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Third Annual Review on Human Rights in EU- Israel relations

Accommodating to the 'special' case of Israel
2005-2006

Executive Summary and Recommendations

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EXECUTIVE SUMMARY

'A Human Rights Review on the EU and Israel – Accomodating to the 'special' case of Israel' is the third EMHRN annual assessment of European Union (EU) compliance with its own commitments to 'respect human rights', 'promote respect for human rights in third countries', and 'promote compliance with international humanitarian law' in its relations with Israel. The Review examines several recent EU and Member State actions addressing violations of human rights and international humanitarian law in the occupied Palestinian territory (oPt) or inside Israel.

The Review has been produced with the backing of a coalition of Palestinian, Israeli, Arab and European NGOs.¹

In the 2005-2006 time frame of the Review, the EU and Israel proceeded to broaden and deepen their bilateral relationship through the implementation of their European Neighbourhood Policy (ENP) Action Plan. Owing to Israel's high level of economic development it is in a position to take advantage of the broadest range of the opportunities now open to ENP countries for gaining 'a stake' in the EU's internal market and participating in Community programmes and agencies.

In 2005 the EU expanded its involvement on the ground through the establishment of a **Border Assistance Mission at Rafah Crossing Point** (EU BAM).

The EU's efforts to establish a **structured dialogue on human rights** under the ENP has led to a human rights dialogue with Israel that has highlighted both important likenesses and important differences. In 2006 the human rights situation in the oPt substantially worsened as Israel's persistent refusal to respect its obligations as occupying power took on new severity following the election of a Hamas-led government of the Palestinian Authority (PA). Israel's use of closure measures was escalated throughout the oPt, paralysing local administration and economic life, often rendering essential services unavailable to the large parts of the civilian population. In the case of the Gaza Strip, these measures took on the character of a land and sea siege, imposing scarcities of fuel, food and medical supplies.

Along with these measures, Israel's refusal to transfer the Palestinian customs and tax revenues under its control to the Hamas-led PA, or to apply them in some other manner to ensure the welfare and safety of the Palestinian population, caused a vacuum of governmental authority and lawful administration in the oPt. This left the armed groups that Israel claimed to be acting against as the only actors able to supply themselves, impose their authority and operate effectively on the ground.

An **international boycott of the Hamas-led PA government** aggravated these problems and helped Israel maintain its own non-compliance with its basic obligations as an occupying power.

In response to these developments the EU established a **Temporary International Mechanism** (TIM) for channelling assistance to the Palestinians in an effort to ease the effects of the siege and the cash starvation of the PA imposed by Israel. It sought to induce

¹ 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.

Israel to release the Palestinian revenues it was holding, and it sought to persuade Israel to moderate its restrictions on movement. However, the EU's participation in the concerted boycott of the PA and the *de facto* involvement of EU BAM in implementing Israeli decisions to close the Rafah border crossing also associated the EU with the siege and cash starvation of the PA, contrary to its own stated position and intent. Perceptions grew among ordinary people throughout the region that the EU had defected from its commitment to uphold the norms of the international order and its rule of law in the case of Israel, and was now punishing the Palestinian public for electing a government that refused to be bound by those norms.

The Review considers the possibility that the EU's practice of tolerating Israel's implementation of its privileged contractual relations in an internationally unlawful manner will be carried forward under the ENP. It also considers the disruptive consequences to the Community's own rule of law that may result.

With regard to the human rights dialogue itself, the way in which the dialogue is framed in the ENP EU Israel Action Plan, and the apparent irreconcilability of the two sides' positions on compliance with International Humanitarian Law and the rights of Israel's Arab citizens, raise the prospect that the dialogue will serve as a mechanism for uncoupling any need to comply with the EU's human rights-related *acquis* from the conditions that must be met to enable the substantial integration of a non-member state into the European Community's internal market.

The arrangements under which **EU BAM** was established pursuant to the Government of Israel (GoI) - PA Agreement on Movement and Access made it possible for Israel to continue exercising effective control over the Rafah crossing without positioning its own armed forces there. However, little attention was paid to this fact.

After a successful start-up, Israel's response to the abduction of one of its soldiers placed the EU BAM in a situation where it was confronted with Israeli decisions to close the border roughly 80 per cent of the time the parties agreed it would be open. Being obligated to comply with Israel's decisions EU BAM – and the EU itself – were also confronted with a responsibility to consider whether or not those decisions might be internationally unlawful and whether they could properly continue their participation in the arrangement as Israel was causing it to operate.

In response to the election of a Hamas-led PA virtually all donor countries in concert decided **to freeze all financial dealings as well as all dialogue** with that government until Hamas met the three conditions laid down by the Quartet. However it was Israel's repudiation of any responsibility for the safety and welfare of the oPt civilian population in these circumstances that confronted the EU with a challenge:

- while maintaining its own boycott, it could not acquiesce to Israel's attempt to divest itself of its own responsibility;

- while maintaining that it could not responsibly trust its assistance funds to the administration of a Hamas-led PA government, it had to insist that Israel either turn over the tax revenues to the PA or establish some other method for fulfilling its obligation to ensure the provision of lawful and effective administration to the affected civilian population.

With the establishment of the **TIM** the EU faced another challenge:

- To maintain the TIM's strictly temporary nature as an emergency response to contain the humanitarian impact and degree of institutional collapse that Israel's withholding of Palestinian customs and tax revenue clearances was causing.

-Not to accept that either Israel's failure to fulfill its responsibilities as an occupying power as lawful, nor to let the TIM drift into operating in a manner that implied that the EU's assistance was being implemented independently of Israel's authority and responsibility.

In all of the cases covered by this Review the EU has been confronted with challenges derived from Israel's 'differing' positions regarding its obligations as an occupying power under international humanitarian law and international human rights law, and its obligations as a 'state of all its citizens'. These are no minor challenges. The EU's interests in intensifying cooperation with Israel, bringing it 'closer,' and avoiding obstacles to Israel's substantial integration into the internal market exert a powerful pull on the EU to overlook the fact that Israel conducts its engagements with the EU in a manner that the EU considers to be internationally unlawful and based on policies that cause serious harm to human rights. Yet, affording any third country the margin it seeks to implement its engagements with the EU in such a manner causes the EU's commitments to respect human rights, promote respect for human rights in third countries and promote compliance with international humanitarian law to lose much of their meaning.

The Review argues that the EU can best succeed in pursuing its stated goals of promoting respect for human rights in third countries and promoting compliance with international humanitarian law - especially when confronted by political resistance - by strictly adhering to the first principle of persuasion applicable to such challenges: set a proper *example*, and raise proper *expectations*.

Accommodating to a partner country's non-compliance, especially in the context of its participation in the internal market, Community programmes or agencies does not set a proper example or raise proper expectations.

The process of 'learning through socialisation' is central to the EU's method for inducing partner countries (governments and societies) to bring themselves closer to its system or norms and rules. It is also central to the EU's method for promoting respect for human rights in third countries.

Like any law-abiding state, the EU is expected to condition appropriately, restrict or break off an engagement that it recognises is being willfully used by a partner country to provide itself with additional opportunities or means to violate an important obligation in international law. This is the minimalist application of conditionality that states owe to international law. It is one reason for incorporating 'essential element' clauses in the EU's cooperation and association agreements with third countries. The result of an overly accommodating approach to the application of such conditionality is negative socialisation.

The Review argues that when the international obligations in question are considered essential to protecting and implementing fundamental human rights, such negative socialisation can reasonably be expected to contribute to increasing the likelihood, frequency and severity of human rights violations. This would represent a failure of the EU itself to comply with the 'essential element' of its external relations, which must be 'based on respect for human rights,' and must also promote their respect in third countries.

Previous reviews have pointed to several examples indicating the existence of such failures. When attention has been called to them, the responsible EU institutions have frequently cited the importance of ensuring the success of the Middle East Peace Process (MEPP), and later the importance of preventing its total collapse, as reasons to continue making exceptions in Israel's case.

By 2003, when the MEPP had effectively already collapsed, the EU had begun to recognise the need for a 'strategy... to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli/Palestinian conflict as a central factor in the efforts to put the Middle East peace process back on track.'²

The Review argues that doing what the EU does best as a European Community under the rule of Community law may provide the critical elements of a solution and way forward.³ It considers that the EU will find it necessary to apply conditionality more carefully and consistently in the expanded relationship with Israel that can be built under the ENP, and in its expanding involvements in the MEPP.

The specific recommendations presented in this Review offer some starting points.

² Communication of the European Commission to the European Parliament and the Council: 'Reinvigorating EU actions on Human Rights and democratization with Mediterranean partners - Strategic guidelines', COM(2003) 294 final, 21.05.2003, p. 5

³ Community programmes and agencies operate in accordance with Community law, which is interpreted and applied in accordance with public international law. Third states wishing to participate in such Community programmes and agencies alongside the Member States must therefore accept to implement their participation as the Community's standards of compliance with international law would require.

RECOMMENDATIONS

Recommendations that remain largely unchanged from those put forward in the 2004-2005 EU Israel Human Rights Review⁴:

1) 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. The EU should press for the establishment of technical dialogue and practical cooperation aimed at promoting the implementation of international human rights and humanitarian law in the territories occupied by Israel since 1967.

2) 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.

3) The EU should also make it clear to Israel that the EU's provision of **humanitarian assistance** is being carried out in the context of the continuing application of the law of occupation and implies no release of Israel from 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. It should resume publicly calling on Israel to respect and perform its responsibilities to the Palestinian civilian population.

4) 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.

5) **Human rights and civil society organizations** should be consulted and involved in the implementation stage of the ENP EU-Israel Action Plan currently underway, as part of a review and evaluation process of the Action Plan, which will expire in early 2008. In order for the consultation and evaluation to be useful, a public review mechanism with a clear timetable and benchmarks should be established.

⁴ A Human Rights Review on the EU and Israel – Mainstreaming or Selectively Extinguishing Human Rights? EMHRN, December 2005, available at: <http://www.euromedrights.net/usr/00000026/00000027/00000028/00000328.pdf>

EMHRN additional recommendations:

6) The EU should ensure that under any **engagement as a third party** to Government of Israel (GoI)-Palestinian Authority (PA) agreements EU actors are not drawn into participating in, or accepting as lawful, any measures that would be illegal if carried out by an occupying power.

7) The EU should ensure that no **engagement with the PA** or the Office of the President, and no action by the EU in support of the safety and welfare of the Palestinian population of the oPt implies the release of Israel from its status and obligations as Occupying Power.

8) If the EU establishes third-party operations at the **Al Muntar/Karni** goods terminal on the Gaza-Israel border, it should condition its involvement on Israel's agreement to clear rules and operating procedures ensuring that Israel's control over the opening of the terminal will not be exercised politically or punitively. The same stipulation should apply if the **EU Border Assistance Mission at Rafah Crossing Point (EU BAM)** is extended.

-The EU should require transparent guidelines and standard operating procedures ensuring against the continuation of allegedly endemic corrupt or extortionate practices at the border operation⁵ and ensuring against favoured treatment of Israeli operators.

9) The EU should seek clarification from Israel regarding how it proposes **to ensure the provision of lawful and effective administration** in the occupied Palestinian territory that it has not unlawfully annexed.

10) The **European Investment Bank** (EIB) should obtain a written undertaking from its Israeli partner bank Hapoalim that no loans will be made through the EIB-financed small and medium-sized enterprises (SME) credit facility to enterprises located in Israeli settlements, to enterprises with branches or subsidiaries in settlements (owing to the fungibility of financial capital), or to enterprises engaged in activities carried out in violation of international humanitarian law (IHL), like construction of the wall/barrier and its associated regime. Consistent with its mandate under the Treaty of the European Community (TEC) to combat poverty in developing countries, the EIB should impress on Hapoalim that a clear and determined effort should be made to enable minority access to the credit facility.

11) The **EIB's** Environmental Programme Loan should ensure that no settlement municipalities, settlement municipal companies or settlement-based enterprises benefit from the investments in wastewater infrastructure, treatment plants or other projects financed from the loan facility.

12) The EU should demand that the **settlement export subsidization** regime that Israel has implemented in violation of WTO rules to 'compensate' settlement enterprises for the EU's refusal of preferential treatment to their products be immediately discontinued. In this connection, the EU should press its demand that Israel provide it with full information on its provision of such internationally unlawful forms of 'state assistance'. Should Israel

⁵ 'Moreover, as may be expected when so much demand is unmet and no other option for the movement of goods is available for the entire population of Gaza, Karni has also attracted large scale corruption, with payments to transport goods to/from the Israeli side of the border running on the order of \$2,000-\$6,000 per truck.' World Bank, 'Potential Alternatives for Palestinian Trade: Developing the Rafah Trade Corridor,' 21 March 2007, p.5.

continue subsidizing its settlement exports to the EU, the EU should not fail to pursue the remedies available under the WTO.

13) EMHRN endorses the positions set out by the European Parliament on the application of the **human rights clause** in EU cooperation agreements, namely:

"[the Parliament] Agrees with the position in the 2005 [Council Human Rights] Report that the human rights clause is a basis for positive engagement on human rights and democracy issues with third countries; emphasises, however, that this cannot exclude the possibility of the temporary suspension of cooperation on the grounds of a breach of the clause; reiterates its call for a sliding scale of measures and a clear system of sanctions to be used with respect to violations of the human rights clause by third countries, and calls on the Council to consider extending qualified majority voting to the decision to adopt restrictive measures at a future appropriate time; reiterates its demand for a better monitoring and consultation mechanism of the clause, and calls on the Commission and the Council to report annually on breaches of human rights clauses [...], to the Human Rights Subcommittee of the European Parliament;"⁶

14) The agendas and outcomes of the proceedings of EU bodies and mechanisms established under the Euro-Mediterranean association agreements to address human rights-related concerns should be transparently documented. Such documentation should be made available publicly, on time and in advance of meetings, so that **external input** is possible.⁷

15) On the matter of **third state participation** in external Community policies or in internal Community policies, programmes and agencies:

Various European Neighbourhood Policy (ENP) documents refer to the existence of the 'frozen and open conflicts' in the EU's neighbourhood. The EU intends to negotiate a general enabling protocol to each of the Partnership and Cooperation Agreements or Association Agreements which will provide the legal basis for the enactment of programme-specific 'memoranda of understanding with ENP partners that settle the details of participation in programmes of interest to both sides.'⁷ Given the existence of these 'frozen and open conflicts' in the EU's neighbourhood, the EMHRN recommends the inclusion of text in each general enabling protocol approximating:

Participating non-Member States shall implement their participation in Community programmes, exercise their rights, perform their obligations and apply Programme regulations and rules in accordance with the standards of compliance with international law observed by the Community and the Member States.

Entities established in contravention of international customary law, or under legislation that has been enacted in their place of establishment in violation of international customary law, shall not be recognised as legal entities;

No contract enabling participation in programmes or activities under this Protocol shall be concluded with any authority, public institution or private actor directly participating in, actively assisting or deriving benefit unlawfully under international law from a serious breach of an obligation arising under a peremptory norm of general international law.

⁶ Report on the Annual Report on Human Rights in the World 2005 and the EU's policy on the matter, A6-0158/2006, Committee on Foreign Affairs, European Parliament, 2.5.2006, point 73.

⁷ Communication on the general approach to enable ENP partner countries to participate in Community agencies and Community programmes," COM(2006) 724 final, 4.12.2006, p. 2.

Facilities or undertakings established or operating in contravention of international customary law, or under legislation that has been enacted in violation of international customary law, shall not be contracted to implement any part of an action supported by a Community financial contribution, nor included in the eligible costs specified in any grant agreement.