/sanctitydenied_english.pdf.

⁸ *Declarative diplomacy* sets out commitments and positions without attaching them to any actual or potential consequences to a third state's interests. EU's declarative diplomacy with regard to Israel is thus the range of declarative acts of the EU institutions and the Member States in response to Israeli policies and practices. *Operative diplomacy* consists of actions taken in the bilateral or multilateral spheres that influence the decisions of a third state by altering its expectations, or actual experience, of consequences affecting its interests. The EU's operative diplomacy towards Israel is the range of engagements and transactions through which the EU seeks to influence the political behaviour of Israel and through which the EU may fulfil, neglect, or even violate obligations relative to Israel's respect for human rights and international law.

⁹ Treaty on European Union, Articles 6 and 11; Treaty Establishing the European Community, Articles 170 and 181a; and EU-Israel Association Agreement, Article 2.

afford Israel an exceptionally broad margin to escape the unwanted consequences that would *normally*, and in some instances *must*, result from Israel's application of policies that either violate or mandate violations of international humanitarian and human rights law in its dealings with the EU. These include the penalisation of the benefits of privileged cooperation that would ordinarily result from Israel's refusal 1) to respect or properly implement provisions of its agreements with the EU, or 2) to cooperate with EU actions that conform to provisions of international law that Israel refuses to apply or respect.

Where these dealings involved Israel's privileged participation in the EU's single market (e.g. free trade), or its privileged association with Community programs (e.g. the Framework Programme for Research and Technological Development), a pattern was observed in which Israel's politically-inspired violations of its agreements with the EU, *and resulting violations of Community law*, were negligently overlooked, or noted but tolerated.

The 2004-2005 EMHRN Review

This report applies an essentially similar test of judgment and intent to EU and member state actions involving Israel since the drafting of the 2003-2004 report. It revisits several of the instances highlighted in that report to examine the EU's follow-up.

In assessing the effects of EU diplomacy on respect for the human rights of the persons under Israel's jurisdiction, this year's report will take broader account of the principles of state responsibility for internationally wrongful acts as they bear on the EU's dealings with third countries engaged in serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*), especially when such breaches result in serious violations of human rights.

Special attention will be given to:

- the approaches taken by the EU in implementing the European Neighbourhood Policy with Israel;
- the EU's involvement in the implementation of Israel's "disengagement plan";
- how the EU has sought to manage the problems raised in the 2003-2004 report arising from Israel's illegal application of its preferential trade agreements, and the agreements associating Israel with the EU's Framework Programme for Research and Technological Development, to settlement enterprises established in occupied territory;
- the EU's wish to include Israel in the paneuromed system of free trade while Israel continues to confer preferential origin on settlement products in violation of those agreements.

In connection with each of the above cases the report considers whether the EU may now be assisting in "maintaining an illegal situation created by the serious breach"¹⁰ of such *jus cogens* obligations by concluding special 'technical' or 'practical' arrangements with Israel and establishing new EU practice specifically to afford Israel the opportunity to continue implementing its cooperation with the EU in breach of those same obligations. Two of the arrangements described in this report have aimed at neutralising obstacles posed by EU law to affording Israel such opportunities.

¹⁰ The quotations reproduce language drawn from the text of Articles 40 and 41 of the Draft Articles on Responsibility of States for Internationally Unlawful Acts, adopted by the International Law Commission at its fifty-third session. Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session (2001), Supplement No. 10 (A/56/10), chp.IV.E.1.

While the political will and the legal latitude to construct such arrangements remain unrestrained, the report concludes that the EU is ill-prepared to meet its own hard legal obligations to respect human rights in the case of Israel; and little prospect exists that the EU will chose to apply any of the robust discretionary measures of positive and negative conditionality¹¹ that are available to it to promote respect for human rights by Israel.

The report will also therefore consider the human rights dividends that can result from a recent European Parliamentary initiative to introduce “safeguard provisions” into the European Neighbourhood Partnership Instrument.¹² The envisaged provisions would legally obligate the EU’s institutions to ensure that all agreements concluded with third countries, and all measures financed under that Instrument, are implemented in accordance with the requirements of general international law and the *acquis communautaire*.

¹¹ Positive conditionalities, often referred to as “carrots”, rely on conditional offers of benefits as an accompaniment to political dialogue. They can be freely applied to procuring the advancement of the EU's goals and interests. Negative conditionalities, often referred to as “sticks”, rely on the suspension or withdrawal of benefits, usually as a result of failed political dialogue. They are in principle reserved for situations in which the EU considers it necessary to defend a right or a fundamental interest.

¹² The financial instrument that will provide the legal basis for all Community funding of measures and activities carried out under the European Neighbourhood Policy.

THE EU'S HUMAN RIGHTS COMMITMENTS

The general commitment across all EU Policies

The EU's commitments to respect human rights flow from Article 6, paragraph 2 of the Treaty on European Union (TEU):

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

General commitments specifically applicable to the EU's external relations

Commitments to respect and promote respect for human rights in third countries are anchored in two hard legal obligations set out in the Treaty establishing the European Community (TEC). Articles 170 and 181a stipulate that Community policies in the areas of economic, financial and technical cooperation, as well as development cooperation, "shall contribute to the objective of respecting human rights and fundamental freedoms."¹³

In addition, Article 11 of the Treaty on European Union (TEU) stipulates that the EU's Common Foreign and Security Policy (CFSP) aims to 'develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'.

Reciprocal EU - partner country commitments

The "essential element" clauses incorporated with minor variations into all EU framework agreements with third countries since 1995 are a further source of the EU's commitment to respect human rights, and a source of reciprocal partner country commitments to the EU. They are often referred to as "human rights clauses".

Article 2 of the EU-Israel Association Agreement states:

Relations between the Parties, as well as all the provisions of the Agreement itself shall be based on respect for human rights and democratic principles which guide their domestic and international policies and constitute an essential element of the Agreement.

Such clauses provide the EU (and in principle the partner countries) with a legal basis to take political action within the framework of its association agreements to fulfil its commitments to respect and promote respect for human rights in third countries. The scope of positive and negative conditionalities and measures that can lawfully be applied for this purpose was discussed in the 2003-2004 report. They extend to the suspension of the agreement itself.¹⁴

As noted in the 2003-2004 report, the "essential element" clauses are also part of Community law, together with the association agreements in which they appear. The stipulation that all the provisions of the Agreement itself shall be based on respect for human rights therefore obligates the EU institutions and individual member states not to permit or accept the agreements' interpretation, application or *implementation* by the EU, as well as by the partner country, in a manner that disrespects human rights.

¹³ Article 170, on development cooperation, preceded the adoption of Article 181a. It refers to this objective more loosely as a "general objective".

¹⁴ Any such lawful measure must meet the tests of necessity, effectiveness and proportionality.

The scope of the EU's commitments to human rights in EU law and practice

As to the scope of human rights to which such commitments directly apply, the text of the TEU specifically recognises a legal obligation to “*respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms... and as they result from the constitutional traditions common to the Member States, as general principles of Community law*”.

In 2000, a Charter of Fundamental Rights of the European Union was “proclaimed” by the Council, Commission and European Parliament. Although it has not yet been adopted as binding EU law, the EU institutions have agreed that all EU policies and actions should respect the rights it recognises.

The EU, and most if not all Association partner countries, refer to the Universal Declaration on Human Rights as the basis for defining the scope of the reciprocal bilateral human rights commitments on which their privileged treaty relations are based.

However, in its own external actions, the EU draws upon the definitions of human rights set out in the two International Covenants, which bind the member states.

Three other sources of obligation complete this list. While they are not acknowledged as part of the EU's own treaty-based human rights-related commitments, their performance clearly contributes to fulfilling those commitments; and their non-performance clearly has harmful immediate and extended effects on respect for human rights:

- The EU's external agreements must be constructed and implemented in accordance with the requirements of general international law, including its provisions that contribute to the protection of human rights.
- In their dealings with states engaged in armed conflict or belligerent occupation, such as Israel, all Member States are bound by the duty established in Article 1 common to the Geneva Conventions of 1949 to ‘respect and ensure respect for [those] Conventions in all circumstances’.
- Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001,¹⁵ stipulates that:
 1. States shall cooperate to bring to an end through lawful means any serious (gross or systematic) breach of a peremptory norm of general international law.
 2. No State shall recognise as lawful a situation created by such a serious breach, *nor render aid or assistance in maintaining that situation.*

While the last two obligations are not recognised in EU law, and have been only ambiguously echoed in one EU Ministerial declaration,¹⁶ they have been affirmed by each of the member states in United Nations resolutions they have supported. More recently, they have been authoritatively confirmed by the International Court of Justice in its advisory opinion on the *Legal consequences of the construction of a wall in the Occupied Palestinian Territory* of 9 July 2004.

The Commission has described its approach towards implementing those commitments as including:

¹⁵ Supplement No. 10 (A/56/10), chp.IV.E.1.

¹⁶ Declaration of the European Council on the Middle East, Dublin, 25-26 June 1990.

- promoting coherent and consistent policies in support of human rights and democratisation,... both ... between European Community policies, and between those policies and other EU action, especially the Common Foreign and Security Policy.;
- the promotion of consistent and complementary action by the EU and Member States, in particular in the promotion and mainstreaming of human rights through development and other official assistance;
- to ensure that the formulation of all Community policies avoids negative human rights effects and maximise the positive impact¹⁷

These self-defined commitments of the Commission evoke two general principles of governmental responsibility to fundamental rights, referred to in the 2003-2004 report as the “duty of care” and “the principle of clean hands.”¹⁸

Human rights commitments in the case of Israel

In the case of Israel, the EU has been frequently criticised for failing to do enough to combat human rights violations by applying the “carrots” and “sticks” available to it. Many elements of civil society regard such assessed inaction as highly objectionable. To the extent that promoting respect for human rights in third countries remains a legally unenforceable commitment, lodging such objections and pressing for more vigorous political application of the legal and technical instruments available for such a purpose must remain an essential part of the process of defending human rights politically. In the 2003-2004 report, the legal scope for applying Article 2 - the “essential element” or “human rights” clause - of the EU-Israel Association Agreement as one such instrument, and the apparent scope and character of the political resistance to employing it in the case of Israel, were discussed.

The failure to suspend an agreement in the face of serious and persistent partner country human rights violations may be difficult to construe *per se* as a violation of the EU’s human rights-related commitments in any legal sense. On the other hand, as noted in the 2003-2004 report, specific EU actions or deliberate failures to act, including to suspend agreements on human rights grounds, constitute a clear betrayal of such commitments when they can be reasonably expected to increase the likelihood, frequency or severity of human rights violations by a partner country’s authorities, or prolong their application of internationally unlawful policies that cause such violations.¹⁹

However, several of the matters reviewed in this report point to a problem far more fundamental than any lack of political will within the EU to avail itself more fully of the legal means available to promote Israel’s respect for human rights.

¹⁷ Communication from the Commission to the Council and the European Parliament, The European Union’s Role in Promoting Human Rights and Democratisation In Third Countries, COM(2001) 252 final, 8 May 2001, pgs 5 and 27. See as well Communication from the Commission to the Council and the European Parliament, Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners, COM(2003) 294 final, Brussels 21.05.2003.

¹⁸ The ‘duty of care’ as it would apply to respect for human rights refers to the failure to take reasonable precautions when plentiful cause exists to expect that one’s action or inaction could prolong, aggravate, or simply increase the likelihood of serious human rights violations. The principle of ‘clean hands’ as it would apply to respect for human rights refers to an obligation to refrain from any act that assists another party to persist in measures that violate human rights by knowingly removing an encumbrance on those measures.

¹⁹ Indeed, in the EU’s Code of Conduct for Arms Export, an even more diligent prudential standard of responsibility has been explicitly adopted. Exports of weapons should not be carried out when the member state considers that a strong likelihood exists that the arms in question could be used in an internationally unlawful fashion.

The EU rejects the positions interpreting international law on which Israel bases its refusal to recognise its status and obligations as an occupying power, considers that Israeli practices that contravene those obligations are illegal and must be ended, and considers that the human rights being harmed by those practices are being violated. However, the EU has opted to maintain a self-described position of “neutrality”²⁰ when confronted with the practical implementation of Israel’s contrary policies and positions under its agreements with the EU, and in various instances of *ad hoc* cooperation. The advocates of such “neutrality” in the EU institutions claim that the EU only bears human rights responsibility in connection with its own direct actions towards the right holders themselves. This *laissez faire* position has most recently been voiced by the UK Presidency:

In our view, Article 1 of the Fourth Geneva Convention does not constitute an obligation in international law to ensure that other High Contracting Parties also respect the Convention [...]. The obligation to respect the law must remain with the parties to the conflict.²¹

On this basis, the EU has been drawn into constructing a system of soft law, often referred to as “practical solutions” or “technical arrangements”, on which to base its relations with Israel, its involvement in the Middle East Peace Process (MEPP) *and its implementation of Community law*. All of this soft law has been constructed with a view to satisfying the one condition Israel has consistently placed on all international cooperation: Israel’s freedom must be preserved to implement that cooperation in a manner dictated by its own “differing” policies, and without prejudice to the positions it consequently takes on the interpretation and application of international law.

Ordinarily there is nothing wrong with soft law. It can be well used to coordinate and organise how actors address special circumstances. It can be used to ‘try out’ the application of new norms and rules before committing them to hard law. It can even be legitimately used to eliminate certain unwanted and unnecessary effects of applying hard law. It can not, however, legitimately be used to escape hard legal obligations in general international law or to frustrate its object and purpose.

Similarly, “practical arrangements” are regularly concluded and usefully applied within the EU and by the EU with third states. However, even if they formally have no legal effect, the practice they generate can contravene hard law, obstruct its operation or bring it into disrepute.

The arrangements reviewed in this report are cut from the cloth of the now formidable body of soft law created by the various actors in the MEPP.²² The essential element of that body of soft law can be summed up in the injunction reportedly delivered to the Netherlands Presidency of the EU²³ during the run-up to the Madrid Peace Conference of 1991 by John Bolton, then United States Deputy Undersecretary for International Organisations: “We expect you (the EU Presidency) to refrain from making reference to the Fourth Geneva Convention in all international fora.” Soft law issuing from such a seed does not coexist harmoniously with the hard international law that governs Israel’s occupation or, for that matter, with the hard international law that absolutely prohibits discriminatory

²⁰ The term used by Commissioner Vitorino representing the Commission during a European Parliament plenary debate on the “Irregular Application of the EC-Israel Trade Agreement, 2 March 2000.

²¹ “UK Policy on the Occupied Palestinian Territories”, Letter to Hickman and Rose by Nick Banner, UK Foreign and Commonwealth Office, 20 September 2005.

²² Examples of such soft law include the Mitchell and Tenant Plans, the Road Map and, many would also argue, the PLO-Israel Declaration of Principles and the series of Israeli-Palestinian agreements based on it.

²³ This were the words attributed to Mr. Bolton by a Netherlands Foreign Ministry official present at the meeting as they were related to one of this report’s authors shortly afterwards.

demographically-inspired internal policies. It does not coexist harmoniously with EU law, including its provisions relative to respect for human rights.

DELIVERING ON ITS COMMITMENTS IN THE CASE OF ISRAEL: THE EU'S RECENT RECORD

The European Neighbourhood Policy

The European Neighbourhood Policy (ENP) emerged from an idea aired at the December 2002 Copenhagen European Council that the Union should seize the opportunity offered by enlargement to enhance relations with neighbouring countries. The Council called for stronger relations based on shared values with Ukraine, Moldova, Belarus and the countries of the eastern and southern Mediterranean.²⁴ This "circle of friends" was expanded later to include Armenia, Azerbaijan and Georgia.

In 2003-04 various Commission Communications and European Council Conclusions established ENP as an EU policy, and in 2004 the first seven country reports and ENP Action Plans were formulated.

The ENP reflects the EU's aims to avoid drawing new dividing lines in Europe post-enlargement, and to promote stability and prosperity within and beyond the EU's new borders.²⁵ ENP countries are not candidates for EU membership. Rather they are supposed to share in the benefits of the EU's enlargement as partners. In contrast to the accession process, a dictate with clear benchmarks a candidate state must meet before being accepted into the EU, the ENP is based on shared ownership and partnership.

The EU negotiates an Action Plan with each ENP country. The Action Plan is a political document which sets out the overarching strategic policy targets and benchmarks by which progress can be judged over several years.²⁶ Action Plans are to contain a number of priorities aimed at strengthening commitment to shared values. Among others, these values include strengthening democracy and the rule of law, trade union rights and core labour standards, rights of minorities and children, and cooperation with the International Criminal Court. According to the Commission, "commitments will also be sought to certain essential aspects of the EU's external action, including, in particular, the fight against terrorism and the proliferation of weapons of mass destruction, as well as abidance by international law and efforts to achieve conflict resolution."²⁷

The key areas for action under the jointly agreed Action Plans are political dialogue and reform; trade and measures preparing partners for gradually obtaining a stake in the EU's Internal Market; justice and home affairs; energy, transport, information society, environment and research and innovation; and social policy and people-to-people contacts.²⁸

As mandated under the Partnership and Cooperation Agreements or Association Agreements, working groups or bodies will be set up to address these areas of cooperation. In the case of the Association Agreements, these will be subcommittees that will work under the authority of the Association Committee. The subcommittees will have no decision-making power, but may submit proposals to the Association Committee.

²⁴ The exception is Libya. Normalisation of EU relations with Libya awaits Libya's acceptance of the Barcelona Process acquis and the resolution of outstanding bilateral issues.

²⁵ Communication from the Commission to the Council and the European Parliament, Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM(2003) 104 final, 11.3.2003, p. 4.

²⁶ Ibid, p.16.

²⁷ Communication from the Commission, European Neighbourhood Policy Strategy Paper, COM(2004) 373 final, 12 May 2004, p.13.

²⁸ Ibid, p. 3.

Once the EU and the partner country agree on the Action Plan, the Plan supersedes common strategies to become the Union's main policy document for relations with that country over the medium term.

The ENP and the Barcelona Process

The Barcelona Process remains the cornerstone of the EU's relations with the region, and the Euro-Mediterranean Partnership Association Agreements remain the legal foundation of bilateral relations. The new Neighbourhood Policy is based on the same economic, political and social pillars of the Partnership, and is supposed to complement and reinvigorate the Barcelona Process.

The ENP distinguishes itself from the Barcelona Process primarily by:

- The prospect of gradually introducing and broadening partner country participation in the EU internal market and its regulatory structures, including those relating to sustainable development (health, consumer and environmental protection), based on the approximation of legislation. More emphasis will also be put on integrating the two sides of the Mediterranean in transport, energy and telecommunications networks.²⁹
- Differentiation. The ENP allows for EU engagements (and separate budgetary commitments) with each partner country to be separately tailored from a broad range of possibilities for cooperation that extend throughout virtually all EU policies, taking into account different partner countries' capacities and special circumstances, levels of commitment, priorities and "political readiness".
- Starting in 2007, the policy will be financed by the European Neighbourhood Policy Instrument (ENPI), which will be more flexible than the MEDA financial assistance instrument in order to better serve tailor-made bilateral agreements. Details on the ENPI follow in a section below.

The ENP is part of EU strategy to promote stability and security in its backyard. It is expected to outperform the Barcelona Process by strengthening the focus on individual countries and introducing an element of competition among them. The EU hopes as well that the reform agendas that partner countries will have to accept in order to participate most fully in the ENP may help their leaders overcome resistance to such reforms amongst their countries' elites and entrenched interests.

EU-Israel

With its highly developed market economy and pre-existing public procurement agreements with the EU,³⁰ Israel is very well positioned to take advantage of the extensive opportunities for participation in the EU's internal policies and programs mandated under the ENP. If it fulfills its commitments, Israel will be able to participate in Community programs like student exchange programs, sit as an observer in Community internal market fora like technical expert groups on public procurement, and participate in ACAAs (Agreements on Conformity, Assessment and Acceptance of Industrial Products).

²⁹ Margot Wallström, Vice President of the European Union responsible for Institutional Relations and Communication Strategy, The European Neighbourhood Policy and the Euro-Mediterranean partnership, Speech 05/171, Cairo, 14 March 2005.

³⁰ In 1997 Israel and the EU signed two procurement agreements going beyond WTO's Government Procurement Agreement. (European Commission, European Neighbourhood Policy, Country Report Israel, SEC(2004) 568, 12.5.2004, p.21).

The tailor-made engagements that are now possible under the ENP will enable Israel to extract itself further from the Euro-Mediterranean Partnership which, since the accession of Cyprus and Malta, and Turkey's move into candidacy status, has left Israel with a peer group of Mediterranean partners comprised entirely of Arab states. Israel will now be able to forge highly differentiated relationships with the EU based on its developed economic, military, industrial and scientific capacities and needs.

"In the framework of implementation of the ENP, the Commission is committed to ensuring that human rights and democratisation issues are fully taken into account in the political chapter of the Actions Plans."³¹ As recommended by the European Parliament,³² and in last year's EMHRN report, the EU has aimed to include in each EuroMed partner country's Action Plan a provision for the establishment of a human rights subcommittee in the framework of its Association Agreement. After what the Commission described as an "extensive debate" on sub-committees at the 14 April EU Israel Association Committee meeting,³³ Israel refused to accept a human rights subcommittee on the grounds that it did not accord with Israel's self-image as a democracy.³⁴

EU Member states found the Commission's first version of the EU-Israel Action Plan "thin", and pressed for elaboration in the political chapter of the draft plan. One concern among member states opposed to the exclusion of a human rights subcommittee was that it would permit other Euro-Mediterranean Partnership countries to insist on excluding it as well. However, only a small minority of the member states opposed the absence of the subcommittee in the EU-Israel Action Plan, and the matter did not come to vote in the Council.

Ironically, having acceded to Israel's rejection of a human rights subcommittee, the Commission then applied the same decision to the Palestinian Authority's Action Plan. Giving "both sides" the same exceptional sub-committee structure represents yet another instance of the subordination of human rights commitments to the soft law that has proliferated in the law-impoverished atmosphere of the Middle East Peace Process to accommodate Israel's "differing positions". In this case the soft law is the EU-Israel Action Plan, and its echo in the EU-Palestinian Authority Action Plan. The "differing position" being accommodated is Israel's contention that its policies are internationally lawful and do respect human rights. Having won its point, Israel accommodated the EU's own hard legal obligation under the Association Agreement (as Community law) to have some dialogue on human rights and democracy with Israel.

³¹ Commission Staff Working Document, Implementation of the Commission Communication on the EU's Role in Promoting Human Rights and Democratisation in Third Countries, SEC(2004) 1041, 30 July 2004, p.8.

³² Simon Coveney, Rapporteur, Report on the Annual Report on Human Rights in the World 2004 and the EU's Policy on the matter, European Parliament, Final A6-0086/2005, 5.4.2005, p. 29.

³³ EU-Israel Association Committee Sets Action Plan Priorities, Newsletter of the European Commission's Delegation to Israel, June 2005. The subcommittees for Israel are 1) Political dialogue and cooperation; 2) Economic and financial matters; 3) Social and migration affairs; 4) Customs cooperation and taxation; 5) Agriculture and fisheries; 6) Internal market; 7) Industry, trade and services; 8) Justice and legal matters; 9) Transport, energy and environment; and 10) Research, innovation, information society, education and culture. See Decision 1/2005 of the EU-Israel Association Council of 29 August 2005, (2005/640/EC).

³⁴ The EU Counter-terrorism Coordinator gave the example of common and persistent torture and abuse of detainees in Egypt in reference to the EU's negotiations on human rights with Egypt over the EU Egypt ENP Action Plan. (Address by Mr Gijs de Vries, European Union Counter-Terrorism Coordinator, at the conference on Terrorism's Global Impact Herzliya, Israel, 12 September 2005) While the EU appears to have accepted Israel's argument that there should not be a sub-committee on human rights in the EU/Israel Action Plan since Israel is "unlike" the surrounding states, the EU did call on Egypt and Israel, among other countries in the neighbourhood, to extend an invitation to the Special Rapporteur on Torture. (Council of the European Union, EU Annual Report on Human Rights - 2005, 12416/05, 28 September 2005, p.60).

Israel and the EU have agreed to discuss “Democracy, human rights and fundamental freedoms” within the subcommittee on Political Dialogue and Cooperation under the heading “Shared values.” This would imply that in Israel’s case no need exists to give special attention to human rights that would warrant the creation of a human rights subcommittee.

Granting such an exception in the case of Israel – and therefore also in the case of the Palestinian Authority -- does little to advance the EU’s declared aim of improving consistency in its human rights policy. Nor does it appear to serve the EU’s announced aim of promoting a just and durable Israeli-Palestinian peace based on two sovereign and viable states living side by side. Widespread violations of human rights and international humanitarian law have been, and remain, principal causes of the Israeli-Palestinian conflict and not simply its unfortunate result.

Whatever resistance there may have been to the “content over form” justification for the absence of the human rights committee was tempered by the EU’s prioritisation of Israel’s commitment to the Action Plan text on non-proliferation of weapons of mass destruction (WMD), which the EU considers non-negotiable.

At the 9 December 2004 adoption by the EU of the first seven Action Plans the Commission stated:

Israel clearly acknowledges the role of the EU in the Quartet and the need to take into account the viability of a future Palestinian state in counter-terrorist activities. Israel has never been willing to make such commitments in writing to any other partner...The same applies to the commitments Israel has entered into concerning WMD.³⁵

Sub-committee on political dialogue and cooperation

The first item in the Action Plan under the subtitle “Democracy, human rights and fundamental freedoms” states that the EU and Israel are committed to:

- Work together to promote the shared values of democracy, rule of law and respect for human rights and international humanitarian law
- Explore the possibility to join the optional protocols related to international conventions on human rights
- Promote and protect rights of minorities, including enhancing political, economic, social and cultural opportunities for all citizens and lawful residents
- Promote evaluation and monitoring of policies from the perspective of gender equality
- Promote a dialogue on policies for the physically and mentally disabled³⁶

Under the subtitle “Situation in the Middle East,” the EU and Israel agree to strengthen political dialogue and identify areas for further cooperation and³⁷:

[..]

³⁵ Benita Ferrero-Waldner, Commissioner for External Relations & European Neighbourhood Policy, Press Conference to launch first seven Action Plans under the European Neighbourhood Policy, SPEECH 04/529, 9 December 2004.

³⁶ European Commission, Proposal for a Council Decision on...the adoption of a Recommendation on the implementation of the EU-Israel Action Plan, COM(2004) 790 final, 9.12.2004, p.10.

³⁷ Ibid, pgs 12 and 13.

While recognising Israel's right of self-defence, the importance of adherence to international law, and the need to preserve the perspective of a viable comprehensive settlement, minimising the impact of security and counter-terrorism measures on the civilian population, facilitate the secure and safe movement of civilians and goods, safeguarding, to the maximum possible, property, institutions and infrastructure [..]

Regarding terrorism, the Action Plan speaks rather more clearly and confidently of envisaged actions. The EU and Israel will "Exchange information on terrorist groups and their support networks, in particular those acting in Europe and in the Middle East and take concrete actions at all levels against such groups in accordance with international and national law."

The Commission notes that among the priorities of the Action Plan, particular attention should be given to:

Enhance political dialogue and co-operation, based on shared values, including issues such as facilitating efforts to resolve the Middle East conflict, strengthening the fight against terrorism and proliferation of Weapons of Mass Destruction, promoting the protection of human rights, improving the dialogue between cultures and religions, cooperating in the fight against anti-Semitism, racism and xenophobia³⁸

Progress on meeting these priorities is to be monitored by the sub-committees, which will meet once a year. A first review of the implementation of the Action Plan will be undertaken within two years of its adoption. The Commission considers this country progress review an opportunity for civil society to exert its influence.

The Commission's Communication on "Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners" recommended that the countries draw up National Action Plans with a "list of specific action points accompanied by measurable benchmarks of performance with clear timelines."³⁹ There is no mention of a national action plan in the EU/Israel Action Plan, as recommended in the Vienna Declaration and Programme of Action of the UN World Conference on Human Rights in Vienna, 1993. Nor are there any benchmarks evident.

The EU's 2001 guidelines on human rights dialogues note that the "EU will as far as possible give the human rights dialogues a degree of genuine transparency vis-à-vis civil society", and that "All human rights dialogues will be assessed on a regular basis, preferably every year.[..] Civil society will be involved in this assessment exercise."⁴⁰

The intention behind this reassuring remark appears limited to signalling the readiness of the Community institutions to receive information *from* civil society while making no commitment to sharing information *with* civil society.

One case in point illustrates the institutions' disinclination to share information, and the advantages of greater transparency. ENP Action Plans are submitted to silent procedure whereby the Community Executive may take a decision if there is no objection from any of the member states. In the case of the EU Egypt Action Plan, it was only because a draft of the plan was leaked that civil society actors were able to approach member state capitals, prompting several of them to object to the first draft. The human rights component of that Action Plan, still under negotiation, is reportedly now much stronger.

³⁸ Ibid, p.9.

³⁹ COM(2003) 294, p. 14.

⁴⁰ Council of the European Union, EU Guidelines on Human Rights, May 2005, pgs. 27 and 28.

It seems that the sub committee structure will not permit any greater transparency with regard to EU-partner country human rights dialogue than has existed previously under the Association Committee, obliging civil society actors to continue pursuing information *ad hoc* from cooperative EU and member state contacts.

The EU appears to have missed the opportunity under the new ENP policy to inject some credibility into the EU's human rights commitments as they are implemented under the EU Israel Association Agreement's essential element clause. It also appears to have set aside the challenge of developing a specific "appropriate strategy" to deal with the "urgent need to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli/Palestinian conflict" as called for by the Commission with regard to Israel in its 2003 Communication on 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners'.⁴¹

There are no visible efforts to condition Israel's access to obtaining a stake in the EU's Internal Market and other areas of the Community *acquis* to its behaviour in the Occupied Territories and the EU/Israel Action Plan remains silent on main Israeli human rights violations in the OPT.

Partnership under the ENP is the highest level a non-candidate country can reach in its relations with the EU. Accepting Israel's refusal of a human rights subcommittee, and apparently making no attempt to insist at least on a human rights subgroup or other measure, reinforces the view that in the EU's politically-managed relationship with Israel its human rights commitments are weakly defended.

However, if the EU/Israel Action Plan is to make sense, the agreed points of cooperation that currently read as list of items will have to be translated into concrete and sequenced actions and/or programmes by the parties. Next year's review will follow-up on the implementation of the Action Plan to see how it is translated into practice including whether items avoided in the current plan are handled.

This exercise could be conducive to promote measures that would increase the transparency, consistency and objectivity of the institutional processes relied upon to apply the essential element clause, as discussed at the end of this report.

European Neighbourhood Policy Instrument (ENPI)

Until 2007, MEDA will remain the main financial assistance instrument for Barcelona Process partner countries. It will provide support for the ENP and in particular for the implementation of the Action Plans. Beginning in 2007, the ENPI will serve as the financial instrument for the ENP. It will be one of the six financial instruments that should operate in the area of EU external relations in 2007-2013. These six instruments will establish the new legal basis for financing and programming a broad range of measures implementing the EU's external policies, including the ENP.

Like the ENP, the ENPI is designed to be a flexible "policy driven" instrument, tailored to an economically, socially, legally and politically diverse group of partner countries. It can be applied to finance measures addressing a very broad range of themes and objectives anticipated in the ENP, once they are adopted in the action plans negotiated with the various partner countries. The ENPI will support cross border cooperation as well as regional cooperation projects involving both EU member states and partner countries⁴², and can be

⁴¹ COM(2003) 294, p. 5.

⁴² COM(2004) 373, p.25.

used to finance activities implemented by regional and local authorities, highly autonomous public institutions and even private actors. In fact, according to the Commission's draft, the ENPI can be used to finance "any type of measure contributing to the objectives of this Regulation."⁴³ Among these, the Commission envisages the possibility of establishing "thematic programmes" to implement the EU's commitments to respect and promote respect for human rights in third countries.

Although Israel's advanced economy disqualifies it from most bilateral funding programmes involving the provision of EU financial assistance, the ENPI will most likely be relied upon to enable the EU to finance joint activities supporting the implementation of the EU-Israel Action Plan, as well as regional and multilateral activities involving Israel under the ENP. The focus of EU financial assistance to Israel under the ENPI explicitly envisaged by the Commission will be to promote "legislative approximation" in preparation for broadening Israel's participation in the EU's internal market⁴⁴. It is therefore likely to be applied to finance "targeted administrative cooperation"⁴⁵ – the kind of activity that has been employed to construct the "practical arrangements" discussed elsewhere in this report.

The EU is currently engaged in finalising the six new external financial instruments, amid much disagreement between the European Parliament, Council and Commission. Four of the instruments, including the ENPI, must be ratified by the European Parliament. As the Commission has drafted them, the country-by-country selection and prioritisation of strategies and goals, the negotiation of action plans and subsidiary agreements with each partner country as well as the programming of measures, will be politically managed by the European Commission, in consultation with the Council. This, and the extreme flexibility of the instruments themselves, has effectively confined the Parliament to ratifying four general budgets without having any political say in how the budgets will actually be used. The Parliament is currently seeking the amendment of all four instruments to give it a political "voice" in shaping the priorities, conditions and thrust of cooperation with partner countries that will be carried out under them.

The move to introduce "Safeguard Provisions" into the EU's external financial instruments, starting with the ENPI

Whether or not the Parliament succeeds in substantially obtaining such a political voice, EU law and institutional checks and balances can generally be relied upon to ensure that no formal agreements concluded under the instruments will actually contravene the applicable requirements of the *acquis communautaire* and general international law.

On the other hand, once action plans, agreements and measures are formally concluded with Partner countries, the political management of their *implementation by the two sides* is not particularly well disciplined by such institutional checks and balances. It is ultimately the implementation of measures that determines their human rights effects, as well as many of their other politically significant effects.

A broad section of the Parliament appears to have recognised this.

⁴³ Article 15.1, Commission Proposal for a Regulation of the European Parliament and of the Council, laying down general provisions establishing a European Neighbourhood and Partnership Instrument, COM(2004) 628 final, p. 24.

⁴⁴ See the Commission's "Legislative Financial Statement", Paragraph 5, Section 5.2, Ibid, p.43.

⁴⁵ One of the "measures" specifically authorised under the Commission's draft of the ENPI in Article 15. 2a, Ibid, p.24.

Like the EU itself, partner countries interpret, apply and therefore implement their agreements as their own policies, legislation and positions on international law dictate. Although partner countries are not expected to adopt public policies and national legislation that violate general international law, they sometimes do.

Sometimes, as in the case of Israel:

- the provisions of international law that are being violated are critical to maintaining respect for human rights.
- the partner country's government recognises a strong interest in maintaining its wrongdoing;
- when challenged by the EU in the context of political dialogue, the partner country claims to interpret international law "differently", and insists on implementing its cooperation with the EU as its interpretation of international law and its unlawful policies dictate.

The only unilateral corrective measure currently available to the EU in such cases involves a suspension of the EU-partner country framework agreement. Such decisions must now be taken politically. As has been seen in the case of Israel, nothing in Community law compels the Commission to propose such a measure, or the Council to take it. Consequently, when serious problems of unlawful implementation have come to light, they have been politically managed by either ignoring them, or by taking the position that the values and the principles of general international law being contravened by the Partner country in implementing its agreements with the EU were not essential to defend.

To safeguard against such political mismanagement the European Parliament is currently considering two sets of "safeguard amendments" that would ensure that Community law, including its human rights-related *acquis*, and general international law, more effectively disciplines the implementation of the activities financed under the EU's new external financial instruments, starting with the ENPI. The amendments would:

- ensure that all agreements concluded, and all programmes and measures financed, under the ENPI are implemented by each contracting party in accordance with the requirements of general international law and the *acquis communautaire*
- ensure that no contracts enabling participation in Community-financed programmes or measures are concluded with any political authority, public institution or private actor directly participating in, actively facilitating, or actively deriving benefit from the commission of internationally wrongful acts.

Neglecting to put an end to the internationally unlawful implementation of any agreement, contract or measure made under the ENPI would now amount to maladministration by the Commission. The Parliament (and any individual member state) would therefore be in a position to decide whether the facts brought to its attention warrant its calling on the Commission to act to rectify an apparent case of unlawful implementation. The Parliament would also be empowered to bring an action against the Commission before the Court of Justice in the event that it is not satisfied by the Commission's response.

Although the role of ENPI finance in the EU-Israel relationship will probably be relatively minor, owing to the absence of any development or poverty relief aid component, this legal discipline would be introduced in all instances involving Israel in which the EU draws on ENPI finance. However, this initiative may be most important for the clear recognition that it gives to the need to prevent the EU's excessively political management of relations with partner countries engaged in serious violations of international law from resulting in its

practical accommodation, bordering on acquiescence, to a partner country's illegal policies and practice.

Interest has been expressed in incorporating these safeguard provisions in the other new external financial instruments. The prospect therefore also exists that the principles the safeguard provisions establish will also find their way into the EU's general institutional practice, and into the spheres of EU-Israel treaty-based relations that are conducted independently of the ENPI.

European Initiative for Democracy and Human Rights (EIDHR)

It is unclear what impact ENPI will have on the European Initiative for Democracy and Human Rights (EIDHR) since all instruments are under discussion and budgets for 2007-2013 have not been approved. The Commission is now arguing against the creation of a successor instrument, having proposed the "horizontal" integration of human rights into all other policies, including the ENP. The Commission now maintains that support for civil society human rights initiatives should be provided under the different external relations financial instruments. However, the EU has also recognised the EIDHR to be a powerful public relations tool. A broad consensus exists in the European Parliament favoring the creation of a successor instrument separate from the financial instruments that have been proposed.⁴⁶ This is mainly to ensure that the EU's support for non-governmental human rights activities is not confined to instruments designed to operate under bilateral and multilateral governmental auspices, and to ensure consistency of the EU's approach to promoting respect for human rights across regions and policies.

⁴⁶ Konrad Szymański, Rapporteur, Draft Report on the proposal for a regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument, provisional 2004/0219(COD), 7.7.2005, p.29.

Disengagement

Stating that Israel “has reached the conclusion that there is currently no partner on the Palestinian side with whom progress can be made on a bilateral peace process”, the Government of Israel approved in June 2004 a modified plan to unilaterally “disengage” Israel from the Gaza Strip.

On 18 July 2005, the Council of the European Union:

recalled its support for the Israeli withdrawal from Gaza and parts of the northern West Bank, in line with the framework outlined in the conclusions of the European Council of March 2004 and as an initial stage towards achieving a fair, lasting and comprehensive peace in the Middle East.

[..]

reaffirmed its position that no party should take unilateral measures which might prejudice the outcome of negotiations on the final settlement.

[..]

recalled that the EU will not recognise any change to the pre-1967 borders other than those arrived at by agreement between the parties.[..]⁴⁷

The March 2004 conclusions of the European Council⁴⁸ referred to by the Council of the European Union note that Israeli withdrawal from the Gaza Strip could represent a “significant step towards the implementation of the Road Map” provided that:

- it took place in the context of the Roadmap;
- it was a step towards a two State solution;
- it did not involve a transfer of settlement activity to the West Bank;
- there was an organised and negotiated handover of responsibility to the Palestinian Authority;
- and Israel facilitated the rehabilitation and reconstruction of Gaza.⁴⁹

Principle number six of the Israeli Cabinet Resolution regarding the Disengagement Plan states “The completion of the [disengagement] plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip.” While this text did not remain in the final version, the Israeli Foreign Ministry's legal advisors and diplomats have been quite active in exploring the conditions on which Israel could succeed in procuring a general release from such responsibility recognised by key third state actors, including the EU.

Israel's interest in procuring such a release is partly attributable to its even stronger interest in drawing other key political players into accepting the position that Israel retains no policing responsibility, has no option to police, and must therefore defend itself militarily from any source of threat arising in Gaza.

The EU's High Representative for Common Foreign and Security Policy, Javier Solana, may have offered Israel some unexpected encouragement when he reportedly stated that only an agreement between Israel and the Palestinians regarding the control over the land, air and

⁴⁷ Council of the European Union, General Affairs and External Affairs, External Affairs, 2675th Council Meeting, 18 July 2005, Press Release, 10815/05 (Press 178) Provisional Version.

⁴⁸ The European Council is composed of the Heads of State or Government of the Member States of the European Union and the President of the European Commission.

⁴⁹ European Council, Presidency Conclusions, Brussels, 25/26 March 2004.

sea passages in Gaza will permit the international community to acknowledge the end of Israel's occupation in Gaza.⁵⁰

While this statement stopped short of declaring that the mere conclusion of such an agreement between Israel and the Palestinians would permit the international community to acknowledge the end of Israel's occupation and responsibility in Gaza, it clearly invites such misunderstanding. If the Gol aspires to be relieved of the status and responsibilities of an occupying power without having to fulfill the conditions on which the termination of such responsibility rests, Mr. Solana's statement sent a welcome signal: the EU's High Representative for CFSP would not be averse to taking up such a discussion were Israel to moderate its unilateralism sufficiently to conclude an agreement with the Palestinians.

With such an agreement, Palestinians could again be made to catch the responsibilities shed by Israel, and again be helped from a safe distance to muddle through the impossible burden. Without such an agreement, and a Palestinian catcher, however weak, Mr. Solana may well appreciate that the EU is likely to find itself standing in the front ranks of the alternative care-takers.

In its statements on disengagement the EU has neither made reference to international law nor affirmed Israel's retention of its status as Occupying Power. Various explanations were heard in Brussels for this reticence. Some note the view that Israel should be "rewarded" for withdrawing from Gaza, and that there is a very different attitude towards Israel in the EU following the withdrawal.

Others note that the situation in Gaza is unclear, that it's not in the EU's interest (or the PA's) to make a separate case of Gaza, and that the "sensitive issue" of the different perceptions on the relation of IHL to the Middle East Peace Process among the member states, as shown by their submissions to the International Court of Justice (ICJ) on the wall/barrier, makes reaching consensus among 25 member states even more difficult than usual.

One explanation that was offered for the EU's reticence to refer to Israel's continuing occupation was that since maintaining an occupation is a part of waging war, acknowledging the continuation of Israel's occupation would provide the Islamic movement Hamas with political and religious justifications for launching political violence, including violence based on the right to resist occupation.

The tactic of not "bringing up" the occupation, and therefore IHL, ironically resonates with the dismissal of IHL by those actors on both sides of the Israeli-Palestinian conflict who consider it necessary to disrespect the immunity of civilians from attack and from acts of reprisal – including the Palestinian elements that the EU hopes to marginalise or wean away from political violence.

Instead of attempting to avoid reminding the Palestinian population that Gaza is still occupied territory, the EU needs to make clear reference to that fact, and not encourage expectations by Israel that its claims to divest itself of responsibility for the civilian population of Gaza while it maintains effective control will be rewarded.

This is not to say that the member states and EU institutions suffer from any lack of clarity as to such matters of law, as is shown by the German government's answer to a parliamentary question on whether the civilian population of the Gaza Strip will continue to be protected by international humanitarian law:

⁵⁰ EU: Gaza deal needed to end occupation, Ynet News, 30 August 2005-

At the same time, the Federal government shares the opinion that the civilian population in the Palestinian territories occupied by Israel is protected by international humanitarian law, in particular the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and situations of occupation. This is the case as long as Israel as occupying military power exercises effective control over the occupied territories. The occupation regime as governed by international humanitarian law terminates as soon as the occupying power fully surrenders its potential for exercising military control over the occupied territories.⁵¹

EU's offer of third party at the Rafah border

The EU offered "if asked by the parties, to play the role of third party in the area of customs management and border control",⁵² and the European Commission has allocated € 60 million to the disengagement process. The EU foresees a need for continued third party mediation/facilitation between the two sides, and its willingness to assist in the "opportunity" offered by disengagement was contingent on the request by the parties for a third party presence.⁵³

Providing border missions is a crisis management tool used by the EU to try and secure regional stability and security in its neighbourhood,⁵⁴ as in the case of the October 2005 initiative to establish an EU border mission on the Moldova/Ukraine border including the disputed Transnistrian segment.

The EU believes its presence in Gaza will help develop the EU's role in the Middle East Peace Process.

To act in accordance with international humanitarian law, the EU will have to ensure that its involvement on the Rafah border does not involve it in measures that infringe on the rights of the protected persons or imply any derogation of those rights.⁵⁵ The EU may find it particularly challenging to respect this obligation should its role exceed monitoring Gol-PA agreements and include their enforcement.

The EU will have to scrutinise all aspects of its engagement to ensure that the arrangements it makes do not implicitly accept any unlawful repudiation of responsibility by Israel vis-à-vis the Palestinian population of the occupied Palestinian territories, or any unlawful measures on the ground, particularly in light of anticipated unilateral steps by the Gol to evacuate some West Bank settlements and annex "seam zone" land between the West Bank wall/barrier and the Green Line.

With regard to the Paris Protocol⁵⁶ and customs control, the customs envelope the EU's presence at Rafah may help preserve recognises only one sovereign, Israel. Therefore, the

⁵¹ Answers of the Federal government to parliamentary questions (Foreign Office, Minister of State Kerstin Müller, 11 May 2005, BT-Documentation 15/5512).

⁵² Javier Solana, A Huge Challenge, a Great Opportunity, Ha'aretz, 23 August 2005.

⁵³ Communication from the Commission to the Council and the European Parliament, EU-Palestinian cooperation beyond disengagement - towards a two-state solution, COM(2005) 458 final, 5.10.2005, p.10.

⁵⁴ "The EU should take a more active role to facilitate settlement of the disputes over Palestine, the Western Sahara and Transdnestria (in support of the efforts of the OSCE and other mediators). Greater EU involvement in crisis management in response to specific regional threats would be a tangible demonstration of the EU's willingness to assume a greater share of the burden of conflict resolution in the neighbouring countries." COM(2003) 104, p.12.

⁵⁵ Article 7 of IVGC: [...] No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.[...]

⁵⁶ The economic codicil to the 1994 Gaza-Jericho Agreement. The Paris Protocol stipulated, among other things, that Israel and the PA would have a "uniform customs envelope", i.e. the two parties would maintain uniform customs and permit the free movement of goods between themselves.

factor of mutual advantage, on which special agreements made by parties to a conflict are often based, is absent.⁵⁷ One of Israel's principal reasons for negotiating a customs envelope between it and the Palestinians was to obfuscate the borders between Israel and the occupied territories. Now that Israel has declared its border with Gaza, it is Gaza that needs the customs envelope to avoid the imposition of additional barriers to its external trade with Israel and the rest of the world. Abolishing the customs envelope with Israel could also cut Gaza off from trade with the West Bank, which Israel desires to keep within its customs envelope until its eastern border is delineated.⁵⁸

The Paris Protocol was accepted by the international community as being in the interest of the Palestinian population. However it was never fully implemented at the best of times,⁵⁹ and Gol restrictions on the movement of Palestinian goods and labour only intensified over the past decade. Israel now has even less stake in the Protocol's intended execution in the case of Gaza. Should the EU be invited to monitor or enforce the customs arrangement, it will have to keep in mind that it will be performing that role with Israel's permission, and will be implementing policies that continue to be set unilaterally by Israel. It must therefore be prepared to disengage should it find itself enforcing a trade regime that functions to the detriment of the interests of the protected persons in Gaza and in the West Bank, including harming their ability to conduct public life.⁶⁰

Purchase of settlement assets

In the run up to Israel's evacuation of Gaza settlements much debate was held on the question of third-party purchase of settlement real estate. The dubious legality in international law of purchasing assets of illegally-established settlements with third-state funds appears to have prompted the privatisation of the measure at the initiative of the Quartet's Special Envoy for Disengagement. However, the official explanation for this initiative was the PA's inability to accept donor assistance to purchase settlement greenhouses and related facilities.⁶¹

⁵⁷ "The factor of mutual advantage, on which special agreements are often based, is therefore less important in the case of a regime of occupation....It is thus the criterion of "derogation", rather than that of "adverse effects", which provides the best basis for deciding whether a special agreement is, or is not, in conformity with the Convention." ICRC, Commentary IV Geneva Convention, Geneva, 1958, p. 67.

⁵⁸ "Once construction of the West Bank separation fence is complete, [National Security Council chairman] Eiland continued, 'trade relations with the Palestinians will take place via border crossings, and on the basis of trade agreements. Until then, the existing customs union will remain in force.'" Ha'aretz, Eiland: Full economic disengagement too, 1 November 2004.

⁵⁹ For example, article VII (1) allows for free movement of labor, and article VII (3a) requires Israel to transfer customs revenue to the PA. These transfers have on occasion been held hostage to conditions Israel imposed on the PA.

⁶⁰ Article 43 of the Hague Regulations imposes a duty on the occupant to "take all measures within his power to restore, and ensure, as far as possible, public order and safety, while respecting the laws in force in the country".

⁶¹ Office of The Special Envoy for Disengagement, Periodic Report, September 2005.

Origin rules

As noted in the 2003-2004 report, since 1998 the EU has struggled to maintain a tenable balance between two competing imperatives:

1. *Community law* could not tolerate the preferential importation of ineligible settlement products, nor the failure of the Commission, as "guardian of the Treaty", to act within its scope of empowerment to bring such "violations of rules" to an end.
2. The EU wanted to avoid any disturbance of its privileged relationship with Israel, which it regarded as a centrepiece of its Mediterranean policy. The EU has therefore been unwilling to take any measures that would require Israel to apply and implement its agreements correctly.

By 2003 this problem had become further complicated by the EU's desire to launch a new 'paneuromed' system of preferential trade that would encompass all of Europe, as well as the eastern European and Mediterranean countries that were not EU member states. The EU and Israel had reached a firm understanding that Israel would be in the first group of countries admitted into this system. Two requirements had to be met by any participating country to enjoy the expanded free trade benefits of this regional arrangement:

- The Protocol on Origin⁶² to its existing free trade agreement with the EU would have to be replaced by a new standard Euromed Protocol. The new Euromed Protocol on Origin would authorise the application of 'diagonal cumulation of origin' between participating countries.
- All countries wishing to participate in diagonal cumulation would have to conclude free trade agreements with each other incorporating the standard Euromed Protocol on Origin.

The EU, however, recognised that it could not proceed to amend the EU-Israel Protocol on Origin while Israel's misapplication of the EU-Israel Association Agreement to its settlements in occupied territories made it impossible for the EU to properly implement the requirements of Community law. While EU customs remained unable to reliably identify and recover duties on the ineligible settlement products that Israel continued to export under the Agreement as products of Israeli origin bringing Israel into the paneuromed system of free trade would only spread problems arising from Israel's "irregular application" of the rules of origin throughout the system. To complicate matters further, the EU could not agree to amend the EU-Israel protocol while Israel maintained its unlawful practice under the Agreement without legally acquiescing⁶³ to Israel's continuation of that practice.

For these reasons, the EU notified Israel informally, and then in the November 2003 EU-Israel Association Council that the EU was not prepared to proceed with amending the Protocol on Origin before "solving the EU-Israel bilateral issue of rules of origin". To put further pressure on Israel, several member state customs authorities began to apply customs control procedures more aggressively. Owing to Israel's non-cooperation with those procedures, duties were imposed with increasing frequency on products that actually originated in Israel and qualified for preferential treatment.

⁶² "Protocol on Origin" is the abbreviated name for a protocol annexed to each EU preferential trade agreement setting out the rules of origin that must be applied to determine whether any product is eligible for preferential treatment under the agreement, and the administrative procedures and regulations that must be followed by the Customs authorities of the trading partners to implement the preferential regime correctly.

⁶³ Acquiescence: failing to take action against infringing parties; performing an act that implies acceptance of the infringing action; or otherwise indicating, implicitly or explicitly, that nothing will be done about it. In the international law of treaties, acquiescence results in the loss of the right to subsequently react to the infringing action by suspending a treaty (in this case the EU-Israel Association Agreement).

To break out of this mutually unsustainable state of affairs, Israel offered a "technical arrangement" that could enable the EU to distinguish products "coming from settlements" from products coming from Israel, while leaving Israel free to continue applying the EU-Israel Association Agreement to occupied territories and issuing proofs of origin under that Agreement accordingly. The Commission accepted.

The 2003-2004 report called attention to the fact that, as originally envisaged by the Commission, the arrangement's method of adoption, and the linkage of the arrangement's implementation to the eventual amendment of the Protocol on Origin, would have resulted in the EU's legal acquiescence to Israel's practice of conferring preferential origin on products that had been produced in settlements located in occupied territory. At the very least, they would have rendered Israel's established practice unobjectionable under the EU-Israel Association Agreement for its duration, and the EU would lose its right to respond to that practice with any measure of suspension.

In the closing months of 2004, the Council recognised these risks. Extensive adjustments were therefore made to the course of action originally envisaged by the Commission, in keeping with the recommendations made on this issue in the 2003-2004 report:

- No action was taken by the EU Council relative to, or predicated on, the arrangement
- The "arrangement" was neither adopted nor endorsed by the EU-Israel Association Council or Association Committee, the only bodies created under the Association Agreement that could enact measures having legal effects. No other action was taken by either of these two bodies that could render the arrangement legally binding in international law;
- The measures that were taken were confined to the Association Agreement's Customs Cooperation Committee, and could not be construed as implementing a "task entrusted to" the Customs Cooperation Committee by the Association Council under Article 39 of the Association Agreement;
- Provisions were included in the arrangement implemented by Israel that would enable the EU customs authorities to identify and refuse preferential treatment to products that had undergone their final substantial transformation in Israeli territory but had in fact been substantially produced in settlements.

In the Association Council of 13 December 2004, the EU confined itself to declaring that it *"takes note of the technical arrangement negotiated between Israel and the Commission"*. It described the arrangement as a *"practical way of handling [as opposed to "solving"] certain long-standing issues related to the problem of Israel's application of the Protocol on rules of origin for goods exported to the Community from the settlements in the occupied territories of Gaza, West Bank, Golan and East Jerusalem."*⁶⁴ The EU went on to state that *"Notwithstanding this technical arrangement, the EU reiterates its position of principle on the Israeli practice of issuing preferential proofs of origin for goods coming from settlements in the occupied areas, which are not covered by the Association Agreement."*⁶⁵

Turning to the hazards of amending the EU-Israel Protocol on Origin while Israel maintained its unlawful practice, the EU confined itself to *noting "that the procedure will be initiated to include Israel in the system of Pan Euro-Mediterranean cumulation of rules of origin, once the new arrangement is implemented"*, but stopped short of committing the EU to actually

⁶⁴ Fifth Meeting of the Association Council EU-Israel, Brussels, 13 December 2004, Statement of the European Union, paragraph 39.

⁶⁵ Ibid, paragraph 40.

amending the Protocol. It took the position that for this to be possible, "*inclusion of Israel in the Pan Euro-Mediterranean system on rules of origin will be without prejudice to the EU's position on the territorial application of the EU-Israel Association Agreement.*"⁶⁶ This quieted the unease of certain member states that continued to entertain serious reservations as to the feasibility of avoiding acquiescence (i.e. 'prejudice to the EU's position on the territorial application'), and also questioned the political propriety of proceeding with amending the Protocol on the strength of the proposed technical arrangement.

Similarly, when the Commission presented the Council with a draft Community position mandating the amendment of the EU-Israel Protocol on Origin, it introduced the text with the following qualification:

In accordance with the statement of the European Union on the occasion of the fourth meeting of the EU-Israel Association Council on 17 and 18 November 2003, the Community position should only be presented to the EU-Israel Association Council after solving the EU-Israel bilateral issue of rules of origin.⁶⁷

Subsequently, the Commission and several member states reiterated their position that as long as Israel treats production carried out in occupied territories as if it had been carried out in the territory of the State of Israel, and maintains its "practice of issuing preferential proofs of origin for goods coming from settlements in the occupied areas, which are not covered by the Association Agreement", the implementation of the technical arrangement does not "solve the EU-Israel bilateral issue of rules of origin".

Under the "technical arrangement" that was finally adopted, and then put into effect on 1 February, 2005, Israel would list on each proof of origin the names and Israeli postal codes of the places in which production relied on to confer preferential origin had taken place. With the help of a list of settlement names and postal codes compiled by the Commission, EU customs authorities would examine each proof of origin issued by Israel and determine whether the product it covered was eligible for preferential treatment under EU law. EU customs would void any proof of origin on which they found a settlement location listed, and refuse preferential treatment to the product in question. Israel would not object.

While the adoption of the 'technical arrangement' has been pulled back from a legally binding act that would alter the EU-Israel Association Agreement, it remains an equally problematic piece of soft law. It conspicuously accommodates Israel's illegal policies and draws the EU into regularised practice shaped by them. It enables the EU and Israel to cooperate below the threshold of hard law in evading the constraints and intent behind the hard legal obligations to which Israel objects. Indeed, the harm done by such arrangements may be greater if they help the EU to avoid responsibility for violating hard law straightforwardly.

However, the EU's slide into legal acquiescence may only have been slowed by a few months. EU customs authorities are now receiving (and voiding) Israeli-issued proofs of origin that contain specific information attesting to the fact that the products they cover have been wholly or partly produced in settlements. Previously, when such proofs of origin containing such information were detected, the EU could object to their issuance by Israel as a violation of the Agreement. Now, the EU can hardly object, since the "technical

⁶⁶ Ibid, Paragraph 41.

⁶⁷ Explanatory Memorandum introducing the "Draft Decision of the EU-Israel Association Council Amending Protocol 4 to the Euro-Mediterranean Agreement, Concerning the Definition of the Concept of 'Originating Products' and Methods of Administrative Co-operation": Draft common position of the Community (presented by the Commission), Brussels, SEC(2004) 1437 final, 29.11.2004.

arrangement" itself envisages their issuance by Israel, and in fact relies on Israel to issue them. It is only a matter of time until the absence of any Community objection renders Israel's practice accepted under the Association Agreement.⁶⁸

Under strong member state political pressure to maintain "positive momentum" in EU-Israel relations on the eve of Israel's implementation of its "disengagement plan", the Council and Commission are also focussing their efforts on finding a way to move forward with the amendment of the Protocol, and establishing a plausible justification for abandoning the condition that they had set earlier: "solving the bilateral issue of rules of origin".

However, amending the Protocol while Israel maintains its current improper practice would involve surrendering the EU's ability to prevent the spread of preferential trade in defection to its own rules of origin throughout the paneuromed system, and into the EU's own single market. The EU will have no right to object to Israel's maintaining that same practice in implementing its preferential trade with third countries that also have agreements with the EU entitling them to participate in paneuromed cumulation since the EU will have given third countries the right to cumulate origin with Israel under their own agreements. It will also have no right to object to the failure of such third countries to oppose Israel's unilateral application of their own respective free trade agreements with Israel to Israeli-occupied territories.

The Commission has already stated the EU has no right to require such third countries to take the customs control measures necessary to distinguish eligible Israeli preferential imports from ineligible ones, even if they join the EU in contending that their agreements with Israel are not applicable to occupied territories.⁶⁹ Effectively, the EU will not be able to prevent such third countries from allowing whatever settlement materials they preferentially import under their own free trade agreements with Israel to be cumulated with their own production and then preferentially exported to the EU.

Acquiescence would be an inescapable consequence of the EU's decision to place itself in such a position, unless it could credibly claim to have been unaware of the consequences at the time it acted. It can not make any such credible claim.

To be able to maintain that it has not acquiesced, the EU is therefore quietly promoting the adoption of the technical arrangement by other EuroMed trading partners. In doing so, it is also encouraging them to accept its premise and its consequences: the EU's EuroMed partners will now be expected to do nothing to prevent Israel from applying their own free trade agreements to occupied territories. They will, however, be expected to declare, like the EU, that they can not accept Israel's practice.

This leaves one problem: all states that will be making new free trade agreements with Israel or amending existing ones can not claim that they were unaware that Israel's interpretation of the scope of its sovereign national territory incorporates the occupied territories (excluding Gaza since the "disengagement"). Israel will not agree to make any new agreement with a

⁶⁸ Article 45 of the Vienna Convention on the Law of Treaties, 1969, entitled "Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty", states:

"A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

⁶⁹ "The EU does not have the competence to interfere in the organisation of customs controls in third countries that participate in the system of pan-Euro-Mediterranean cumulation." Answer by the Commission dated 24 June 2005, to a priority written question by MEP Vittorio Agnoletto dated 17 May 2005.

territorial clause that specifically excludes the occupied territories. The EU's EuroMed trading partners have thus been left with one option for fully participating in the regional free trade system that includes Israel: concluding agreements with Israel in circumstances that afford them little if any ground for objecting to Israel's application of those agreements to its settlements. Perhaps Israel will permit them to apply the "technical arrangement" themselves and unilaterally void the invalid Israeli proofs of origin they manage to detect. However, it is also quite possible that many of the EU's trading partners will not want to bother.

Framework Programme

The 2003-04 Review identified settlement entities participating illicitly in the Framework Programme for Research and Technological Development, the Community's main research funding instrument. The Commission's Directorate-General for Research administers the programme.

Although discussion had been held within DG Research about the risk of settlement firm participation in the Framework Programme (FP), it was only after being alerted to their participation in the Fifth Framework Programme (FP5) that the Commission carried out in-depth research to assess the degree of risk, and proceeded to sensitise units dealing with project contracts to that risk. The Commission characterised the participation of Israeli settlement entities in the FP as "hazardous" for the Community, and described the situation as "very disagreeable."

Previously, the Commission had presumed that settlement participation in the framework programme was minimal. On that basis it made no attempt to detect it, and consigned any cases that might have gone undetected to the margin of appreciation⁷⁰ allowed the Commission in the fulfilment of its guardianship duties. This echoes the Commission's initial approach to the rules of origin problem.

Later, after having been pushed to look into the matter, the Commission concluded that settlement enterprise participation in the FP has been marginal, and that it is "not worthwhile" making an issue of it with Israel. Instead the Commission focused on technical and administrative means, and an informal arrangement with the programme's Israeli implementing counterpart,⁷¹ to try and filter out any visible settlement entity participation. There is an "understanding" on the territorial application of the Agreement between Israel and the Commission, and Israel "also has no interest in letting this problem persist," according to the Commission.

The Commission's assumption of the administrative burden to try to ensure no privileged participation by settlement entities in the programme, and its "practical arrangement" with its Israeli counterpart, repeats the approach worked out with Israel on rules of origin.

The sole purpose of these "arrangements" is to replace hard law unacceptable to Israel with soft law that poses no obstacle or disincentive to Israel's maintaining the internationally unlawful policies that the arrangements accommodate. The arrangements aim to uncouple the need to prevent the harm being caused to the Palestinian populace by these Gol policies from the need to prevent the harm that was being caused to the Community's own rule of law

⁷⁰ The discretion left to governmental authorities for interpreting and implementing rights and freedoms and limitations of rights and freedoms.

⁷¹ Armed with the settlement address lists compiled by the Commission for the implementation of the "technical arrangement" on rules of origin, DG Research checks any enterprise address about which it may have "reasonable doubt" against the list. If suspicion remains the Commission consults with ISERD, the Israeli inter-ministerial directorate for the FP programme.

– to its institutional interests and, indirectly, to the interests of its citizens. This at once testifies to the strong institutional defenses that protect the EU's rule of law, and to an extraordinary resolve to arrest its politically unwanted human rights dividends. Rather than mainstreaming the application of EU's human rights commitments into its conduct of external relations, such measures appear aimed at selectively extinguishing them.

In the Framework Programme the Commission confronts the additional problem that the partner country's legal entities entitled to participate in the programme are whatever legal entities the partner country's national law recognises. Rather than face this "political bullet," the Commission has chosen to try and put in place the coordinated internal screening procedure described above. While declaring that it recognises the importance of settlement entity participation, the Commission regards it as more the exception than the rule, and will not consider modifying or clarifying the rules of the programme to preclude it.

The screening arrangement falls short in the following ways:

- It will not flag an entity using an address in Israel but with a core or affiliated settlement facility.
- The Commission has decided to handle the screening on a case-by-case basis but admits that reviewing the details of all legal entities in all contracts imposes an unmanageable administrative burden.
- DG Research signs the project agreement with the direct operator, or contractor. A contractor may hire a "minor subcontractor", defined as receiving less than 25% of the funds allocated to the contractor. A minor subcontractor, usually a service provider, is accountable legally only to the contractor and does not need to be mentioned in the project documentation. The Commission considers this association with the programme peripheral even though a settlement entity may still be receiving Community funds.

An informal search through the current Sixth Framework Programme (FP6) database delivered a West Bank settlement firm participating under project reference number 508645.

An unknown number of "legal bodies" situated in illegal settlements also participated in find-a-partner calls under FP6.⁷² While access to the Programme remains open to settlement enterprises, this does not mean necessarily that they will be funded. However, taking no steps to close off their access also leaves the door open to their participation, particularly in light of DG Research's admission that there are too many entities to review closely. Maintaining their official eligibility also satisfies Israel's need to ensure that in this case as well as others, it remains free to implement its cooperation with the EU as its own policies dictate.

Finally, MATIMOP, the Israeli Ministry of Industry, Trade and Labor's technological and R&D cooperation organization, was a contractor to a number of FP6 projects. MATIMOP's companies list contains settlement enterprises, and, as detailed in a later section of the review on the EU's Galileo Programme, some of MATIMOP's R&D centres are located in settlements. It does not appear that the Commission's understanding with MATIMOP/ISERD⁷³ extends to preventing MATIMOP from directing Community funds to settlement enterprises. Should the EU accept Israel's request that a representative of the Office of the Chief Scientist participates in the recently established FP7 steering committee,

⁷² e.g.: http://icadc.cordis.lu/fep-cgi/srchidadb?CALLER=FP6_PARTNERS&ACTION=D&RCN=59872&DOC=70&CAT=PART&QUERY=9

⁷³ The inter-ministerial directorate for the FP programme under the Ministry of Industry, Trade and Labour.

it is also unlikely that it will be able to procure the representative's formal agreement to respect the rules on settlement exclusion that the EU is attempting to apply without causing offence.

On a positive note, according to the Arab Israeli organisation that complained to the Commission about the poor Arabic language on the EC Delegation to Israel's FP website, the language has been improved. The likelihood of Palestinian minority participation in the Programme remains minimal, however, reflecting the effects of educational and institutional discrimination. Those discriminatory policies were reviewed in last year's report.

EU Assistance to the Occupied Palestinian Territories (oPts) / Humanitarian assistance

The European Commission's Humanitarian Aid Office (ECHO)'s provision of humanitarian assistance to the oPts population in 2005 remained at roughly the same level as 2004.

The 2003-04 Review discussed donors' absorption of the additional costs on the delivery of humanitarian assistance stemming from access and mobility restrictions imposed unlawfully by the Israeli military authorities. The Review noted that without "making vigorous protest about these conditions, and without taking clear actions aimed at rectifying them, donors weaken respect for the body of law [IVGC] relied upon by the occupied population for its protection, and violate the principle of clean hands."

ECHO reports that its oPt operation is still its most expensive per beneficiary in the world.

ECHO also reports that whenever it attempts to raise IHL in relation to its operations in the oPts it encounters political stalemate. The EU's declaration at the December 2004 EU Israel Association Council did not mention additional costs as it had in 2003, but noted:

Recalling Israel's obligations under international law including the IV Geneva Convention, the EU calls on the Government of Israel to increase efforts to ease the plight of the Palestinian people by taking all necessary measures that would alleviate the humanitarian situation in the Palestinian Territories and by ensuring full and secure access for the diplomatic missions and humanitarian organisations to the Palestinian Territory.⁷⁴

The new Commissioner for Development and Humanitarian Aid Louis Michel said in May 2005:

Despite the improving political climate, most movement restrictions for people and goods remain in place. While it is crucial that humanitarian aid does not become a structural feature of the Palestinian economy, international donors must continue to help meet the urgent needs of the population."⁷⁵

The question of what donors do when unable or unwilling to address the policy framework has been asked more publicly since mid-2004. A World Bank representative observed that donors did not address upfront the restrictions on movement of goods and people, instead pumping in more money into the equivalent of a massive social security net. Without significant push for changes on the policy front, he concluded, "we'll be wasting our time."

⁷⁴ Fifth meeting of the Association Council EU – Israel, paragraph 13.

⁷⁵ Commission provides Euro 28.3 million in humanitarian aid to vulnerable Palestinians, Press Release, IP/05/549, 10.05.2005.

The suggestion that assistance cannot continue to replace the lack of political action of the international donor community gained ground with the local donor community in the end of 2004, particularly with reference to barrier/wall mitigation.⁷⁶

ICJ Advisory Opinion – barrier/wall mitigation projects⁷⁷

The donor community's attempts to interpret and make operational Paragraph 159⁷⁸ of the ICJ Advisory Opinion have foundered in 2005 however, and select agencies have begun to fund what are essentially wall mitigation projects but to call them something else. The difficulty donors and implementing agencies face in trying to balance the finding of the Advisory Opinion with the needs of the population harmed by the barrier/wall and its associated regime, and with the pressure to dispatch large amounts of MEPP-driven funding, is compounded by the absence of clear guidelines from any donor coalition body, or elaborated follow-up from the Palestinian Authority on its 2004 guidelines for donors concerning barrier/"wall mitigation" projects. The need for common EU guidelines to be agreed upon at the EU Heads of Mission level was suggested at an EU Development Cooperation meeting in September 2004,⁷⁹ but to date none exist.

Notably absent is the expectation that the EU member states, as High Contracting Parties to the Fourth Geneva Convention, should provide guidance to their agencies. Only the Netherlands is reported to have asked for guidance from its capital regarding wall mitigation,⁸⁰ but reports almost a year later that it received nothing. Waiting for the Palestinian National Authority's direction may make sense from the viewpoint of coordinated planning, but it also serves to shift an obligation of states under IVGC as High Contracting Parties onto the PA.

The position of the Jerusalem European Technical Assistance Office at the end of 2004 on barrier/wall mitigation was that the "EC has decided not to support and implement infrastructure projects in affected areas on the basis that such projects have a tangible effect and are not transitional. However, the EC will support other activities, in particular temporary, humanitarian efforts, as well as advocacy projects and support to NGOs' legal action."⁸¹ This remained the Technical Assistance Office's position in 2005.

The injunction set in Article 41 of the Draft Articles on Responsibility for Internationally Wrongful Acts and reaffirmed in the ICJ Advisory Opinion enjoins states "not to recognise as lawful a situation created by a serious breach [of international law]." This injunction would appear to cover engaging in commercial transactions with any illegally-established settlement entity.

⁷⁶ As an example: "In a statement by Jan Bjerninger (Head of [Swedish] Sida Asia Department) and Johan Schaar (Head of Sida Humanitarian Department), the role of international donor assistance to the OPT has been questioned. In particular, it was stated that in light of the continued occupation of the Palestinian Territories and the construction of the Separation Barrier, the costs for the international community and Swedish development assistance have grown dramatically due to the restrictions and other direct obstacles to development operations." LACC Secretariat Office, Wall Mitigation: Implications for Donors and Implementing Agencies Operating in Areas Affected by the Separation Barrier, 30 January 2005, footnote 54 p. 27.

⁷⁷ For further information see [http://asp.alhaq.org/zalhaq/site/books/files/Building%20Walls,%20Breaking%20Communities%20\(Final\).pdf](http://asp.alhaq.org/zalhaq/site/books/files/Building%20Walls,%20Breaking%20Communities%20(Final).pdf) and http://www.pchrgaza.org/files/Reports/English/pdf_spec/PCHR%20Memorandum%20Implementation.pdf.

⁷⁸ In Paragraph 159 of the 9 July 2004 International Court of Justice Advisory Opinion, the Court held that all states were obligated not to recognise the illegal situation resulting from the construction of the wall/barrier, and not to render aid or assistance in maintaining it.

⁷⁹ LACC, p.24.

⁸⁰ Ibid, p. 29.

⁸¹ Ibid, p. 25.

The disclosure in last year's review that a humanitarian assistance implementing agency had hired storage facilities in the east Jerusalem settlement industrial zone of Atarot prompted a question by an MEP on whether the Commission knew "if any programme of humanitarian assistance financed by the Community is using Community funds to procure goods or services from illegally-established settlement-based enterprises?"⁸²

Directorate-General for Humanitarian Aid ECHO answered that it had not known that its beneficiary organisation World Food Programme (WFP) rents storage space in Atarot, and stated that "The Commission will take the appropriate action towards WFP in order to avoid that the storage facilities at Atarot continue to be used for the storage of EU funded aid." WFP is looking for new warehouse space.

ECHO's answer is a welcome example of the Commission acting in accordance with the principle of clean hands. Its action also complies with Community law, since Article 16 of the EC Framework Partnership Agreement with humanitarian organisations prescribes that 'Humanitarian aid operations shall respect and promote the enforcement of international humanitarian law...' ⁸³ The inclusion of this provision in the Framework Partnership Agreement suggests a modest correlation of what could be the case if the ENPI included provisions legally obligating the EU to ensure that all agreements concluded with third countries and financed under the Instrument were implemented in accordance with the requirements of general international law.

Rehabilitation and reconstruction

In compliance with the PA's request, by the end of 2004 all donors had decided not to fund the separate West Bank road system that had been proposed by the GoI.

In its December 2004 EU Israel Association Council declaration, the EU stated:

The EU remains seriously concerned at the destruction of Palestinian infrastructure and other facilities which help Palestinians in their economic, social and humanitarian development and which are financed by the EU and other donors.

The Commission maintains a project damage assessment database, but has never "presented a bill" to the GoI. The Commission has set some very sensible criteria for EU involvement in a future comprehensive reconstruction programme in line with the Quartet Special Envoy's three-year plan:

Criteria for EU involvement: prior to major infrastructure investments, movement and access restrictions for people and goods will have to be eased, and guarantees from Israel on the operation of the port and airport will have to be sought. ⁸⁴

Israel's facilitating the rehabilitation and reconstruction of Gaza is one of the conditions on which the European Council based its expression of support for Israel's withdrawal from Gaza.

⁸² Question H0749/05 by MEP Luisa Morgantini, 15 September 2005.

⁸³ "[...] Article 16 of its Framework Partnership Agreement with humanitarian organisations, which is the basis upon which financial aid for the implementation of humanitarian operation is granted, already prescribes, inter alia, that: 'Humanitarian aid operations shall respect and promote the enforcement of international humanitarian law and humanitarian principles'." Commission reply to EP Question H0749/05, Annex, Strasbourg, 29 September 2005.

⁸⁴ COM(2005) 458, p.11.

In the immediate aftermath of the Israeli withdrawal, completed on 12 September, Karni goods terminal was closed by the Israeli authorities for long stretches of time during a 6-week period, opening intermittently mostly for imported food stuffs. The Egyptian Palestinian border at Rafah was closed on 7 September and, except for some 7 days when it was opened to process pilgrims to Mecca,⁸⁵ did not re-open until ten weeks later, and then only after the direct intervention of the U.S. Secretary of State.

The Galileo programme

Israel and the EU signed an agreement in June 2004 enabling Israeli participation in Galileo, the European Space Agency's global satellite navigation programme. An additional agreement was signed on 6 September 2005 permitting the Israeli entity MATIMOP to become a member of the Galileo Joint Undertaking (GJU).

MATIMOP, the Israeli Industry Venture for R&D at the Chief Scientist's Office (under the Ministry of Industry, Trade and Labor), promotes technological and R&D cooperation and technology transfer activities between Israeli and foreign industries.

Three MATIMOP incubators for technological initiatives are settlement-based. Mofet B'Yehuda Ltd. is in Kiryat Arba settlement next to Hebron; Meytag High Tech Ventures is in the Katzrin Industrial Zone on the Golan Heights; and Incentive Technological Incubator Ltd. (formerly Orit Technological R&D Center) is in the northern West Bank settlement of Ariel. The Israel Space Agency funds projects at the Ariel-based College of Judea and Samaria.⁸⁶

In the case with the trade chapter of the EU-Israel Association Agreement and the Framework Programme, European Commission was prompted to take action after non-governmental organizations exposed the unlawful participation of settlement enterprises in these areas of privileged cooperation. It was not possible for the authors of this report to establish whether the Commission has taken any measures in the absence of such prompting to ensure that Community finances are not channelled to illegally-established settlement-based enterprises under the Galileo programme, and that settlement entities do not otherwise directly benefit from it.

⁸⁵ UN OCHA, Gaza Strip Situation Report., 31 October 2005, p.2.

⁸⁶ Israel Space Agency Head Visits CJS, College of Judea & Samaria Press Release, 1 September 2005.

PRIVATE SECTOR PARTICIPATION IN THE VIOLATION OF IHL AND IHRL: EU AND MEMBER STATE INVOLVEMENT

The 2003-04 Review referred to the stream of ‘technical problems’ and irregularities that are likely to result from expanding the scope of the EU’s partnership with a state whose public policies and national legislation contravene international law.

As Israel has dismantled its market access barriers, privatised the banking sector and loosened public procurement regulations, investment by EU companies in Israel has increased. This trend continues. As Israel’s integration into the EU’s single market progresses and Israel-EU reciprocal procurement programs expand, it is reasonable to expect that Israeli settlement firms, and Israeli firms engaged in activities which violate IHL, might have greater presence in EU public procurement programs (including as implementers of foreign aid) and other publicly financed activities. This raises questions about the extent to which EU and member state engagement of the private sector takes into account their commitments to human rights and obligations in public international law.

Foreign private ownership of settlement companies, or companies with branches or subsidiaries in settlements, is long established. As examples, Unilever Israel, a subsidiary of the UK/Netherlands company Unilever, owns Beigel & Beigel, located in Barkan settlement. Groupe Danone France has a joint venture Danone Springs of Eden with the Mei Eden company which bottles water on the Golan Heights. And the Swedish firm Assa Abloy AB is majority shareholder in Mul-T-Lock, which has a production facility in Barkan settlement.

Discussion as to what extent corporations can be held to account in public international law is beyond the scope of this review. However, when EC or member state public funds are involved, or when the EC or member states actively promote trade and investment with third countries, governments cannot simply consign their own duty of care and their own duty to respect and ensure respect for the IVGC to the private sector. As the Commission has noted, “where public support is provided to enterprises, this implies co-responsibility of the government in those activities.”⁸⁷

The section below outlines various examples of member state public investment and trade promotion initiatives that appear to fail this basic test.

State of Israel tenders and EU company participation promoted by member states

The following Gol tenders invite participation by firms in projects that implement internationally- unlawful measures. They have been extracted from the UK Trade & Investment “Israel Projects List” compiled by the UK Trade and Investment Team, British Embassy Tel Aviv, and are advertised by the Embassy’s website.

Jerusalem light rail

The new Jerusalem light rail will connect the East Jerusalem settlements of French Hill and Pisgat Zeev to West Jerusalem. French company Alstom and multi-national company CGEA-Connex are members of the City Pass Group, which won the tender with a bid that offered to supply funding for 28% of the project, with the State of Israel funding the rest.

A spokesman for the French Foreign Ministry stated that “the participation of French companies in the construction of the Jerusalem light rail is in the framework of the

⁸⁷ Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, (COM)2002 347 final 2.7.2002, p. 23.

international market," and added that this participation does not have "any effect on the status of east Jerusalem."⁸⁸ However, the fact that the French ambassador in Tel Aviv was present at the contract signature ceremony "deprives the French government of their allegation that they are not involved," said a French official.⁸⁹

In reference to the "legitimacy and to the political viability of a future Palestinian State", the Commission's Communication on disengagement notes that *with regard to Jerusalem* "the EU must increase the effectiveness of its messages rejecting the recent upsurge in settlement activity and efforts to establish new 'facts on the ground'."⁹⁰

A1 Railway line

In May 2005 Israel Railways Ltd published a pre-qualification tender for construction of Section B of the A1 Railway Line Modiin-Jerusalem. Section B includes 2 tunnels: 3.5 km north of Latrun interchange, and 1.2 km north of Sha'ar Haguy interchange.

It is unlikely that construction of the tunnels will be able to avoid West Bank territory.

Regarding an earlier route plan for the A1 line, the Israeli transport minister received approval from the attorney general for parts of two planned tunnels to be beyond the Green Line.⁹¹ Unlike Gol presentation of the wall/barrier as a temporary structure, the planned Tel Aviv-Jerusalem rail line will obviously be a permanent part of Israel Railways infrastructure.

Prison

The State of Israel posted a tender for a private prison for low and medium security criminal prisoners. According to the tender the contractor will be responsible for designing and building the prison and operating it for 25 years. The updated tender is directed at three consortia that passed the initial financing stage. The first consortium includes GEPSA of France.

Several points need to be noted with regard to EU companies' possible participation in a public-private partnership entailing the construction and operation of a private prison in Israel:

- Israel incarcerates WBG administrative detainees in prisons in Israel in violation of the IVGC.⁹²
- Israel has signed the UN Convention against Torture but has not adopted it into domestic law. Private and official petitions for its adoption into domestic law have failed. The 1987 Landau Report on the use of torture contains only recommendations, and one of its two sections, believed to address acceptable procedures for GSS interrogators, remains confidential. The EU's ENP country report on Israel notes that since the outbreak of the second intifada there have been renewed allegations of torture, and cites the UNHCR Special Rapporteur's report of September 2003 which stated his difficulty in assessing the situation, "given that he was not granted permission to visit Israeli prisons or detention centres or to meet government officials who might assist in assessing the validity of these allegations."⁹³
- The cell space for housing four inmates is alleged to be smaller than the norm in other countries including the average in Western Europe.

⁸⁸ Paris: Tram Line will not affect status of East Jerusalem, Al Quds 27 October 2005.

⁸⁹ Peggy Cidor, Palestinians lobby France to stop Jerusalem light rail project, Jerusalem Post, 7 November 2005.

⁹⁰ COM(2005) 458 p. 7.

⁹¹ Israel Insider, Tel Aviv-Jerusalem train route to pass under "Green Line" in two spots, 31 December 2004.

⁹² Article 76, IVGC: "Protected persons accused of offences shall be detained in the occupied territory, and if convicted shall serve their sentences therein. [...]".

⁹³ COM(2004) 373, p.9. For further information see

<http://www.stoptorture.org.il/eng/images/uploaded/publications/58.pdf>.

Member state support to EU firms

The UK Embassy Tel Aviv is alleged to have provided active support for UK contractor A4e in its bid on the Jerusalem branch of the Gol “Wisconsin plan” welfare-to-work program.⁹⁴ The Israeli Finance Ministry’s public affairs office confirmed that the scheme to be operated by A4e includes neighbourhoods in East Jerusalem.

After an investigative journalist pursued the matter with the British Embassy and A4e, the Embassy noted “We have already advised A4e that, as British government policy clearly states, we cannot and will not support any work emanating from this winning bid if it covers operations in East Jerusalem and the surrounding settlements that have been annexed to the city by Israel.”⁹⁵

Opening member state tenders to Israeli companies violating IHL

Israeli defence supply company Elbit Systems is one of two contractors installing perimeter intrusion detection systems along the “seam line”. The ICJ Advisory Opinion declared the wall/barrier and its associated regime in occupied territory illegal.

Elbit Systems is the major subcontractor in a consortium that won a British Ministry of Defence tender. A question asking “whether it is Government policy to permit the participation in UK-awarded contracts of firms that engage in activities that grossly violate international humanitarian law and have been condemned specifically as such by the UK and its government?” has been tabled by a British MP. It has not been answered at the time of writing.

⁹⁴ Ali Abunimeh, How Britain helps Israel, Middle East International, 14 April 2005.

⁹⁵ Ibid.

MEMBER STATE ACTION UNDER JUSTICE AND HOME AFFAIRS

Primary responsibility for the EU policies on justice and home affairs lies with the member states.

Example of member state action taken in support of obligations under IHL

In May 2005 the German Justice Minister requested a change of venue for her meeting with the Israeli Justice Minister Tzipi Livni's upon learning that Livni's office is in East Jerusalem. Livni did not agree to a change of venue and the meeting was not held.⁹⁶

Example of member state action undermining the functioning of IHL:

- *Fourth Geneva Convention and Universal Jurisdiction - UK*

Under the Geneva Conventions Act of 1957, the UK government has universal jurisdiction to arrest and try suspected perpetrators of grave breaches of the Fourth Geneva Convention.⁹⁷ Human rights activists presented evidence to the British police of alleged crimes committed by Israeli General (reserve) Doron Almog while he was commander of the Gaza Strip from 2000-2003. These alleged crimes included targeted killings by the Israeli military and house demolitions. The issuing of the arrest warrant for General Almog was in relation to the wanton destruction of 59 houses in Rafah refugee camp on 10 January 2002.⁹⁸

In July 2001 British Foreign Secretary Jack Straw issued a statement expressing deep concern about the demolition of houses in Rafah.⁹⁹

When Almog's plane arrived at Heathrow airport on 11 September 2005, police from the Anti-Terrorism and War Crimes unit were waiting to arrest him. Almog had apparently been informed of the impending arrest and remained on the plane. London Metropolitan Police did not enter the plane, and Almog returned to Israel.

Article 146 of the Fourth Geneva Convention states

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.

The UK's Geneva Conventions Act 1957 applies to:

Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the scheduled conventions or the first protocol...[Article 1.-(1)].¹⁰⁰

Following on the incident, Israel's Justice Minister was expected to ask her British counterpart to amend the law empowering magistrates to issue arrest warrants on the basis of allegations of a war crime. Reportedly, one proposal would require the approval of the Attorney General—a political appointee—before any such warrants could be served. Another

⁹⁶ Diana Bahur-Nir, German politician says 'no' to Livni, YNet News, 15 May 2005.

⁹⁷ Daniel Machover and Kate Maynard, The UK's duty to 'universal jurisdiction', The Times, 4 October 2005.

⁹⁸ Grave breaches include willful killing, torture or inhuman treatment, and unlawful and wanton destruction and appropriation of property. (Article 147 IVGC).

⁹⁹ Statement by the British Foreign Secretary, Jack Straw, on house demolitions in Jerusalem and Rafah - 10 July 2001.

¹⁰⁰ Amnesty International UK, Amnesty deplores failure to arrest Israeli war crimes suspect, 14 September 2005.

proposal, along the lines of the 'Belgian model' instituted on the face of it to quell a pending action against Prime Minister Ariel Sharon, would have the UK compile a list of countries considered to observe due process of the law, and declare their nationals exempt from war crimes suits filed privately. "Of course, we would expect Israel to be on that list", an Israeli official said."¹⁰¹

There are currently two petitions before the Israeli High Court concerning the grave breach of wilful killing. Hearings on the petition against targeted killings were suspended in February, three and a half years after the original filing, due to the Gol's declaration of cessation of the practice at the Sharm el Sheikh conference on 8 February 2005.¹⁰²

The High Court has also refrained for over two years from ruling on a petition on the legality of the policy of not investigating the killing of Palestinian civilians by the Israeli Defence Forces (IDF), apart from exceptional cases, which has been in place since the outbreak of the second intifada in 2000.¹⁰³

The EU reports that it urged the Israeli government:

to cease its practice of extra judicial killings and house demolitions as well as act with restraint in the face of Palestinian violence. The EU has also raised its concerns about collective punishments, and called on Israel to ensure that any abuses by members of the Israeli Defence Forces, settlers and others are properly investigated and perpetrators are prosecuted.¹⁰⁴

"We are approaching instances abroad only after we have tried everything possible in Israel," stated Yesh Gvul spokesman Yishai Menuhin.¹⁰⁵ Few prospects appear to exist to promote any reform of the culture of impunity that many Israeli jurists and human rights specialists have described as endemic inside the Israeli military, judicial and political system while third states are prepared to prevent the operation of the legislation they have enacted to bring suspected perpetrators of war crimes to justice in their own courts pursuant to their obligations under the Geneva Conventions of 1949 when the suspected perpetrator is Israeli.¹⁰⁶

The EU's response to Israel's selective non-cooperation with the application of universal jurisdiction over war crimes: *nolo contendere*?

Under the ENP Action Plan the EU and Israel agree to "Promote co-operation on issues such as fight against impunity of authors of genocide, war crimes and any other crime against humanity."¹⁰⁷ "Cooperation with international human rights procedures and mechanisms... international cooperation in the field of justice" are among the priority issues that should be included in the agenda for every human rights dialogue, according to the Council's guidelines on human rights dialogues.¹⁰⁸

Israel's Interpol police unit assisted in the August 2005 arrest of a fugitive Croatian assumed to be the key financial backer of a Croatian general accused of murdering more than 150 Serbs during Croatia's war of independence. The war criminal General Gotovina was

¹⁰¹ Dan Williams, Israel wants Britain to tighten law on war crimes suit, Reuters, 18 September 2005.

¹⁰² Public Committee against Torture in Israel, Press Release, 16 February 2005.

¹⁰³ Michael Sfar, Either High Court, or House of Lords, Ha'aretz, 14 September 2005.

¹⁰⁴ EU Annual Report on Human Rights - 2005, p. 150.

¹⁰⁵ Yuval Yoaz and Gideon Alon, Knesset to discuss law suits against IDF officers abroad, Ha'aretz, 14 September 2005.

¹⁰⁶ Hickman & Rose Solicitors and Palestinian Centre for Human Rights [PCHR], Israeli war crimes suspect evades British justice after UK court issues warrant, PCHR Ref 105, 11 September 2005.

¹⁰⁷ COM(2004) 790, p.14.

¹⁰⁸ Guidelines, p. 25.

indicted by the International Criminal Tribunal in the former Yugoslavia in 2001 for the 1995 murders.¹⁰⁹

But in July 2005 Israel refused for a second time to extradite to Poland a Jewish Israeli national accused of crimes against German prisoners just after the end of World War II. Polish prosecutors charge that Solomon Morel is responsible for the deaths of at least 1,500 prisoners in the Swietochlowice camp. Israel, which has no extradition treaty with Poland, in 1998 refused an extradition request based on charges of torture; the current request broadened the charges to genocide, for which there is no statute of limitations in Polish law. Morel left Poland for Israel in 1994 after accusations against him surfaced.¹¹⁰ Israel has declared the charges groundless.

Whether Israel was insisting on its right to exempt a national from the implementation of universal criminal jurisdiction, or on its right to selectively cooperate with the application of universal jurisdiction to perpetrators of war crimes that it recognised, Israel's non-cooperation apparently provoked considerable unease among Poland's authorities.

However, notwithstanding the EU's strong support for the establishment of an International Criminal Court, and strong opposition to attempts being made (including by the US) to defeat the ICC's implementation of universal jurisdiction, no clear and public response to Israel's refusal of cooperation, or challenge to the premises on which it rests, was made by the EU as of this writing. Poland was left to lodge its own complaint, as if the matter had no particular bearing on the cooperation envisaged with Israel in the sphere of justice and home affairs.

¹⁰⁹ Yaakov Katz, Israel aids nabbing of Croatian fugitive, Jerusalem Post, 28 September 2005.

¹¹⁰ Israel won't extradite Polish Jew accused of WWII genocide, Associated Press, 6 July 2005.

CLOSING OBSERVATIONS

As evidenced from many of the instances reviewed in this report, the EU's commitment to the coherent, consistent and effective application of its existing human rights commitments is often unable to stand up to pre-emptive and distorting political pressures. In the case of Israel, the processes and approaches currently envisaged to rectify the deficiencies attributed to the EU's practice either seek to alter prevailing political will or render the EU's human rights-related institutional processes more robust in standing up to adverse political will.

The EU treats its human rights-related commitments as "horizontal", or "cross-cutting", which means that the obligation to respect them as a part of the *acquis communautaire* is to be implemented within the EU institutions by applying coherent and consistent norms across the EU's various policies, both proactively (in identifying deficiencies, objectives, and ways of addressing them) and retrospectively (in evaluating the implementation of policies). However, there has been general agreement regarding the need to substantially strengthen the capacity of the institutions to apply the EU's human rights *acquis* effectively, and to strengthen the legal and technical institutional foundations for their application. Several international human rights NGOs have been promoting institutional reforms with these objectives in mind, including the adoption of consistent and appropriate human rights benchmarking practices. Within the EU institutions, the European Parliament has played a strong instigating role in promoting such reforms for many years.

Application of the 'Essential Element' clause

As a tool for promoting respect for human rights in third countries, the EU's politically-managed application of the 'essential element' clauses in its framework cooperation agreements with third countries has been widely criticised for being, in the words of a draft European Parliament report currently under consideration,

[...]overly dependent on geopolitical or geoeconomic considerations which have compromised its credibility, frequently reducing it to declarations of principle with no effect in practice, and subject on occasion to double standards, depending on the countries where human rights violations have been recorded.¹¹¹

Over the past decade the European Parliament has given considerable attention to this problem, and has been effective in promoting several institutional and policy improvements.

In a 2004 report¹¹² Parliament recommended to the Council and Commission that under the European Neighbourhood Policy a human rights subcommittee should be established with each association partner country. That recommendation was indeed adopted as an objective to be pursued with all partner countries, and has been implemented with several partner countries. However, as is noted earlier in this report, the EU abandoned its efforts to persuade Israel to agree to constitute that new subcommittee in the face of Israel's objections.

In connection with the preparation of a new Parliamentary report¹¹³, support is now building in the Parliament behind efforts to promote measures that would increase:

¹¹¹ Vittorio Agnoletto, Rapporteur, Draft report on the human rights and democracy clause in European Union agreements, European Parliament, Committee on Foreign Affairs, Provisional 2005/2057, 28 September 2005, p.5.

¹¹² A6-0086/2005.

¹¹³ 2005/2057.

- the transparency, consistency, and objectivity of the essential element clause's application and the institutional processes relied upon to apply it;
- the transparency, clarity and consistency of the standards and processes that are applied to assess the performance of third countries (including the establishment of a uniform system of benchmarks); and
- the transparency, clarity and consistency of the processes that are applied to determine and implement EU responses to third country human rights deficits and violations.

However, in the case of Israel the most compelling questions that are raised within the EU institutions concern the utility of applying the essential element clause to its fullest extent – i.e. suspending the entire EU-Israel Association Agreement and all subsidiary cooperation agreements arrangements. Until now, the EU has only seen fit to take measures of suspension with weak, internationally isolated, or highly aid-dependent regimes, mainly in the Africa Caribbean and Pacific (ACP) region.

The EU clearly does not consider that it can procure Israel's compliance with international law by threatening to apply the most stringent negative measures available to it. It is clearly not inclined to apply such negative measures on human rights grounds in the hope of setting an example to be followed by Israel's other important cooperation partners. It is not prepared to take the larger view that setting such an example would itself be worthwhile considering the contribution it could make towards strengthening the credibility of the EU's commitments to human rights, and the political cogency of the body of international law on which they rest.

Questions regarding the utility and appropriateness of negative conditionality in relation to Israel have no legal answer, and the political answers prevailing within the EU tend, perhaps somewhat too enthusiastically, to presume the futility of any measure of suspension in Israel's case. The process of developing the essential element clause and the EU's application of it may eventually commit the EU to a legally-prescribed answer that would override both political aversion and *bona fide* presumptions of futility. For the time being, the politically prescribed answer, however suspect it may be, is the only answer that practically counts.

CONCLUSIONS

The report's main conclusions remain largely unchanged from those reached in the 2003-2004 report, but are updated to reflect recent developments:

- *Israel implements its agreements with the EU in violation of general international law, and in violation of the agreements themselves. The EU has repeatedly chosen not to prevent this.*

Update: In the past year, the EU has concluded at least two 'practical arrangements'¹¹⁴ with Israel in order to make it possible for Israel to maintain its internationally unlawful practices under those same agreements by neutralising the obstacles posed by Community law.

- *To the extent that the EU has addressed questions of international law, the positions that have been taken have been consistent and legally correct.*

Update: The EU has thus far remained silent on the questions regarding the applicability and application of IHL in the context of the measures being taken under Israel's 'disengagement plan'. However, it has strongly reiterated its legally correct positions concerning, inter alia, settlements and annexation, the separation wall/barrier, targeted killings and occupied Jerusalem.

- *Key elements of the EU's operative diplomacy, including its contractual relations with Israel, reveal a striking lack of coherence with the EU's legally correct declarative diplomacy.*

Update: No change. In connection with the "bilateral issue of rules of origin" and the incorporation of Israel into the paneuromed system of free trade, as well as the implementation of EU-Israel cooperation under the Framework Programmes for Research and Technological Development, the EU has chosen to conclude "practical arrangements" that explicitly accommodate Israel's continued implementation of illegal policies and practices in its cooperation with the EU. Several other matters reviewed in this report, such as the EU's reaction to the use of its funds by a UN agency to procure services from settlements, indicate that the EU is prepared practically to adhere to its declared legal positions quite diligently when lapses are brought to light, as long as in doing so, it does not have to place any impediment in the way of Israel's policy-based violations of international law.

In light of Israel's self-declared intention of procuring an internationally-recognised general release from responsibility for the Palestinian population in Gaza as a result of its "disengagement" measures, the EU's own direct involvement in their implementation raises concerns that, whatever legal positions it may eventually declare, the EU may be drawn into concluding additional practical arrangements that will further accommodate Israel's unlawful unilateral practice. If the precedents established in the other spheres of EU-Israel cooperation reviewed in the report are followed in this instance, such accommodations could consolidate the *de facto* status quo: leaving Israel free to project

¹¹⁴ The practical arrangement to "implement the EU-Israel Protocol on Origin" (the Olmert Arrangement), and the practical arrangement to prevent the granting of contracts to settlement-based enterprises under the EU's Framework Programme for Research and Technological Development.

its power unlawfully in Gaza, while enabling the EU to act against any resulting humanitarian crisis.

- *The EU may have actually facilitated Israel's violations of international human rights and humanitarian law by deferring to the internationally unlawful policies that Israel applies in its own dealings with the EU.*

Update: No change. The above-mentioned “practical arrangements” were concluded to enable Israel to continue implementing its privileged cooperation with the EU in accordance with policies that violate human rights and international humanitarian law, and in a manner that also violates its agreements with the EU, without incurring any loss of privilege or benefit. Publicly financed member state trade promotion activities have also facilitated the commercial involvement of EU firms in implementing such internationally unlawful policies and measures.

This report reaches the following new conclusions:

- Few prospects appear to exist that the EU will fulfil its own commitments to respecting and promoting respect for human rights within the EU-Israel relationship, given the evident lack of political will within the EU institutions. The EU's stated political priorities are to promote progress towards implementing the Quartet's “roadmap”, including securing an end to “violence”, arresting settlement expansion, preventing the further isolation and degradation of Palestinian life in occupied eastern Jerusalem, and helping to construct successful state-like Palestinian institutions and political life in the West Bank and Gaza Strip. To accomplish such progress, the EU prefers to rely on promoting and forging new “understandings” and “technical arrangements” with Israel and the Palestinian Authority. In its own practice it therefore wishes to avoid the application of international humanitarian and human rights law beyond what is “jointly acceptable” to the Israeli and Palestinian sides – which means what is acceptable to Israel. This approach has failed to bring about any such progress in the past.
- The critical relevance of ensuring respect for the rules of international humanitarian law to the successful construction of state-like Palestinian institutions and political life is overlooked in this case by the EU's political echelon. The harm caused to the security and stability of the state-based political and legal order by the conspicuous general defection of states from their responsibilities under IHL is similarly overlooked. The concerted defection of states from these responsibilities, like the failure of states themselves, can impel:
 - The emergence of non-state political actors as parallel or substitute authorities that gain popular legitimacy and obedience owing to their readiness to organise “best available” alternatives to the lawful provision of essential services and functions of government entrusted to states. Defense and justice, the most basic of those essential services, rely on the political use of force.
 - The progressive abandonment of the principles of humanity and the universality of human rights within the affected societies themselves, as political norms and institutional life adapt to the ways and means of the parallel authorities on which parts of the population have come to depend;
 - The transformation of the underlying conflict into one that defies political resolution or lawful regulation.

Growing problems of human insecurity, lawlessness and unregulated political violence can be clearly observed in the Occupied Palestinian Territory. They are unlikely to disappear

prior to the establishment of a fully sovereign and viable Palestinian state while the occupying power fails to respect its obligations and third states conspicuously defect from theirs.