



EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK
RÉSEAU EURO-MÉDITERRANÉEN DES DROITS DE L'HOMME
الشبكة الأوروبية - المتوسطية لحقوق الإنسان

1997-2007



Third Annual Review on Human Rights in EU-Israel Relations

Accommodating to the 'special' case of Israel

2005-2006

Copenhagen, June 2007

Euro-Mediterranean Human Rights Network
Vestergade 14-16, 2nd Floor
DK- 1456 Copenhagen K
Denmark
Tel: + 45 32 64 17 00
Fax: +45 32 64 17 01
E-mail: info@euromedrights.net
Web: www.euromedrights.net

© Copyright 2007 Euro-Mediterranean Human Rights Network

Bibliographic information

Title: Third Annual Review on Human Rights in EU-Israel Relations – Accomodating to the 'special' case of Israel 2005-2006

Personal authors: Rockwell Susan; Shamas Charles

Editors: Grenier Sandrine; Schade-Poulsen Marc

Corporate author: Euro-Mediterranean Human Rights Network

Publisher: Euro-Mediterranean Human Rights Network

Date of publication: June 2007

Number of pages: 57

Original Language: English

Table of contents

LIST OF ABBREVIATIONS	5
PROJECT BACKGROUND	6
EXECUTIVE SUMMARY	8
RECOMMENDATIONS	11
I- INTRODUCTION AND OVERVIEW	14
PROMOTING RESPECT FOR HUMAN RIGHTS IN THIRD COUNTRIES INCLUDING ISRAEL: WHAT IS AT STAKE FOR THE EU?	15
COOPERATION AND 'PARTNERSHIP': FROM EURO-MEDITERRANEAN ASSOCIATION TO THE EUROPEAN NEIGHBOURHOOD	16
THE SPECIAL CASE OF ISRAEL.....	17
ENLARGEMENT WITHOUT MEMBERSHIP: AMBITIONS TO TURN ISRAEL INTO A 'NON-EUROPEAN' PART OF EUROPE VIA THE ENP	17
COMMON FOREIGN AND SECURITY POLICY (CFSP)	19
II- THE EUROPEAN NEIGHBORHOOD POLICY	21
THE HUMAN RIGHTS COMPONENT OF THE EU-ISRAEL ACTION PLAN.....	21
EU-ISRAEL HUMAN RIGHTS DIALOGUE.....	22
ESTABLISHING EXPECTATIONS – SIGNALLING THE UNCOUPLING OF THE EU'S HUMAN RIGHTS-RELATED COMMITMENTS FROM THE EXPANSION OF THE BILATERAL RELATIONSHIP.....	26
THE CHALLENGE AHEAD	28
WHAT NEEDS TO BE FIXED, TO START WITH	30
THE EU-ISRAEL ACTION PLAN AND COOPERATION ON UN REFORM.....	31
III- THE EU BORDER ASSISTANCE MISSION AT RAFAH CROSSING POINT IN THE PALESTINIAN TERRITORIES (EU BAM RAFAH)	32
THE NEED TO DO SOMETHING	33
IV- BOYCOTT/SANCTIONS AND THE TEMPORARY INTERNATIONAL MECHANISM (TIM)	35
SETTING.....	35

ACTIONS TAKEN	36
1) <i>Placing Hamas on the EU 'terrorist list'</i>	36
2) <i>Applying EU sanctions targeting the Hamas-led PA government</i>	36
3) <i>Responding to Israel's suspension of dealings with the PA and its suspension of Palestinian revenue transfers</i>	37
4) <i>Responding to the aggravated humanitarian crisis, including the establishment of the Temporary International Mechanism</i>	37
APPLICABLE NORMS	40
OTHER ASSISTANCE: COST OF ISRAELI MILITARY DESTRUCTION OF EU-FUNDED INFRASTRUCTURE	41
V- FOLLOW-UP ON THE 2004-2005 REVIEW	42
'RULES OF ORIGIN'	42
THE WALL/BARRIER	44
VI- CONCLUSIONS.....	46
ANNEX I COMMON FOREIGN AND SECURITY POLICY: 'CARROTS AND STICKS' AND 'PROTECTION'	50
ANNEX II EC PRODUCT LABELLING REQUIREMENTS AND SETTLEMENT PRODUCTS ..	55
ANNEX III USEFUL WEBSITES.....	57

LIST OF ABBREVIATIONS

AMA	Agreement on Movement and Access
CFSP	Common Foreign and Security Policy
EEA	European Economic Area
EIB	European Investment Bank
EMP	Euro-Mediterranean Partnership
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood and Partnership Instrument
ESDP	European Security and Defense Policy
EU	European Union
FP	Framework Programs for Research and Technological Development
FTA	Free Trade Agreement
GoI	Government of Israel
IERC	Interim Emergency Relief Contribution
IHL	International Humanitarian Law
MEPP	Middle East Peace Process
MOU	Memorandum of Understanding
NGO	Non-Governmental Organization
oPt	occupied Palestinian territory
PA	Palestinian Authority
PLO	Palestine Liberation Organization
SME	Small and Medium-sized Enterprises
TEC	Treaty of the European Community
TIM	Temporary International Mechanism
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

PROJECT BACKGROUND

The present report is the third in a series meant to assess the European Union's (EU) relations to Israel 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 on an annual basis.

The reviews constitute a 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 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. *A Human Rights Review on the EU and Israel: Mainstreaming or Selectively Extinguishing Human Rights*; Copenhagen 2005; *Human Rights in Euro-Mediterranean Relations, Copenhagen 2006*. Letters and statements published on the occasion of Association Council meeting between the EU and Egypt, Jordan, Israel, Morocco, and Tunisia.

The current project was outlined during meetings of the Working Group in the course of 2006 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 particular the Action Plan under the European Neighbourhood Policy. 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 Union officials. The time frame of the review is October 2005 to December 2006.

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

- Acsur – Las Segovias (Spain)
- Adalah – The Legal Centre for Arab Minority Rights in Israel (Israel)
- Al-Haq (The West Bank, Palestine)
- Al Mezan Centre for Human Rights (Gaza, 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)
- Federation of Associations for the Defense and the Promotion of Human Rights (Spain)
- Greek Committee for International Solidarity (Greece)
- 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)

The project was steered by:

- Mays Warrad, Al-Haq (the West Bank, Palestine)
- Per Stadig, International Commission of Jurists (Sweden)
- Mohammed Zeidan, Arab Association for Human Rights (Israel)

in close cooperation with EMHRN Secretariat Staff.

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

EXECUTIVE SUMMARY

'A Human Rights Review on the EU and Israel – Accommodating 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.³

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 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

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.

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.'⁴

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.⁵ 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.

⁴ 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

⁵ 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 Review⁶:

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.

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.

⁶ 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>

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 operation⁷ 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 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;"⁸

⁷ '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.

⁸ 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.

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.'

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.'⁹ 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.

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.

⁹ 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.

I- INTRODUCTION AND OVERVIEW

The EMHRN's previous human rights reviews on the EU and Israel, 'Relating Commitments to Actions' (2003-2004) and 'Mainstreaming or Selectively Extinguishing Human Rights?' (2004-2005) examined several elements of the EU's declarative and operative diplomacy¹⁰ involving Israel. This included an analysis of the legal commitments to respect human rights and promote their respect in third countries that have been set out in the EU treaties.

This Review follows up developments in several of the cases covered in the earlier reviews and examines how the EU has dealt with several new challenges in the period covered by this Review. As in the previous reviews, the following questions are asked:

Could the EU and Member State actions in question be reasonably expected to contribute to increasing the number of internationally unlawful acts violating the human rights of persons and groups under Israel's jurisdiction and responsibility?

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

In previous reviews the most systematic and serious violations of human rights by Israel in the territories it has occupied since 1967 were observed to involve systematic violations of international humanitarian law (IHL). Within Israel, discriminatory state laws, policies and administrative measures that disadvantage, impoverish, disturb and displace established Arab communities have resulted in systematic violations of the Arab minority's human rights. In both cases, the underlying Israeli policies were considered to engender and prolong conflict, thereby causing wider harm to the human rights of both Palestinians and Israelis¹¹.

This assessment remains unchanged. Indeed, it closely mirrors the EU's own long-standing assessment of the human rights-related challenges that Israel presents, as set out in 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners - Strategic guidelines' by the European Commission in 2003:¹²

Compared to the other MEDA partners, Israel presents distinct characteristics. It functions as a well established parliamentary democracy, with an effective separation of powers, a functioning system of governance, and active participation of NGOs and civil society in all internal aspects of political and social life. However, Israel's compliance with internationally accepted standards of Human Rights is not satisfactory. Two important specific areas need to be tackled: Firstly, the issue of reconciling the declared Jewish nature of the State of Israel with the rights of Israel's non-Jewish minorities; secondly, the violation of Human Rights in the context of the occupation of Palestinian territories. There is an urgent need to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli/Palestinian conflict as a

¹⁰ Declarative diplomacy sets out commitments and positions without attaching them to any actual or potential consequence to a third state's interest. Operative diplomacy consists of actions taken in the bilateral or multilateral spheres that influence the decisions of a third state.

¹¹ See websites of EMHRN members: Adalah www.adalah.org, Al Haq www.alhaq.org, Arab Association for Human Rights www.arabhra.org, B'Tselem www.btselem.org, Palestinian Centre for Human Rights www.pchrgaza.org, Public Committee Against Torture in Israel (PCATI) www.stoptorture.org.il, Al Mezan Centre for Human Rights www.mezan.org. See also Israel Human Rights Behaviour July 2004-July 2005, EMHRN, August 2005

¹² As noted in the body of this review, the topics concerning Israel's respect for human rights that were tabled in the June 2006 EU-Israel Informal Working Group on human rights were drawn entirely from these same two general categories.

central factor in the efforts to put the Middle East peace process back on track. **This will require a special effort by the EU and the setting up of an appropriate strategy.**¹³

The observations presented in this Review suggest that the EU's tools for promoting respect for human rights in third countries under its Common Foreign and Security Policy (CFSP)¹⁴ and under its external Community¹⁵ policies are ill-suited *to the class of situations in which Israel falls, and the class of human rights challenges that it poses*. Bilateral and multilateral cooperation based on the earlier Euro-Mediterranean Partnership and the new European Neighbourhood Policy (ENP) has not proven effective at promoting Israeli reforms in either of the two critical areas identified above by the Commission.

Previous reviews have called attention to notable failures by the EU to prevent EU-Israel association and cooperation agreements from being implemented by Israel in an internationally unlawful manner based on the very same internationally unlawful Israeli policies and national legislation that the Commission has wanted to see tackled and reformed. The EU and Israel are now about to negotiate new agreements expanding the scope of their cooperation, and possibly giving Israel a 'stake' in the European Community's internal market, without agreeing to any standard of compliance with the human rights-related norms and rules of international law in light of which those agreements will be interpreted and implemented. In this permissive context, the EU-Israel dialogue on human rights does not appear to hold much promise.

The observations presented in this review also suggest that in Israel's case the apparent ineffectiveness of the EU's tools is largely attributable to the self-imposed limits that the EU has placed on their use in deference to the political foundations of the Middle East peace process (MEPP). In the context of the MEPP, and in the interest of playing a more influential role in it, the EU has gone to great lengths to accommodate Israel's insistence that all participants respect its right to interpret and apply key provisions of international humanitarian and human rights law differently.

The Review suggests that what the EU does best as a *European Community under the rule of Community law* - rather than what the EU attempts to do politically - may provide a solution and an effective way forward.

Promoting respect for human rights in third countries including Israel: what is at stake for the EU?

The international legal system is based on state sovereignty, and respects it. Nonetheless, states recognize that serious abuses of power by other states or by non-state actors under their jurisdiction can instigate instability or conflict. In the modern globalised era, instability and conflict, even in isolated and remote settings, can pose significant threats to security, stability and prosperity elsewhere.

¹³ COM(2003) 294, p. 5, op cit. Emphasis added

¹⁴ 'The EU has during the year made a conscious effort to **enhance coherence** by better organising its "tool-box" for the promotion of human rights. The EU has become more aware of the various means it can use (such as démarches, guidelines, dialogues, development cooperation etc), and tried to promote coherent and consistent use of these tools.' Emphasis in the original. Council of the European Union, EU Annual Report on Human Rights, 13522/1/06, 12 October 2006, p.53.

¹⁵ The European Union takes decisions in three separate 'domains' (policy areas), also known as the three 'pillars' of the EU: The first pillar is the 'Community domain', covering most of the common policies, where decisions are taken by the 'Community method' – involving the Commission, Parliament and the Council. The second pillar is the common foreign and security policy, where decisions are taken by the Council alone. The third pillar is 'police and judicial cooperation in criminal matters', where – once again – the Council takes the decisions. From http://europa.eu/abc/eurojargon/index_en.htm

To protect against such threats, international human rights law and international humanitarian law give states certain rights, as well as certain duties, to interfere against violations of the law's basic norms and rules, lest those violations (in the words of the Universal Declaration on Human Rights) "compel ... recourse, as a last resort, to rebellion against tyranny and oppression." Europe's own history makes it clear that even highly developed states with democratically elected governments can pose such destabilizing threats.

Alongside the EU's other 'common values,' both respecting and promoting respect for human rights *internally* and *externally* are therefore 'essential elements' of common EU policy¹⁶ and of EU law¹⁷ on which the EU's own security, stability and prosperity, and that of its surroundings, are considered to rest. It is also for these reasons that the EU does recognise a clear *political and security* interest in promoting Israeli human rights-related reforms in relation to its treatment of its Arab minority as well as its violations of international humanitarian law in the occupied Palestinian territory (oPt).

Normally a third country's serious disrespect for human rights is also recognized as posing obstacles to the broadening and deepening of its relations with the EU, even if that disrespect is not considered to be posing any serious political liability or contributing to any security threat. 'Respect for human rights and democratic principles' is therefore also the 'essential element' of the 'shared values' on which the EU bases its privileged contractual relations with third countries, including its association partnerships with its southern and eastern neighbours.

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."

Cooperation and 'Partnership': from Euro-Mediterranean Association to the European Neighbourhood

Normally, the EU considers that achieving greater respect for human rights in third countries rests largely on a third country's progress in accomplishing the objectives of the EU's development and trade/ free market-focussed external policies which also help engender progress in implementing a rule of law and democratising their political life. European Community external policies and their cooperation instruments provide the EU with the means to construct particular 'partnerships' with third countries focused on achieving some agreed subset of these objectives, through some agreed mix of capacity-building measures and institutional reforms. These also serve to bring the third country 'closer to the EU' in particular respects.

'Shared values' refers to the similarity of the normative foundations of a partner country's civil, political, economic, and social life to the EU's normative foundations. 'Willing' partner countries are those whose scope of 'shared values' makes them ready to undertake measures of capacity building and reform appropriate to their current levels of development in order to implement their 'shared values' more successfully. In such cases, EU assistance is supposed to help the partner country achieve agreed capacity building objectives and institutional reforms at tolerable financial and social costs. Progress and success open the way for expanded cooperation.

Whatever their objective, both the actions taken in cooperation with partner countries, *and their expected effects*, should be 'coherent and consistent' with the range of values, norms and goals that the EU seeks to promote under its various external policies. For this reason the EU has

¹⁶ Member State ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the 'constitutional traditions common to the Member States' and their 'common foreign and security policy.'

¹⁷ See Annex I for the scope of the EU's obligations

determined that promoting respect for human rights must be an objective of all economic, financial, technical and development cooperation with partner countries. For this same reason, all cooperation with partner countries, including Israel, must be implemented in a manner that respects human rights.

The special case of Israel

Israel is considered to be both very 'close' and very far from the EU. It is the only partner country in the region, and one of the few in the world, that is considered normatively and developmentally like the EU in most respects, but still confronts the EU with a serious challenge regarding respect for human rights.

Attempts to explain this combination of likeness and distance often settle on the observation that the differences, and the problems they cause, are 'political' in origin, and must therefore be overcome politically. If they are indeed 'political,' the question becomes how deeply they are constitutionally embedded in Israel's institutions and public life – i.e. how separable are the institutions themselves from the policies that the EU might wish to see reformed. This places the problem where national legislation and public policy encounter international law.

Unlike all other partner countries under the ENP, at present the EU apparently does not consider Israel a candidate for reform.¹⁸ This may mean that the EU sees no room to promote the human rights-related reforms it considers necessary through the range of external cooperation instruments and conditionalities it has available or envisages applying. The EU may simply recognize important gaps in shared values, and consider Israel 'unwilling' to get closer to it in these particular respects.

If, as noted above, the EU is looking to set up 'an appropriate strategy' to solve this problem, it clearly cannot rely on 'shared values' that do not exist to promote the reforms it has in mind. The 'appropriate strategy' it is looking for must be capable of transforming values.

Until now, the EU's thinking on this matter has been bound to the idea that an end to Israeli-Palestinian conflict would make such a transformation possible. However, the policies that Israel has been pursuing in contravention of international human rights law and international humanitarian law are causes of that conflict and not merely products of it. Under their weight, it is unlikely that any Palestinian leadership or combination of civil society forces advocating peace can themselves manage to transform the dynamics of conflict into dynamics of peace-building. An appropriate strategy for transforming Israel's values will require a different approach, and different tools.

Until now, the EU's main context and tools for promoting transformations of values have been confined to its Enlargement Policy, and to its engagements with third countries that have some prospect of membership in the EU. Similar tools are now becoming available under the ENP.

Enlargement without Membership: Ambitions to turn Israel into a 'non-European' part of Europe via the ENP

The EU knows how to enlarge itself in an orderly fashion. Under its Enlargement policy it knows how to motivate and assist 'willing' *European third countries that have a prospect of membership in the EU* to carry out a rigorous process of political and institutional reform and development aimed at finally making them 'fully like a Member State,' and thus entitled to become one.

¹⁸ Its distinct status is apparent from the Commission's 'Fiches on Partners' prepared for the occasion of the launch of its December 2006 'Strengthening the ENP' Communication. The title of the fiche for all the ENP countries except Israel is 'Supporting reforms in X.' The Israeli fiche is entitled 'Strengthening bilateral relations with Israel.'

The EU recognises that any political wish to enlarge must respect the EU's own need to preserve the foundation of common values, legislation and rule of law on which its own success and survival depend. An important reason the pre-accession process works is that Community law pre-empts political discretion in determining the minimum standard of compliance that can be accepted in each candidate country's particular case. Both the European Commission - the 'guardian of the EU treaties'- and the Council are responsible for ensuring a prospective candidate country's compliance with benchmarks and criteria that can admit of no exception.

In Israel's case, the political wish that appears to be emerging on both the EU and Israeli sides is for broad participation in the Community without the prospect of membership. Under the ENP the door is now open to enabling Israel's greater integration into the EU's internal market, 'further integration into European economic and social structures,'¹⁹ and participation alongside the Member States in a broad range of Community programmes and agencies that must operate in accordance with Community law.

The ENP also makes it possible to construct a special relationship with Israel that would put it in the league of several European non-member countries (Norway, Iceland, Lichtenstein and Switzerland). However, the EU considers that those countries have strong human rights-related shared values and apply and respect international law similarly, in contrast to Israel

Israel's developmental, economic and institutional readiness to participate is already largely in place. The question is whether the EU recognises that Israeli policies, national legislation and interpretations of international law that violate 'the rights of Israel's non-Jewish minorities' and 'Human Rights in the context of the occupation of Palestinian territories' pose significant obstacles to the process of integrating Israel further into the Community that the two sides appear to have in mind.

Previous reviews have called attention to the fact that Israel applies and implements its existing agreements with the EU in an internationally unlawful manner that European Community law cannot accept.²⁰ The EU's efforts to accommodate Israel's insistence on maintaining its unlawful practice in such cases, even when the agreements themselves were being violated, were found to be inconsistent with its own obligations to respect human rights and promote respect for human rights in third countries.

Until now, such accommodation has been possible under Community law because EU-Israel contractual relations have been based mainly on *bilateral cooperation* rather than *integration*. However, this review notes that the EU will soon have little choice but to require Israel to interpret and apply all provisions of international law relevant to its participation in Community programmes and agencies under the ENP in a manner compatible with that of the Member States. Accepting Israel's 'right to differ' with the EU on the interpretation and application of key provisions of international law that protect human rights should no longer be an option.

¹⁹ Proposal for a Council decision ... with regard to the adoption of a Recommendation on the implementation of the EU-Israel Action Plan, COM (2004) 790 final, 9.12.2004, p.1.

²⁰ Under Community law all agreements with third countries must be interpreted and applied in accordance with public international law (PIL). In this case the relevant provisions of PIL include the prohibition against the transfer of parts of an occupying power's population to occupied territories (IVGC, Article 49), the extension of an occupying power's application of its national legislation and sovereign treaty making authority to occupied territory and the prohibition against discrimination.

Common Foreign and Security Policy (CFSP)

The political application²¹ of the EU's external cooperation instruments at the third country and regional levels is managed under CFSP, in support of strategies unanimously agreed by the Member States.

Member States and the Commission already understand quite well how to wield various classical forms of power to influence the political behaviour of state (and non-state) actors. They have tools for monitoring legislation and practice, offering incentives in exchange for desired concessions and threatening penalties to discourage 'non-cooperation.' Under CFSP they can employ a range of 'positive' and 'negative' measures ('carrots' and 'sticks') for such purposes.²² Inasmuch as the EU has been constituted as an international law abiding entity, its carrots and sticks must be applied in accordance with international law.²³

To promote the coherence, consistency and effectiveness of its conduct of CFSP, Council bodies have produced a series of 'guidelines' covering a range of thematic topics, many of which are directly relevant to the implementation of the EU's human rights-related commitments under CFSP.²⁴ Offering 'carrots' is the rule. 'Sticks' are considered as a measure of last resort. Generally their use is limited to situations where their target is considered to be violating an important obligation to the EU that it has formally accepted, or in support of United Nations mandated sanctions regimes.

The most important 'carrots' at the EU's disposal are the opportunities for cooperation and participation it can offer third states under its external and internal policies, and the political conditions it may choose to require third countries to meet and respect in order to enjoy the opportunities. Indeed, providing the EU with a larger range of such carrots is one of the purposes of the ENP.

Although one of the objectives of CFSP is 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms,' the observations in this Review do not suggest that an 'appropriate strategy' yet exists under CFSP for addressing this objective politically in relation to Israel and the Middle East Peace Process, even as the EU's involvements on the ground under CFSP are multiplying. Two of those involvements, the EU Border Assistance Mission at Rafah Crossing Point, and the Temporary International Mechanism (TIM) for channelling assistance to the Palestinians, are reviewed later in this text.

The Review was written as the EU was confronting two contextual challenges that also tested its ability to conduct its operative diplomacy in accordance with its commitments to respect human rights and promote compliance with international humanitarian law:

- 1) how to avoid contributing to the deepening humanitarian crisis in the oPt and preserve its earlier investments in Palestinian institution-building while applying sanctions to a democratically elected Hamas-led Palestinian Authority (PA) government;

²¹ E.g. deciding what offers to make, what political conditions to set, what political messages to send, what external political developments or special EU interests to take into account, and how to assess and react to partner country failures to perform and partner country successes.

²² See Annex I for a summary of the types of measures available to the EU under CFSP and their basis in the EU Treaties.

²³ "The European Community must respect international law in the exercise of its powers." Case C-286/90; Poulsen and Diva Corp, Judgement of the Court of Justice 24 November 1992, paragraph 9.

²⁴ The six EU Guidelines on Human Rights cover the death penalty (adopted 1998), human rights dialogues (2001), torture and other cruel, inhuman or degrading treatment or punishment (2001), children and armed conflict (2003), human rights defenders (2004) and promotion of International Humanitarian Law (2005)

2) how to promote the conclusion of new arrangements with Israel that could

- 1) moderate Israeli restrictions on movement and access within the oPt and across its international borders,
- 2) provide a 'solution' to Israel's refusal to transfer Palestinian tax and customs revenues to the PA, and
- 3) expand EU involvement on the ground without accommodating to Israel's claims that it no longer bears international responsibility as an occupying power for the welfare of the civilian population in the Gaza Strip or the effects of its restrictive measures on their welfare.

II- THE EUROPEAN NEIGHBORHOOD POLICY

The European Neighbourhood Policy (ENP) is the latest European Union strategy to try to secure greater stability in its neighbourhood by inducing governmental and judicial reform in its southern and eastern neighbours. If progress is achieved in meeting the 'mutual objectives and commitments' declared in each non-binding Action Plan between the EU and its ENP 'partner,' the partner country will have the opportunity to have a stake in the Community's internal market. It will also be eligible to participate in select EU programmes and to cooperate with certain EU agencies. The ENP is a bilateral policy which builds, in the case of the EU's southern neighbours, on the regional Barcelona Process.²⁵

ENP countries are partners and not accession candidates. They will not enjoy the benefits of full EU membership nor will they be required to meet the Copenhagen membership criteria.²⁶ The Association Agreement or Partnership and Cooperation Agreement between the EU and each neighbourhood country continue to provide the legal basis of their privileged relations and the framework for bilateral cooperation.

According to the Commission, at the end of 2006 the ENP forerunners in progress made on implementing their Action Plans were Ukraine and Moldova in the East and Morocco and Jordan in the South. Israel's advanced market economy and its well developed public administration place it in a category of its own in the ENP.²⁷ The EU's negotiation of an Action Plan with the non-state Palestinian Authority (PA) was based mostly on the EU's perception that its only real options for promoting a viable settlement of the Israel-Palestine conflict under the Middle East Peace Process (MEPP) require it to 'bring' both Israel and the Palestinians 'closer' to it.

The human rights component of the EU-Israel Action Plan

ENP Country Reports, Action Plans and progress reports supersede previous EU policy references for the partner country and are the primary reference document for relations with that country over the medium term. The three-year jointly-negotiated EU-Israel Action Plan was adopted in April 2005 and will end in the first half of 2008.

Following the incorporation of an 'essential element' clause in all EU association and partnership and cooperation agreements, dialogue on human rights issues has already been a standard feature of the political dialogue conducted under those agreements. With a view to institutionalising this dialogue further under the ENP,²⁸ the EU aimed for each Action Plan to

²⁵ For more background on the ENP, see the 2004-2005 EMHRN EU-Israel Human Rights Review and the Training Guide on Human Rights Instruments in Euro-Mediterranean relations, EMHRN 2007, available at <http://www.euromedrights.net/usr/00000047/00001165.pdf>

²⁶ The rules defining membership eligibility laid down at the June 1993 European Council in Copenhagen.

²⁷ 'The European Council considers that Israel, on account of its high level of economic development, should enjoy special status in its relations with the EU on the basis of reciprocity and common interest.' Presidency conclusions of the Essen Council, December 1994.

²⁸ In 2001 the EU Council published 'European Union guidelines on Human rights dialogues' (13 December 2001). This is one of a series of 'guidelines' produced by the Council with the aim of developing purpose-specific instruments for the EU's CFSP 'toolbox' and coherent and consistent approaches to using them. It states: *The objectives of human rights dialogues will vary from one country to another and will be defined on a case-by-case basis. These objectives may include:*

(a) *discussing questions of mutual interest and enhancing cooperation on human rights inter alia, in multinational fora such as the United Nations;*

(b) *registering the concern felt by the EU at the human rights situation in the country concerned, information gathering and endeavouring to improve the human rights situation in that country.*

Moreover, human rights dialogues can identify at an early stage problems likely to lead to conflict in the future.

include a provision for the creation of a subcommittee on human rights in the framework of the Association Agreement. As was reported in the 2005 EMHRN EU Israel Human Rights Review, Israel did not agree to a human rights subcommittee, claiming that it would not accord with its character as a democracy that respected human rights. Reportedly Israel also informed the EU that if the EU wanted to discuss Israel's conduct in the occupied Palestinian territories (oPts) and questions of compliance with international humanitarian law (IHL), such discussions would have to occur under the heading of political dialogue and not human rights.

EU-Israel Human Rights Dialogue

The subheading 'Democracy, human rights and fundamental freedoms' was accordingly placed under 'shared values' in the Action Plan's Political Dialogue and Cooperation subcommittee, along with a considerable number of topics including 'Co-operation under CFSP (Common Foreign and Security Policy)...' and 'Combating terrorism.'²⁹ The same subcommittee structure was then replicated in the EU-PA Action Plan. As a result, in both cases, institutionalised dialogue on human rights remained under political dialogue as had been the case prior to the implementation of the ENP. Making this same exception for both sides of the Israeli-Palestinian conflict implied an intention to link the dialogue on human rights and IHL in their cases with dialogue on the Middle East Peace Process and other political matters. This gave other Mediterranean partner countries no reason to demand 'equal treatment' or press for similar exemptions from the subcommittee venue for human rights dialogue.

Israel agreed to the establishment of an 'Informal Working Group on Human Rights' under the political dialogue subcommittee. Reportedly it requested in exchange a Working Group on International Organizations in order to press for EU support for improving Israel's standing in the UN and in the International Committee of the Red Cross.

The key human rights reference points for 'political dialogue and co-operation' that were agreed between the two sides and put in their Action Plan are:

Under the 'Situation in the Middle East' subheading:

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.

Under the 'Shared values' subheading:

Work together to promote the shared values of democracy, rule of law and respect for human rights and international humanitarian law

Promote and protect rights of minorities, including enhancing political, economic, social and cultural opportunities for all citizens and lawful residents.

None of these points appeared to merit any assessment of progress made in the EU's November 2006 ENP Progress Report on Israel.

²⁹ 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).

Four occasions for EU-Israel dialogue on human rights matters took place within the period covered by this Review:

- 1 in the Subcommittee on Political Dialogue and Cooperation on 21 November 2005;
- 2 at a meeting of the Informal Working Group on Human Rights on 7 June 2006;
- 3 at the EU-Israel Association Council meeting on 13 June;
- 4 in the Subcommittee on Political Dialogue and Cooperation on 9 November.

The half-day working group meetings are held under closed Troika³⁰ format.

The following topics were brought to the table in the June 2006 Working Group meeting:

- Minorities: situation in the EU and Israel³¹. The Commission asked how a minority was defined in Israel
- Follow-up to the Orr Commission (land distribution, budget allocations, employment, 'day of tolerance') with regard to the Palestinian Arab population in Israel
- Nationality and Entry into Israel law³²
- Anti-Semitism in Europe
- EU Guidelines on promoting compliance with international humanitarian law
- Movement restrictions of humanitarian NGOs in the oPt
- The wall/barrier³³
- Administrative detention
- Extra-judicial killings³⁴
- UN Human Rights Council

The issue of torture was not placed under discussion.

Member State Council representatives interviewed noted that while the working group is informal, and while Israel affects a casual approach to it, the Israeli delegation arrives well-prepared and with ministerial legal staff. Several noted that the working group was still in its early days, and considered that simply opening a dialogue with Israel on many of these subjects was itself a significant achievement. Reportedly the Commission considers that the June 2006 meeting marked the first time a real dialogue on human rights took place between the EU and Israel.

On the presumption that Israel was a highly developed democratic country already committed to respecting human rights, and having an extensive range of 'shared values' with the EU, the two sides only committed themselves in the Action Plan to 'explore,' 'promote' and 'work together to promote,' their shared values via 'deepened dialogue' and 'exchange of information.' The EU's own 18-months 'ENP Progress Report – Israel' reports 'on progress made on the implementation of the priorities addressed in the first year' of the Action Plan. The Progress Report does note that '*differences remain on important questions relating to respect for international law and human*

³⁰ The current and future Member State Presidency and the European Commission.

³¹ For more information on the Palestinian Arab minority inside Israel see HRA's report *On the Margins: Annual Review of Human Rights Violations of the Arab Palestinian Minority in Israel 2005*, available at <http://www.arabhra.org/publications/reports/Word/YearlyReport2005English.doc>

³² For additional information, please see Adalah petition file to the Supreme Court demanding the cancellation of the extension of the Nationality and Entry into Israel Law as it Contradicts the Court's Prior Decision, see http://www.adalah.org/eng/pressreleases/pr.php?file=07_01_26

³³ For more information on the wall/barrier see B'Tselem's reports *A Wall in Jerusalem: Obstacles to Human Rights in the Holy City* available at www.btselem.org/download/200607_A_Wall_in_Jerusalem.pdf and *Under the Guise of Security: Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank* at http://www.btselem.org/Download/200512_Under_the_Guise_of_Security_Eng.pdf

³⁴ For more information on extra-judicial killings, see Al-Haq's report on Israel's extra-judicial killings in the OPT: available at: <http://www.alhaq.org/pdfs/Extra-judicial%20killings%20briefing%20by%20Al-Haq.pdf>

*rights in the context of the conflict, difficulties in respecting the principles of the Roadmap, and a number of issues affecting the potential to reach a final status agreement between Israel and the Palestinians.*³⁵ This apparently sums up the diagnostic outputs of the dialogue up to that point.

The Council's report on the Informal Working Group meeting notes that the 'Israeli answers to the human rights concerns expressed by the EU were generally legalistic (...), laying emphasis on a special position of Israel in the region and a difficult security situation.' Israel's responses either repeated known arguments invoking its interpretation of its security needs, as in the cases of the wall/barrier and extrajudicial killings, or differed with the EU on definitions, as when the EU attempted to raise questions concerning the treatment of 'minorities.'³⁶ The two sides did agree to schedule a seminar on racism, xenophobia and anti-Semitism in December 2006.

Earlier reviews have described the EU's handling of the problems posed by Israel's implementation of its partnership agreements in violation of IHL as demonstrating a 'pattern of accommodation bordering on acquiescence.'³⁷ A reported EU-Israel human rights working group dialogue on extra-judicial killings indicates how this pattern of accommodation can be expressed in the human rights-related exchanges between the two sides:

The EU's declaration for the June 2006 EU Israel Association Council meeting noted that the EU raised 'specific issues of serious concern at the current time' at the preceding human rights Working Group meeting. Prominent mention is made of the EU's concern about 'civilian casualties claimed at extra-judicial killings.'³⁸ The decision to focus discussion on the problem of civilian casualties was apparently a pragmatic compromise that acknowledged the obstacles to dialogue that were posed by the two sides' irreconcilable positions.³⁹ This enabled the EU to reiterate the position it conveyed at the November 2005 meeting, maintaining that Israel was engaged in extra-judicial killings and condemning them as unlawful.⁴⁰ On the other hand, turning to the question of minimising civilian casualties gave Israel the room it sought to frame the discussion as a question of 'collateral harm' to innocent civilians resulting from legitimate military attacks against legitimate military targets, rather than as a question of extra-judicial killings of targeted civilians.

The EU Council has elaborated a series of guidelines which 'serve as a framework for protecting and promoting human rights in third countries.'⁴¹ The 2001 Guidelines on human rights dialogues⁴² note that all human rights dialogues will be 'assessed on a regular basis, preferably

³⁵ Commission Staff Working Document Accompanying the: Communication on Strengthening the European Neighbourhood Policy, ENP Progress Report Israel, SEC(2006) 1507/2, 29 November 2006, p.2.

³⁶ 'According to the Israeli delegation the declared Jewish character of the State does not mean discrimination of any part of the population. The Israelis also explained that there was no definition of minority and that every Israeli citizen had the same rights.' Israel is attempting to associate minority rights with immigrants' rights in EU countries, while the EU is insisting that the two remain separate.

³⁷ Acquiescence: accepting an unlawful practice as lawful.

³⁸ Council of the European Union, Declaration of the EU on the occasion of the Sixth EU Israel Association Council, 10025/06, 8 June 2006, paragraph. 10.

³⁹ 'The reference to general principles of international law introduces elements of uncertainties because this notion is often interpreted in diverging ways.' From an undated internal Commission note explaining why it opposed three 'safeguard amendments' to the European Neighbourhood and Partnership financial instrument that has been adopted by the European Parliament's Committee on Foreign Affairs. This will be discussed later in the text.

⁴⁰ SEC (2006) 1507/2, p.4. The ENP Progress Report on Israel notes that the EU 'stresses that the commitment to combating terrorism must be carried out in full respect for international law, including international humanitarian law, human rights, fundamental freedoms and the rule of law.' Ibid, p. 8.

⁴¹ See 'The EU's Human Rights and Democratisation Policy – Overview' at http://ec.europa.eu/external_relations/human_rights/intro/index.htm#3

⁴² In the EU guidelines on Human Rights dialogues the following are identified as 'priority issues which should be included on the agenda for every dialogue: the signing, ratification and implementation of international human rights instruments, cooperation with international human rights procedures and mechanisms, combating the death penalty, combating torture, combating all forms of discrimination, children's rights, women's rights, freedom of expression, the role

every year.’ However, the EU’s dialogue with Israel is characterized as “atypical.” The meetings are held in closed Troika format, and it is unknown whether an assessment of the dialogue will take place. In the European Parliament’s 2006 Human Rights report, which examines the Council’s 2005 Human Rights report, the Parliament suggested that ‘a key priority for the Council in future Human Rights reports should be the analysis and implementation of the EU’s guidelines, as well as the production of impact assessments for each of the guidelines, weighing up their effectiveness in forging change in third countries;’⁴³ The Parliament is considering how to increase its access to and involvement in the human rights dialogues.

The deepening bilateral relationship between the EU and Israel also appears to be accompanied by a further marginalisation of civil society as the two parties’ ‘atypical’ dialogue becomes even less transparent. The two sides agreed that the Working Group meetings would not be minuted. The declaration of the EU’s position prior to the annual EU-Israel Association Council meeting does make reference to the topics discussed in previous dialogues but provides little indication of content.

While it may be considered necessary to keep the substance of the dialogue out of public view in the interest of maximising the prospects for its success, one key question that does need clarification has to do with the expectations imparted by the EU to Israel in the dialogue and outside it, irrespective of the particular human rights issues or the differing positions that may be aired by the two sides.

The EU has worked to develop human rights dialogue as a mechanism that can help it set the course for its use of other external relations ‘tools’ under the CFSP and under the ENP to promote reform. The human rights dialogue enables the EU to both indicate to partner countries what they should expect, and find out what it should expect.

At the very least, the information conveyed in the dialogue regarding certain of Israel’s policies, positions and national legislation should alert the EU to the need to consider whether it will be able to accept Israel’s conducting its side of any of the envisaged new contractual relationships in accordance with them. Such prudence is hardly at odds with offering Israel an ambitious horizon for integration into the internal market and expanding its opportunities for cooperation and participation in Community programmes and agencies.

In light of the clarity gained in the dialogue regarding Israel’s human rights-related practices and intentions, the EU should not exclude the possibility that prudential restrictive measures may be needed -- such as those envisaged in the EU’s code of conduct on arms exports.⁴⁴ Israel’s practice and intent regarding extra-judicial killing and the construction of the wall/barrier, and the EU’s positions, have already been clarified in the dialogue. In presenting the EU Guidelines on Promoting Compliance with IHL for Israel’s information within the dialogue, the EU reportedly emphasized that ‘the Guidelines are a tool of the EU’s Common Foreign and Security Policy (CFSP) which mandate the use of restrictive measures against third parties in case of non-compliance with IHL.’ The EU may therefore be at a point where some further signal of intent could reasonably be expected by Israel, and where receiving no such signal would raise expectations of EU inaction.

of civil society, international cooperation in the field of justice, promotion of the processes of democratisation and good governance, and the prevention of conflict.’

⁴³ 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.May.2006, point 9. As well the EP is investigating a greater role for itself regarding human rights dialogues for a planned resolution on that subject in 2007.

⁴⁴ European Union Code of Conduct on Arms Exports, 8675/2/98, 8 June 1998. E.g. ‘Criterion Two: [...] Member States will (a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression. [...]’

EU-Israel dialogue is held on a broad range of matters other than respect for human rights and international humanitarian law. Some fall within the sphere of their political dialogue. Others concern matters of mutual interest ranging from customs cooperation to transport to the environment.

Where any of the opportunities for cooperation or participation that the ENP is adding to the EU's external relations toolbox come under discussion, so do the conditions that must be met by the partner country to enable the relationship or activity to be carried out without disturbing the implementation of the EU's own *acquis* within the Community. In participating in any Community programme or agency alongside the Member States, third country practice must expect to conform to the standard of respect for human rights and related rules of Community and international law with which the Member States must themselves comply. *This matter-of-fact message has apparently thus far been overlooked in all areas of EU-Israel dialogue conducted under the ENP.*

Establishing expectations – signalling the uncoupling of the EU's human rights-related commitments from the expansion of the bilateral relationship.

As the two sides seek to deepen their relationship, the core human rights-related issue is not the existence of 'differences on important questions relating to respect for international law and human rights in the context of the conflict', but what *consequences may be expected from the unlawful policies and violations of human rights that underly those differences.*

The objectives of the first EU-Israel Action Plan as envisaged by the EU were to contribute to 'an increasingly close relationship, involving a significant measure of economic integration and a deepening of political co-operation. Implementation of the Action Plan will significantly advance the approximation of Israel's legislation, norms and standards to those of the European Union.'⁴⁵

The status quo relative to which progress would be evaluated under the Action Plan was set out in the baseline assessment 2004 ENP Country Report on Israel. This was to be followed by the 18-month mid-term review of the Action Plan in December 2006. However, apart from the fact that the mid-term review did not assess progress or set-backs of the key human rights points, before the mid-term review could be carried out, Israel and the EU agreed to find ways to accelerate implementation of their Action Plan at the May 2006 Association Committee meeting. This is one of several actions noted in this Review that suggest the uncoupling of human rights related commitments, including the EU's general 'goal of promoting compliance with IHL,' from the EU's management of the expansion of the EU-Israel relationship under the ENP, and from the EU's pursuit of its MEPP-related objectives under CFSP.

At the end of the three-year plan in early 2008 Israel and the EU will agree on whether to renew and extend the Action Plan, or to shift Israel onto a track that will give it the same standing as European Economic Area (EEA) countries Iceland, Liechtenstein and Norway.⁴⁶ In this last scenario, the long term reform-driven ENP will have been a short term stepping stone, and Israel's integration into the Community may well be decided before achieving any resolution of the remaining 'differences on important questions.'

This raises three questions of a more fundamental nature concerning the management of the overall process of opening up of Community programmes and agencies to third countries under the ENP:

⁴⁵ Proposal for a Council decision ... with regard to the adoption of a Recommendation on the implementation of the EU-Israel Action Plan, COM (2004) 790 final, 9.12.2004, p.1.

⁴⁶ At the February 2007 Working Group meeting the EU and Israel agreed to establish a 'reflection group' in which to consider Israel's future status with the EU.

Has the EU considered that existing 'differences on important questions relating to respect for international law and human rights in the context of the conflict' can result in the implementation of Israel's participation, cooperation and economic integration in the Community in a manner that would be inconsistent with the EU's common values and its need to apply Community law in accordance with international law?

What degree of 'approximation of Israel's legislation, norms and standards to those of the European Union' in relation to such matters as compliance with IHL, the annexation and settlement of occupied territory and discrimination against its Arab minority may be necessary to avoid this hazard?

Will the EU at least construct an appropriate 'firewall' mechanism in the instruments that establish the legal basis for Israel's participation and cooperation alongside the Member States to preserve the lawful operation of the Community's internal market, and its programmes and agencies?

According to the principle of 'Partnership' on which EU-Israel privileged relations have until now been largely based, the EU does not consider that it must oblige partner countries to implement their agreements with the EU in a manner that the EU considers internationally lawful, and that Community law could therefore accept.⁴⁷ When confronted by facts establishing a partner country's unlawful practice under a Community partnership agreement, *the EU considers that declaring the practice 'unacceptable' and registering its objection is enough to meet its own obligation to maintain 'coherence and consistency' under CFSP, and to avoid acquiescing to the partner country's violations of international law.* Beyond this, how the EU decides to deal with such situations is left to the political discretion of the Council under CFSP, and to its choice of tools from its CFSP 'tool box.'

Under the ENP, the question is whether this accommodating approach can be maintained.

Earlier reviews have documented the hazards the EU has faced by accepting Israel's 'right to differ' on the territorial scope of the applicability of the EU Israel Association Agreement, which Israel continues to apply to its settlements in occupied territory.⁴⁸ In 2004 only the intervention of civil society actors and an exceptional last-minute effort by the Netherlands Presidency prevented the EU from enacting an Association Council decision that would have acquiesced to Israel's application of its Association Agreement to the settlements it has illegally established in occupied territory.⁴⁹ That risk has not yet been completely resolved.⁵⁰

Israel's cooperation with the Community's Framework Programmes for Research and Technological Development (FP), and the Commission's management of that Community programme, have already resulted in the participation of Israeli settlement-based entities in Community-funded research activities, and their receipt of Community funding. During the period covered by this Review, European Parliamentary scrutiny brought the Commission to acknowledge that 'administrative errors' had resulted in the participation of entities incorporated in Israeli settlements, in contravention of the FP programmes' Rules for Participation. However, the

⁴⁷ Internal Commission note, op cit

⁴⁸ The EU did not act to end Israel's misapplication of the Agreement to Israeli entities located in illegal settlements in occupied territory. Instead it toiled to put into place a 'technical arrangement' designed to enable Member State customs officials to distinguish imported Israeli products originating in settlements from those originating within Israel's internationally-recognized borders. Only violations of Community law by Member States or EU institutions matter. In the origin rules case what mattered legally was that duties on imports from Israel were not being correctly recovered by EU customs authorities. See pgs 33-34 of the 2005 EMHRN EU Israel Human Rights Review.

⁴⁹ The 'technical arrangement' for implementing the EU-Israel protocol on origin was neither enacted nor endorsed by the EU-Israel Association Council. Legally enacting or formally endorsing it would have entitled Israel to continue applying the Association Agreement to the occupied territories.

⁵⁰ See p. 36 of the 2005 EMHRN EU Israel Human Rights Review

Commission would not address the fact that those Rules for Participation do not prevent entities incorporated in Israel but operating in settlements from receiving Community programme subsidies for their settlement-based activities.⁵¹

At least one Israeli settlement firm has been participating in the pan-European small business network, EUREKA, in whose political body, the Ministerial Conference, the European Commission is a member.⁵²

The problems posed by the EU's concept of 'partnership' are not limited to Israel. During the period covered by this report, the provisions of an EU-Morocco fisheries cooperation agreement were debated in the Council and the European Parliament. Nothing in the Agreement prevents Morocco from applying it to the territorial waters and economic zone of the Western Sahara, which it has occupied and unilaterally annexed. It is only a matter of time before facts come to light establishing the participation of EU operators in the unlawful exploitation of Western Sahara fisheries under that agreement. This will raise similar questions regarding the EU's acquiescing to, or materially assisting, Morocco's unilateral annexation of Western Saharan territory.

As cooperation extends under the ENP to areas covered by other EU policies, particularly in the sphere of law enforcement and judicial cooperation, including counter-terrorism cooperation, the application of the principle of 'Partnership' can open the door to a much wider range of such problems.

The Challenge Ahead

Partner country governments may not always be motivated to bring critical elements of their policy and practice closer to the EU's in order to seize opportunities for cooperation and participation compatible with their levels of institutional and economic development. In such cases, which clearly include Israel, differences in 'shared values,' as expressed in partner country legislation and application of international law, rather than gaps in development, can pose the most difficult obstacles. For each type and level of cooperation and integration being considered, the EU must determine correctly what partner country legislation, norms and standards are incompatible with the EU's need to adhere to its own common values and *acquis*, including its human rights and international law-related *acquis*.

The Commission bears principal responsibility for addressing such questions of legal or, more precisely, 'technical' correctness. It also bears responsibility for 'mainstreaming respect for human rights' throughout the Community's external relations. However, the Commission's line services⁵³ currently engaged in preparing the regulatory and procedural basis for opening up the Community programmes and agencies to partner country participation under the ENP⁵⁴ do not appear to regard such matters as pertinent to their responsibilities since they fall outside the scope of the sectoral *acquis* with which the line services are familiar.

The EU maintains that 'the relationship the EU is establishing with Israel, via the European Neighbourhood Policy, will better enable it to bring its influence to bear on issues of occupation and international humanitarian law.'⁵⁵ However, no indication exists that the 'carrots' under

⁵¹ European Commission memo, 'Participation in the Research Framework Programmes of entities established in contravention of customary international law – participation of legal entities operating in the occupied territories (West Bank, Gaza, East Jerusalem),' 16 November 2006.

⁵² Bio-Lab Laboratories Ltd., Atarot Industrial Zone.

⁵³ i.e. the Commission's different General Directorates that deal with specific sectoral Community policies like DG Fisheries, DG Environment, DG Competition, DG Agriculture

⁵⁴ Communication from the Commission...on the general approach to enable ENP partner countries to participate in Community agencies and Community programmes, COM(2006) 724 final, 4 December 2006.

⁵⁵ Answer given by the Commission to MEP question E-1351/06, 22 May 2006

consideration will be subject to any politically applied conditions relevant to promoting compliance with IHL. Indeed, EU-Israel contractual relations continue to be conducted by each side in accordance with its own 'differing interpretations' of Israel's international legal obligations. It is therefore difficult to see how the EU expects to 'bring its influence to bear' unless the EU concludes that Community law should leave no legal margin to accommodate any partner country's insistence on implementing cooperation and participation under the ENP in an internationally unlawful manner and informs Israel of this.

However, it may be that the EU-Israel relationship has too much momentum, and the EU now commands too little bilateral leverage to steer away from such hazards without bringing in the discipline of Community law to bear on the unruly politically-managed relationship. Many of the incentives offered in the 'Strengthening the ENP' plan are of little interest to Israel, and many of those in which it is strongly interested are already either in place or under negotiation with no human rights or international law-related conditions attached:

- 1) Israel already has a 'deep and comprehensive' **free trade agreement** (FTA) for industrial and agricultural products, and the liberalization of services and remaining restrictions on goods are being negotiated;
- 2) Israel's citizens do not require **visas** to enter EU Member States;
- 3) Israel's isolation in the region, its developed economy and robust Research & Development align it with the EU rather than its neighbours, minimizing the importance of Neighbourhood **multilateral agreements and processes**;
- 4) Israel's developed economy makes it ineligible for most **EU funding**. European Neighbourhood and Partnership Instrument (ENPI) funds earmarked for Israel are only €8 million from 2007-10 for support of Action Plan activities.

In terms of participation in programs, Israel is already included in the EU's Seventh Framework Programme for Research and Technological Development and is associated with the European Civil Global Navigation Satellite System (Galileo). The 'Tempus' and 'Erasmus Mundus' education programmes have also been extended to Israel. Israel has expressed interest in participating in other programs e.g. the Competitiveness and Innovation Programme.⁵⁶

Given this already advanced level of the relationship it comes as no surprise that the only direct criticism of Israel in the EU's progress review was that 'regrettably, and against the spirit of the Action Plan,' Israel had not reformed its intellectual property rights legislation sufficiently.⁵⁷

⁵⁶ '[...] Israel has expressed interest in participating *inter alia* in: the CIP (Competitiveness and Innovation Programme), Customs 2013, Fiscalis 2013, Marco Polo, Youth, MEDIA 2004, CULTURE 2007 and Hercules. Israel has also expressed the interest in cooperating with several European agencies and/or bodies, for example the EEA, ENIA, EUROPOL, EUROJUST, ECPOL, ESA, etc.' SEC(2006) 1507/2, p.3.

Some examples of concrete progress on Israel's implementation of priorities addressed in the Action Plan include: 1) in financial services, the Banking Supervision Department has directed banks to prepare for the implementation of Basle core principles for effective banking supervision by 2009; 2) in public procurement, Israel has agreed to reduce the value of its offsets, and to expand the scope of opened sectors (in services); 3) Israel initiated contacts with the aim to develop co-operation with EUROJUST (to improve coordination and cooperation between investigators and prosecutors dealing with serious international crime). Ibid, pgs 7-8.

⁵⁷ Ibid, p. 7. In a December 2005 session before the Israeli Knesset, the EU Ambassador to Israel said 'The European Commission is concerned about Israel's intention to amend its law for patents in the pharmaceutical industry. Such actions are inconsistent with Israel's commitments to the EU for proper and effective protection of intellectual property rights.' Manor, Hadas, EU Ambassador to Israel Ramiro Cibrian Uzal supports the US position before tomorrow's decision on changing the Patents Law, Globes, 11.12.05

What needs to be fixed, to start with

The EU maintains that 'promoting compliance with international humanitarian law is a goal of the EU,' together with promoting respect for human rights. The European Court of Justice has declared that, as a general principle of Community law, 'The European Community must respect international law in the exercise of its powers.'⁵⁸ However, the Community and its institutions currently recognize no legal obligation in Community law to prevent partner countries from implementing Community agreements in a manner that violates mandatory rules of international humanitarian law and international human rights law – *even when this causes the functioning of the agreements to materially assist partner countries to commit new violations and maintain the illegal situations resulting from them.*

To address this incoherent state of affairs, attempts were made in the European Parliament in 2006 to insert 'safeguard' provisions into two Community instruments: the Rules for Participation for the Seventh Framework Programme for Research and Technological Development (FP7)⁵⁹ and the European Neighbourhood and Partnership [financial] Instrument (ENPI).⁶⁰ One set of amendments essentially stipulated that all agreements concluded and all projects and measures funded under those instruments would have to be formulated and implemented in accordance with international customary law. Another set prohibited contracting with entities that had been established in contravention of international customary law (e.g. Israeli settlement entities), or entities actively participating in, assisting or seeking to profit unlawfully from the commission of internationally unlawful acts.

Both attempts met with strong opposition from the Commission, which stated in an internal note that 'these amendments introduce elements contrary to the heart of the Neighbourhood policy,' and referred to the idea of partnership as the applicable principle. Some Member States also reportedly expressed concern about the uncertain and possibly unwanted broad scope of the ENPI amendments' applicability. Several voiced discomfort over how their incorporation in EU legislation might conceivably impact their national interests, citing, for example, the UK's and Denmark's involvement in Iraq.

The idea of incorporating international law-conserving 'pre-conditions' regulating third state participation in Community programmes is not unknown. To participate in the Community's CULTURE 2007 programme, a country must have ratified the UNESCO convention on the protection and promotion of the diversity of cultural expression which the European Community, along with 12 Member States, ratified on 18 December 2006. The Convention is therefore now part of the Community *acquis*. According to the Commission, any country wishing to participate in CULTURE 2007 will be informed of this 'pre-condition' for participation.⁶¹

However, since it is not a state, and since it does not engage in the conduct of military hostilities, the Community can not itself ratify or adopt the IHL instruments. The International Court of Justice has declared the four Geneva Conventions of 1949 customary in their entirety, but the European Court of Justice (the Community's judicial authority) has not yet been presented with an occasion to declare them customary and therefore binding on the Community itself. They are therefore not incorporated into the *acquis communautaire*. So a different approach is needed.

⁵⁸ Case C-286/90, *op cit*

⁵⁹ Regulation of the European Parliament and of the Council laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007-2013)

⁶⁰ The ENPI is the financial instrument providing the EU budget for all activities carried out under the ENP. The Seventh Framework Programme's Rules for Participation set the criteria and conditions on which European and non-European entities engaged in cooperative research projects can benefit from Community (FP7) research grants.

⁶¹ Item 2.6.3. of the EU Israel Action Plan: 'Develop a dialogue on cultural diversity, including in the context of the relevant negotiation in UNESCO.'

To streamline the procedures establishing a legal basis for each ENP partner country's future participation in EU programmes, the Commission has proposed that

As a first step, the Commission will seek a mandate to negotiate a **general enabling protocol to each of the Partnership and Cooperation Agreements or Association Agreements**, starting with those ENP partner countries that have already agreed ENP Action Plans. Once ratified, these protocols will provide a sound legal basis for a much simpler process of programme-specific memoranda of understanding with ENP partners that settle the details of participation in programmes of interest to both sides.⁶²

In this case a memorandum of understanding (MOU) will be concluded with each partner country setting out the specific engagements, conditions and special arrangements that will apply in its case.

This Review recommends the insertion of 'safeguard' provisions in the text of the Community regulation authorizing the enactment of that general enabling protocol. The provisions would require each partner country wishing to benefit from the opportunity to participate in the Community programmes covered by the protocol to agree to conduct their participation in conformity with the standards of compliance with applicable Community law and international law observed by the Member States.

The incorporation of these provisions would also compel the Commission to identify the elements of partner country public policy and national legislation that could be incompatible with such standards of compliance. It could then see to it that the problematic policies and legislation are duly amended as a pre-condition for the partner country's participation. Alternatively, the Commission could see to it that specific provisions are incorporated in the partner country's MOU that would prevent it from conducting its contractual relations with the Community in a manner dictated by its problematic policies and legislation.

The EU-Israel Action Plan and Cooperation on UN Reform

Under the 'International Organisations' subheading of the Committee on Political Dialogue and Cooperation in their Action Plan, the EU and Israel agree to 'cooperate on UN reform and streamlining by, inter alia, working towards normalisation of Israel's status in international organisations and the reduction in number of Middle East resolutions.' In apparent compliance with this undertaking, the EU bloc abstained on UNGA Resolutions 61/22 and 61/23 of 1 December 2006 which requested the renewal of the Committee on the Exercise of the Inalienable Rights of the Palestinian People and the Division for Palestinian Rights of the Secretariat respectively. Israel is adamant in its opposition to the work of these committees.⁶³

⁶² COM(2006) 724, p. 2.

⁶³ 'These bodies are the focus of the worst anti-Israel activity under the aegis of the UN.' From the website of the Permanent Mission of Israel to the UN. Prior to 2000, Israel was excluded from any UN regional grouping due to its being banned from the Asian Group. Since 2000 Israel has been a temporary member in the Western European and Other States Group (WEOG) in New York, but remains unable to participate in UN bodies not organized under the New York regional group system.

III- THE EU BORDER ASSISTANCE MISSION AT RAFAH CROSSING POINT IN THE PALESTINIAN TERRITORIES (EU BAM RAFAH)

EU BAM is a European Security and Defense Policy (ESDP) mission formulated after the EU agreed to undertake the third-party role at the Rafah border crossing proposed in the US-brokered Israel-PA Agreement on Movement and Access (AMA) of 15 November 2005. ESDP missions are 'joint actions' carried out under Common Foreign and Security Policy (CFSP). EU BAM operations are overseen by the EU's foreign policy chief and its Middle East envoy. The EU monitors operations in the Rafah terminal and trains Palestinian border personnel.

EU BAM was considered the jewel in the crown of improved EU-Israel relations under the ENP, 'symbolic', in the words of an EU diplomat accredited to Israel, "of the EU's increased credibility and trustworthiness in Israel's eyes." The mission's mandate was extended for six months on 13 November 2006. According to the same diplomat, the European presence at Rafah border crossing has emboldened some Israeli interlocutors to suggest a future European trusteeship for the occupied Palestinian territories.

EU officials consider that EU BAM is operating "perfectly, within its mandate." However the same officials clearly do not consider that the Rafah border crossing where EU BAM is supposed to be deployed has been operating as agreed since June 2006. The border crossing has been open less than a fifth of the time since the June 2006 abduction of an Israeli soldier due mostly to the Government of Israel's (GoI) closure of the linked three-party liaison office at the nearby crossing on the Israel-Gaza border for 'security' reasons. The liaison office must be operational for Rafah crossing to open.⁶⁴ This has led the EU to assert that clear rules prohibiting the opening and closing of Rafah for political purposes⁶⁵ will have to be negotiated if EU BAM is to be extended a second time after May 2007.⁶⁶ It is absolutely prohibited in international humanitarian law for an occupying power to exercise its control over the borders of occupied territories to impose collective penalties on a civilian population, or to serve its own political interests.

EU officials have emphasised the EU's refusal to perform an executive role at the Rafah border despite Israel's strong preference for it to take on that function. The EU has been wary and clearly unwilling to be drawn into acting in place of the occupying power in Gaza. Limiting its role to monitoring and training was also prudent given that the AMA agreement was brokered by the U.S., and that the EU serves only as an observer in the U.S.-headed local Security Group. The AMA states simply that 'the passages will operate continuously.' The AMA refers to an accompanying Security Agreement and to a Memorandum of Understanding on the role of the third party. Neither of the two documents is signed and therefore officially they do not exist.

⁶⁴ 'In practice, however, Israel has since June 2006 dictated the opening and closing of Rafah.' Footnote 6, the World Bank, 'Potential Alternatives for Palestinian Trade: Developing the Rafah Trade Corridor', 21 March 2007. See as well pg 36 Gisha, 'Disengaged Occupiers: The Legal Status of Gaza,' January 2007.

⁶⁵ 'We oppose the opening of the crossing, even for a few hours, so long as the matter of the abducted soldier remains unchanged. Pressure on this matter must remain in place at this stage.' Israeli Shin Bet statement from transcript of Israeli Defense Ministry meeting. Quoted in Issacharoff, Avi, Israel using Rafah crossing to pressure PA on Shalit release, Ha'aretz, 30.08.2006

⁶⁶ In May 2007 the mission was extended for a year.

The need to do something

In its December 2006 'Strengthening the ENP' document the Commission stated both that

The ENP has achieved little in supporting the resolution of frozen or open conflicts in the region, notwithstanding certain specific achievements (e.g. in relation to border management in Moldova and the Palestinian Territories). The EU needs to be more active, and more present, in regional or multilateral conflict-resolution mechanisms and in peace-monitoring or peace-keeping efforts.⁶⁷

If the ENP cannot contribute to addressing conflicts in the region, it will have failed in one of its key purposes.⁶⁸

EU BAM was set up on the premise that Israel as occupying power had delegated to the PA the operation of the Rafah border crossing. The mechanism of a third party role in the AMA served both parties well: Israel was unwilling to accept the PA exercising sole discretion over the border, and the PA needed a counterpart other than the GoI that it could respect and obey.

EU BAM positioned itself as part of a transmission rod between Israeli decisions and Palestinian actions to operate the border crossing. When the decisions of the occupying power became internationally unlawful, the EU observer mission had already been drawn into providing it with a new mechanism for executing them.

The EU BAM's CFSP mandate derives from Article 11 of the Treaty of the European Union, which makes the development and consolidation of human rights and the rule of law a mandatory objective of CFSP.⁶⁹ The EU argues that if its mission were not present at Rafah, the border would not have been open at all after Israel's redeployment from Gaza. However the arrangement involving EU BAM has also made it possible for Israel to continue exercising effective control over the Rafah crossing without positioning its own armed forces there.

Nothing in the agreements or understandings pursuant to which the EU took up its mission has prevented Israel from using that effective control as a means of sanction amounting to collective punishment.

The 2005 EMHRN review noted the prevalence of 'soft law' in the Middle East Peace Process. Soft law is formulated to maximize political and administrative flexibility and expediency, but is not legally binding. In the MEPP it has been tailored to preserve Israel's freedom to implement its 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.⁷⁰

⁶⁷ Communication 'On Strengthening the European Neighbourhood Policy', COM(2006) 726 final, 4 December 2006, p. 4.

⁶⁸ Ibid, p. 9.

⁶⁹ 'The mission will implement its mandate in the context of a situation which poses a threat to law and order, the security and safety of individuals, and to the stability of the area and which could harm the objectives of the Common Foreign and Security Policy as set out in Article 11 of the Treaty.' Article 11 states, *inter alia*: 'to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;' 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'.

⁷⁰ See p. 18 of the 2004-05 EMHRN Review. 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.

As the EU has moved to expand its role in the MEPP under the Neighbourhood policy, it has already found itself confronted with the non-implementation of such soft law agreements by Israel and/or the PA. Should it take on more functions shed by Israel on the basis of such agreements, it may find itself in difficult territory where the applicable hard rules of international law, on which its involvement can legitimately be based, are neither accepted nor respected by Israel, nor understood or considered relevant by the PA. As has happened in the case at hand, the EU will then run an increased risk that the agreements that can be brokered and serve as the basis for its involvement will be made to operate in an internationally unlawful manner. It will have to extricate itself or become implicated.

On the other hand, the proliferating soft law agreements in the MEPP might better serve some of the purposes of conflict management that inspired their creation if key third parties like the EU take steps to discipline their own involvements better in light of the international law that they are committed to uphold. From a human rights standpoint, one key responsibility of the EU and all participants in the MEPP, has been to ensure the implementation of such arrangements in accordance with the hard law that must continue to govern the circumstances the arrangements aim to help manage. This would also be consistent with the EU's 'duty of care.'⁷¹

⁷¹ 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.

IV- BOYCOTT/SANCTIONS AND THE TEMPORARY INTERNATIONAL MECHANISM (TIM)

Neither international human rights norms nor IHL tolerates the deliberate or negligent causation of collective harm to civilian populations. The following two sections ask to what extent the EU has succeeded in respecting this general principle of international law in connection with the unprecedented restrictive measures it took in response to the election of a Hamas-led government of the PA.

While EU officials and Member States have not always agreed regarding the appropriateness and effectiveness of the measures taken in light of their political objectives, this discussion will address these issues from two vantage points: the question of applicable norms, and the question of propriety in light of those applicable norms. The broad spectrum of the harm caused to the exercise of fundamental human rights of virtually the entire Palestinian population in the oPt by the combination of actions taken by Israel, the US and the EU is already self-evident. Questions of responsibility, propriety and likely impact on respect for human rights and IHL by Israel and in the region deserve clarification.

Setting

Over the past fifteen years the EU, the sponsors of the MEPP, and the international donor community at large, have committed major efforts to 'developing' and 'reforming' the PA, in large part so that both Israel and broad sections of the Palestinian public might each consider that they have an opportunity for peace that is 'too good to waste.'

The establishment of the PA and cooperation between the parties rested on a set of political commitments set out in the Israel-PLO 'Declaration of Principles.' Commitments to respect human rights and IHL were absent from those understandings. Key Palestinian commitments included the renunciation of violence directed against Israel and accepting Israel's right to exist.

One key question that needs to be addressed in light of applicable human rights-related norms is what can legitimately be done, and what human rights obligations must be respected, when such arrangements break down. In the case at hand, it is widely recognised that the principal causes of the aggravated humanitarian crisis that has gripped the oPt were three types of measures taken by Israel: withholding of PA customs and tax revenues; extreme restriction of Palestinian internal and cross-border movement; and military strikes on civilian persons and objects. It is also recognised that the EU took the lead in mobilising a response to relieve critical scarcities of potable water, essential foodstuffs, electricity and fuel, mitigate the collapse of essential health services and provide social allowances to the households of public sector employees that had lost their sole source of regular income.

However, in taking into account all the EU has done, and how it may have differed in substance and political intent from what Israel was doing, the key issue remains:

Have the effects of the EU's actions contributed to increasing or to reducing the severity and extent of the harm to human rights being most directly caused by Israel's wrongful acts?

Does the EU consider them internationally wrongful, and has it made this clear?

As it has deepened its involvement on the ground, has it confronted or accommodated to the political and legal positions on which Israel has based its wrongful acts, notwithstanding the EU's desire to see them changed?

Actions taken

1) Placing Hamas on the EU 'terrorist list'

Hamas is considered a non-state actor that advocates, justifies and engages in unlawful and deadly violence randomly directed against civilians or carried out indiscriminately in pursuit of its political objectives. It does not apply the rules of IHL.

Based on such considerations, Hamas was placed on the EU's 'terrorist list'⁷² when it was updated in September 2003.⁷³ The EU established the list in 2001 in compliance with UNSC resolution 1373(2001). Several EU officials pointed out that the conduct of Israel's senior governing officials and military command could be similarly assessed. However, one key distinction is generally made: As a state, Israel has the right to engage in lawful violence,⁷⁴ whereas neither Hamas nor the PA have such an internationally-recognized right.

2) Applying EU sanctions targeting the Hamas-led PA government

The sanctions applied by the EU had two components: a freeze on aid ('financial flows')⁷⁵ that was based on UN-mandated international counter-terrorism cooperation, and a decision to boycott or ostracize Hamas as a form of pressure to comply with the political conditions on which the MEPP and the PA's establishment were based.

a) The European Commission suspended direct assistance to the PA: 'In view of the obligations arising from the Council's Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, the Commission had no other choice but to temporarily suspend financial flows through the Palestinian Authority (PA) Government.'⁷⁶

b) Following the formation of the Hamas-led Palestinian Authority government on 29 March 2006, the EU Council reportedly reached a minimal consensus that they "wanted Hamas to change," presumably making it possible to remove it from the EU's terrorist list and also making it possible to include Hamas as a player in the MEPP. The EU proceeded to suspend political dialogue and contacts with the officials of that elected government, despite the fact that it had supported, funded, and observed the election, accepted the participation of candidates openly associated with

⁷² A list of persons, groups and entities engaged in terrorism to whom the EU addresses 'specific measures to combat terrorism', by freezing assets, blocking financial flows and excluding those placed on the list from activities that could enable them to circumvent these financial.

⁷³ Council Common Position 2003/651/CFSP of 12 September 2003. Removing Hamas from the terrorist list requires a unanimous decision of the Council.

⁷⁴ 'With regard to the plight of Palestinians who are victims of the Israeli-Palestinian conflict; while the EU has repeatedly condemned terrorist atrocities against Israelis and recognised Israel's right to protect its citizens against terrorist attacks, the EU has consistently pointed to the obligation on Israel to exercise this right within the parameters of international law.' Council joint reply of 2 August 2006 to MEP questions E-2077/06, P-2315/06

⁷⁵ See the statement of the EMHRN on the freezing of funds: "Should the Palestinians be punished?" April 12th 2006, available at <http://www.euromedrights.net/pages/275/news/focus/9435>

⁷⁶ Commission answer of 17 August 2006 to MEP question E-2238/06. "The Commission's action is a precautionary measure taken to ensure that no Community funds pass into the hands of Hamas. We have taken it pending the possible evolution of the Palestinian Authority position and a definitive decision by the Council on relations with the Palestinian Authority. It is not a definitive decision: we are currently reviewing all projects involving payments to or through the Palestinian Authority to see whether we can find alternative solutions."

Hamas and declared the election to be 'free and fair.' That decision was described as political, and was not dictated by Community law or international law.

The EU's demands simply repeated the three cardinal principles agreed by Israel and the Quartet: to renounce violence, recognize the right of Israel to exist and accept existing agreements.⁷⁷ "It has to be borne in mind that these three principles were not newly invented, specially designed benchmarks with which to confront the new Hamas-led government, but represent criteria that originate in the long-standing Oslo process."⁷⁸

While the Council also wished not to break ranks with the US, there was no consensus among the Member States to support the 'regime change' options reportedly preferred by the US and Israel: either the forceful removal of Hamas-affiliated officials from the PA or the replacement of the PA with another structure of authority. However, the Council did not set any operational guidelines for interpreting how Hamas members' presence in the PA should affect the EU's dealings with those institutions. Nor did it clarify what would actually have to occur on the part of Hamas, Hamas members of the PA government, or the PA for the EU to consider that its demands had been met by any of them. What resulted was an open-ended and near total break in communication with all but the small staff of the PA President's office.

3) Responding to Israel's suspension of dealings with the PA and its suspension of Palestinian revenue transfers

Since Hamas' unanticipated election victory Israel has refused to release the PA's tax and customs revenues under its control and taken further measures in concert with the United States and neighbouring countries to prevent financial assistance from reaching the PA from any other sources. The clearance revenues account for over 60 per cent of the PA's revenues.⁷⁹ As noted below, the EU has repeatedly called attention to the fact that, unlike EU assistance, the funds in question were rightfully the property of the Palestinian public, encouraged Israel to release them, and offered the Temporary International Mechanism it had constructed as a facilitating channel. In this connection, it has also publicly reminded Israel that it remains the occupying power and retains responsibility for ensuring the welfare of the protected Palestinian civilian population.

4) Responding to the aggravated humanitarian crisis, including the establishment of the Temporary International Mechanism

Under established EU policy concerning sanctions, the EU could not take the decisions it took without considering its impact on the welfare of the affected Palestinian population after taking into the account all that it might be able to achieve by way of efforts to mitigate that impact.⁸⁰

⁷⁷ For examples of the range of interpretations of the Quartet's three principles, see Keinon, Herb, Straw softens Hamas benchmarks, Jerusalem Post, 11 April 2006

⁷⁸ Council reply to questions E-2077/06, P-2315/06, op cit.

⁷⁹ The World Bank, West Bank and Gaza Public Expenditure Review Vol I, February 2007, p. vi. Commissioner Ferrero-Waldner, Suspension of aid to the Palestinian Authority government, SPEECH/06/260, 26 April 2006: "A real problem now is Israel withholding Palestinian customs and tax revenues. These are Palestinian taxes which people have already paid. Withholding them means that basic services won't be delivered, salaries cannot be paid, and families will suffer. Israel has also increased the closures of territory in the West Bank and into and out of Gaza. Addressing these problems will do more to help the Palestinian people than any measure the EU can take. The international community must intensify its diplomatic efforts with Israel on these two issues"

⁸⁰ European Council, Basic Principles on the Use of Restrictive Measures (Sanctions), 10198/1/04 REV 1, 7 June 2004, paragraph 6: 'Sanctions should be targeted in a way that has maximum impact on those whose behaviour we want to influence. Targeting should reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries. Measures, such as arms embargoes, visa bans and the freezing of funds are a way of achieving this.'

A 'Temporary International Mechanism' (TIM) to 'channel assistance directly to the Palestinian people' was proposed by the Commission on 9 May 2006 and endorsed by the European Council on 16 June and then by the Quartet on 17 June. On 20 September 2006, the TIM mandate was expanded and extended until May 2007.

The EU has described the TIM's establishment and purpose as follows:

Taking into consideration the desperate economic and humanitarian conditions in the Palestinian territories, the European Council and the Quartet decided in June 2006 that the EU should go ahead with the establishing of the Temporary International Mechanism (TIM), aiming at taking care of immediate needs in the Palestinian territories. The EU has encouraged the Israeli Government to resume transfers of withheld Palestinian fiscal revenues, including via the TIM.⁸¹

Support via the TIM is directed via three "windows":

- I) essential supplies and running costs of hospitals and health care centres, mainly through the World Bank's Emergency Services Support Programme;
- II) Interim Emergency Relief Contribution (IERC) for utilities supply;
- III) payment of social allowances to the poorest part of the population and to key workers delivering essential public services

Total EU aid to the Palestinians came to €700 million in 2006, an increase of about 30 percent over 2005. Over €300 million of that assistance was channelled through the TIM split roughly evenly between Community contributions and that of 14 Member States.

In a speech on human security, Commissioner Ferrero-Waldner used this definition: the comprehensive security of people, not the security of states, encompassing both freedom from fear and freedom from want.[...] Later in that speech she said "Through innovative approaches like the Temporary International Mechanism to support the Palestinian people we try to ensure humanitarian support for people even when working with their government is not possible. Hence also the decision not to suspend humanitarian aid to the people of North Korea.[.]⁸²

In 2003 the EU called on the GoI to 'increase efforts to ease the plight of the Palestinian people by taking on more responsibility from the international community to provide humanitarian assistance to the Palestinian population.'⁸³ A humanitarian crisis had already been provoked several years prior to the election of Hamas. For several years the Community and Member States have been responding to its intensification with greater levels of humanitarian assistance, while curtailing reconstruction and development assistance. Many EU diplomats and officials had noted that primary responsibility for the provision of humanitarian relief and ensuring the welfare of the civilian population properly rested with Israel as the occupying power. Insofar as the humanitarian crisis was also being induced by measures carried out by Israel in clear violation of IHL, several also voiced concern that the EU's humanitarian efforts were both relieving Israel of the burdens and responsibilities it bore to the stricken civilian population, and, more importantly, enabling Israel to escape the practical consequences of wrongfully instigating a humanitarian crisis in the first place.

After the formation of the Hamas-led PA government and Israel's suspension of Palestinian tax revenue transfers to the PA, the EU appears to have concluded that Israel could not be expected to perform even its minimal obligation to make the Palestinian tax revenues it collected available to cover essential public sector payroll and service provision in the oPt if one of three things did

⁸¹ COM(2006) 726, p.4.

⁸² Commissioner Benita Ferrero-Waldner, Human Security and Aid Effectiveness: The EU's challenges, SPEECH/06/636, London, 26 October 2006, pgs. 2-3.

⁸³ Declaration of the European Union, Fourth Meeting of the Association Council EU-Israel 17 – 18 November 2003.

not happen: Hamas could accept the Quartet's three conditions, and then stay in the PA government; a parallel governing structure acceptable to Israel and the Quartet could be established enabling the EU and other MEPP players to bypass the Hamas-led government; or Hamas could be removed from the PA government. Getting Hamas to accept the absolute prohibitions in international law against directing political violence against civilians was not considered good enough.

The international community (...) cannot substitute for the responsibilities of the Palestinian Authority, which must take steps to meet the Quartet principles and end violence. Nor can the international community substitute for the responsibilities of Israel (as occupying under international law) in preventing a further deterioration of the economic, social and humanitarian situation in the Palestinian territories. A key aim of the temporary mechanism is therefore to facilitate the transfer by Israel of withheld Palestinian tax and customs revenues.⁸⁴

Meanwhile, the EU proceeded to set up the TIM as a parallel financial mechanism to mitigate the humanitarian crisis, offer Israel a way to comply with its obligations to transfer Palestinian tax revenues to Palestinian hands, and seek ways to salvage the EU and other donor country investments in building the PA institutions by preventing their total collapse until the PA was deemed politically fit to resume operations.

Some Member State representatives consider that the humanitarian benefits of the TIM outweigh its operational weaknesses of skewed eligibility criteria (e.g. the exclusion of persons employed in the private sector), the inability to control fully against patronage of the PA's beneficiaries list, and the glaring omission of support to the police under the TIM's window III. However discussion of the larger political picture -- the encouragement of a parallel authority through the establishment of parallel funding mechanism -- drew the observation that there is not one historical success story of third-state funding of one indigenous political party in order to enable it to weaken and replace another.

Some EU officials do appear surprised by Hamas' resilience and reportedly certain senior EU officials objected to the establishment of the TIM, believing that greater economic hardship would force regime change faster, or maintaining that the operation of the TIM was consolidating Hamas' position, particularly since recipients of the bank payments deposits transfers of social allowances paid to needy families via the local banking system allegedly often attributed the payments to Hamas.

How this situation was confronted by the EU and the actions it took raise serious doubts that the EU has complied with its own human rights-related commitments and its basic obligation in international law not to recognize an unlawful situation as lawful.

The UN's Special Rapporteur on the situation of human rights in the Palestinian territories noted

In effect, the Palestinian people have been subjected to economic sanctions - the first time an occupied people have been so treated. This is difficult to understand. Israel is in violation of major Security Council and General Assembly resolutions dealing with unlawful territorial change and the violation of human rights and has failed to implement the 2004 advisory opinion of the International Court of Justice, yet it escapes the imposition of sanctions.

Instead, the Palestinian people, rather than the Palestinian Authority, have been subjected to possibly the most rigorous form of international sanctions imposed in modern times.⁸⁵

⁸⁴ Letter from Commissioner Ferrero-Waldner to the Association of World Council of Churches Related Development Organizations in Europe (APRODEV), D/06/930, Lien A/06/1544, 3 July 2006.

⁸⁵ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/4/17, 29 January 2007, paragraph 54.

Applicable norms

International humanitarian law obligates an occupying power to ensure to the best of its ability the provision of lawful and effective administration,⁸⁶ preserving the institutions and functioning of the system of administration already in place. Compliance with this obligation is considered essential to ensuring the basic safety and welfare of the protected civilian population. No political interest or agreement that may impair the occupying power's ability to perform this obligation can justify its deficient implementation or release the occupying power from it prior to ending its occupation.

States party to the Fourth Geneva Convention of 1949 have undertaken to 'respect and ensure respect' for that Convention 'in all circumstances.' As a minimum implementation of these obligations they must also ensure that the measures they take in pursuit of political or humanitarian objectives do not draw them into accepting an occupying power's unlawful actions or inaction as lawful, or into aiding or assisting in maintaining the illegal situations resulting from them.

The logic of Israel's 'disengagement' strategy in which the EU has involved itself as an actor on the ground rests on two internationally unlawful pillars: the divestment of Israel's responsibilities as an occupying power in the areas of the oPt in which Palestinian population is concentrated⁸⁷, and the extra-territorial application of Israeli domestic legislation, political authority and international agreements to the areas of the oPt it intends to further settle and ultimately annex. If the rules it must respect to enjoy extensive benefits of cooperation are those of the MEPP, Israel will have ample margin to move ahead on both pillars. If the rules are set by IHL, it will have less margin to do so.

For all that the EU has done to address the aggravated humanitarian crisis induced by Israel's withholding of Palestinian tax revenues, obstruction of movement and access and unlawful military strikes, it should have earned the right to ask Israel, preferably publicly, to explain how it expects to perform its obligations to ensure the welfare and safety of the Palestinian civilian population and ensure the provision of lawful and effective administration while these practices continue.

The EU should also ask itself whether Israel's continued pursuit of the two pillars of its strategy under the MEPP does not call into question an EU involvement that has become almost entirely preoccupied with relieving humanitarian crises. Perhaps it is time to begin considering working for a solution of an international trusteeship solution under which Israel's two strategic pillars can be extracted from the architecture of the MEPP, rendering it finally viable.

With regard to the EU-PLO Interim Association Agreement, the joint committee and the subcommittees established under the Agreement have not met since 2005 "mainly because of the no contact policy." However the Agreement has not been suspended.

⁸⁶ These obligations of the occupying power include the maintenance of public order and the preservation of public life – conditions considered vital to ensuring the welfare of the civilian population. They arise from the fact that establishing military control over occupied territory entails interdicting or disrupting the previously established authority's exercise of the functions of government vital to the preservation of the welfare of the civilian population.

⁸⁷ Soon after the establishment of the PA, Israel began claiming that in the areas in which PA administration was operating it had shed its status and responsibilities in international law as an occupying power. Through these claims it reportedly aimed to minimise any consequences to its own interests were the PA to collapse or fail to maintain order and provide effective administration for any reasons, including those arising from Israel's own actions. This presumably would leave Israel freer to concentrate on achieving its goals in the framework of the MEPP. Undeterred by any major risk of renewed burdens were its actions to provoke a serious deterioration in humanitarian conditions of the civilian population, it could choose its tactics with only one consideration in mind: maximising its leverage over all forms of possible Palestinian opposition.

Other assistance: cost of Israeli military destruction of EU-funded infrastructure

The UN's Special Rapporteur on the situation of human rights in the Palestinian territories noted

Individual criminal accountability is no substitute for State responsibility. A State that violates international law by destroying the property of another State used for humanitarian purposes in an occupied territory may be held responsible by the injured State in accordance with the traditional principles of State responsibility. Moreover a State that systematically violates a peremptory norm of general international law may incur responsibility to the international community as a whole for such conduct; and be subject to an international claim for reparation at the instance of any State prepared to make such a claim.⁸⁸ Many States, particularly European States, have suffered damages as a result of Israeli attacks on their humanitarian assistance projects in the OPT. Moreover Israel has systematically violated peremptory norms of international law in the OPT, ranging from the denial of self-determination to serious crimes against humanity. States may well consider bringing claims against Israel under the rules governing State responsibility in order to induce it to comply with its obligations in the fields of human rights and humanitarian law.⁸⁹

The August 2001-beginning May 2007 estimated total cost to EU- and Member State- funded projects for physical infrastructure (only) destroyed or damaged by Israeli military forces was €43,974,563, out of which €27,395,751 was from EU funding.⁹⁰

Reportedly the EU has not raised the subject of these damages with Israel recently. In addition to failing to hold the Government of Israel accountable for its unlawful attacks on civilian property, foreign governments have funded the repairs. This has led to consternation and dejection on the part of the Palestinian population and civil society actors who see donor governments issuing correct declarations on IHL but failing to hold Israel accountable for its unlawful destruction of civilian property.

⁸⁸ Draft articles on the Responsibility of States for Intentionally Wrongful Acts (arts. 40 and 48 (2) (b)), Official Records of the General Assembly, Fifty-sixth Session, Supplement No.10 (A/56/10). Footnote in the original text of A/HRC/4/17, paragraph 57.

⁸⁹ A/HRC/4/17, op cit

⁹⁰ European Commission Office for West Bank & Gaza and UNRWA, 3 May 2007

V- FOLLOW-UP ON THE 2004-2005 REVIEW

'Rules of Origin'

In February 2005 Israel and the EU implemented a non-binding 'technical arrangement' whose purpose is to enable Member State customs to distinguish Israeli settlement products from those originating within Israel's internationally recognized borders for the purpose of denying preferential treatment (zero or reduced customs duty) to settlement products. The Commission considers that this arrangement should ensure the proper implementation of the Association Agreement and protection of the EC's customs revenues.⁹¹ However one Member State representative acknowledged that the technical arrangement can be circumvented easily and "that is undoubtedly happening."

At an Origin Committee meeting in late March 2007 the Commission and national customs agreed that the technical arrangement is functioning well and would no longer be reviewed every six months. Meanwhile Israel continues to misapply the Association Agreement to Israeli entities located in settlements and continues to issue certificates of origin for settlement products. The EU considers that the provision within the technical arrangement providing that the arrangement 'is without prejudice to the positions of the parties to the association agreement concerning the application of that agreement' protects it from the risk of acquiescing to Israel's application of their agreement extra-territorially.

However the EU does not appear to have addressed Israel's improper implementation of the Agreement's protocol of origin, i.e. Israel's continuing to issue certificates of origin under that agreement to such non-originating products. The EU should take the positive step of objecting formally to Israel's non-performance of an administrative obligation under their agreement in order to avoid the risk of acquiescence.

GoI 2006 and 2007 budget line items subsidizing settlement exports to the EU and possible violation of WTO rules and the EU Israel Association Agreement

The GoI appropriated state funds under its 2006 and 2007 budgets to subsidise the exports of settlement products to the EU in order to compensate affected Israeli operators for the collection of duty on such products by EU customs authorities.⁹² The Commission said that it is aware of the 2006 Israel state budget allocation, but that 'Further enquiries are required to establish whether payments have actually been made from these funds. The Commission will assess this mechanism and possible implications for EU-Israel trade relations if it has confirmation that it is operational.'⁹³

This wait-and-be-shown approach appears to typify the EU's response to information that Israel's implementation of agreements may be occurring in an internationally unlawful manner that can not be accepted under Community law. The Commission has informed NGOs that it would welcome receipt of information about Israeli settlement entity participation in EU cooperation instruments, effectively privatizing and outsourcing its role as 'guardian of The Treaty.' Presumably this is unusual. The EU contends that it would be improper for it to look for improper

⁹¹ For background information see the 2004 and 2005 EMHRN EU Israel reviews.

⁹² State of Israel; Budget Regulation 320408: 'indemnity to exporters (unofficial translation): Following the non-recognition by the EU of territories beyond the Green Line as part of the trade agreement between Israel and the EU, a total of NIS 31 million [in 2006] is allotted to the Israel Export Institute for indemnity to agricultural and industrial producers who export to the EU and who produce their products in territories beyond the Green Line.'

⁹³ Commission reply to MEP Question P-5212/06, 21 December 2006.

administration on the part of a partner country.⁹⁴ In the case at hand, the EU may also be considering the difficulties it might encounter should it attempt to obtain information on the subsidy from Israel. The EU has already complained of the difficulties it has encountered attempting to obtain information from Israel on the provision of state aid⁹⁵ despite the commitment to exchange information on state aid in the ENP EU-Israel Action Plan.⁹⁶

The Commission may also be hesitant to propose any action that would adversely affect Israel's interests to a 27-member Council that delivers a lowest common denominator position on sensitive matters. However, such reluctance on the part of the EU to confront violations by Israel of the technical and legal conditions in its agreements undermines the credibility of the EU's insistence that third countries must comply with their contractual obligations under the European Neighbourhood Policy.

The labeling of settlement goods in the EC market and consumers' right to know that they are not supporting illegal settlements through their purchases

The extensive appropriation of property not justified by military necessity and carried out unlawfully is a grave breach of the Fourth Geneva Convention, i.e. a war crime.⁹⁷ All state parties to the Fourth Geneva Convention are obligated to enact national legislation enabling the criminal prosecution of perpetrators of such grave breaches in their domestic courts.⁹⁸ For the purposes of applying domestic criminal and civil law, Member State courts should therefore recognise as a crime all acts of extensive appropriation of property not justified by military necessity and carried out unlawfully in a foreign territory by the occupying forces of a third state.

After ascertaining the actual legal situation in this regard in any Member State, several further questions may bear examination:

Does domestic law make any provision against commercing in goods or services the production of which has relied on the employment of factors of production that have been criminally acquired or have been acquired from the proceeds of crime?

Does domestic law assign citizens any obligation, responsibility or protected right to avoid purchasing or trading in such products when the above facts are known to them?

Does domestic law consider that when such information is in the possession of an operator offering such products for sale, the operator has an obligation to disclose it to a potential consumer or purchaser upon their demand?

EU consumer legislation, which delineates the basis and scope of the legitimate interests of consumers in knowing the real origin or provenance of products offered for sale should also be taken into consideration.

See Annex II for information on EC product labelling requirements in relation to Israeli settlement goods.

⁹⁴ Under the international law of treaties states must apply their agreements in 'good faith,' and should presume such good faith on the part of their treaty partners. See the Vienna Convention on the Law of Treaties, articles 26 and 31 *inter alia*.

⁹⁵ 'No real progress has yet been made as concerns increased transparency in the field of state aid.' 1507/2, p. 8.

⁹⁶ Item 2.3.4 of the EU Israel Action Plan: 'Exchange of information regarding state aid (including exploration of EU and Israeli definitions and agreement of common definition on which information-exchange will be based).'

⁹⁷ The Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War, Article 147.

⁹⁸ Ibid, Article 146

The Wall/Barrier

In its 9 July 2004 Advisory Opinion, the International Court of Justice 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.⁹⁹

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.'¹⁰⁰ This remains the Technical Assistance Office's position.

In the same Advisory Opinion the ICJ reminded states of their duty to 'respect and ensure respect' for the Fourth Geneva Convention,¹⁰¹ and called upon them to act in accordance with it. While its provisions providing for the exercise of universal jurisdiction by the state parties and their prosecution of perpetrators of grave breaches set out one concrete obligation that must be performed by all state parties to implement their general duty to ensure respect, other practical aspects of that obligation remain unspecified in the Convention. One of them, however, derives from the international criminalisation of grave breaches, the recognition of such international crimes as crimes under domestic law, and the preventative law enforcement responsibilities of states towards persons under their jurisdiction: When it becomes known to a state authority that its nationals or other persons under its jurisdiction are engaging in activities that could or would render them legally complicit in an international crime, that state authority has a responsibility to caution them.

The action taken by the Netherlands government after learning of a Netherlands' company's involvement in the construction of the wall/barrier demonstrates that it is effective to alert private actors to the possibility of incurring such criminal liability, but even more effective to alert the state authority to its own responsibility in such cases.

Upon ascertaining that there was '*if not a direct involvement, at least an indirect involvement*' of a Netherlands company in constructing the wall/barrier, and although '*[...] no judgement is made in the advisory opinion of the International Court of Justice with regard to the liability of states for compliance with international law by private parties,*' the Netherlands government insisted to the board members of the Lima Holding B.V. '*that they instruct the branch office in Tel Aviv to make no (more) equipment available for work on the barrier.*'¹⁰²

France has apparently chosen not to take similar action with regard to French companies participating in the Jerusalem light rail project which will connect Israeli settlements in unilaterally annexed East Jerusalem with West Jerusalem. While one French diplomat confirmed that the foreign ministry "always had strong reservations about French companies taking part in this project," France's ambassador to Israel attended the light rail tender's signing ceremony. A French consulate official in Jerusalem did stress that neither of the two French companies involved

⁹⁹ Paragraph 159. 'Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction [...]'

¹⁰⁰ LACC Secretariat Office, Wall Mitigation: Implications for Donors and Implementing Agencies Operating in Areas Affected by the Separation Barrier, 30 January 2005, p.25.

¹⁰¹ Article 1 common to the Four Geneva Conventions of 1949 states: "The High Contracting Parties shall respect and ensure respect for this Convention in all circumstances"

¹⁰² Reply of the Netherlands Minister of Foreign Affairs and the State Secretary for Economic Affairs to MP questions, DAM-534/06, 10 October 2006.

in the light rail project had benefited from any export credits or guarantees from Coface, the official French export guarantee department.¹⁰³

The European Parliament has asked the Commission to develop a strategy for promoting the application of all EU human rights guidelines by transnational corporations in the course of implementing the Commission's recent Communication on Corporate Social Responsibility.¹⁰⁴

¹⁰³ Rekacewicz, Philippe, 'The Politics of Urban Planning,' *Le Monde Diplomatique*, 8 February 2007

¹⁰⁴ A6-0158/2006, point 96.

VI- CONCLUSIONS

This Review draws two general conclusions which inform its specific recommendations:

1) The European Union's (EU) human rights-related obligations in law are considerably more extensive than the obligations set out in human rights law. They include, for example, the duty not to recognize any internationally unlawful act carried out in violation of a *jus cogens*¹⁰⁵ obligation as lawful, including unlawful acts of third states that violate human rights or prejudice their eventual exercise. The discipline imposed by such obligations on the ad hoc exercise of political discretion is, like preserving the EU's own rule of law, critical to the EU's success as a norm and value-based project.

Whether acting under CFSP or as the Community, 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*.

The EU should demonstrate that it must respect the constraints imposed by its own human rights-related obligations and rule of law on its pursuit of other political objectives. Values and normative policies are by their nature constraining. To maintain the EU's own steady political hands as an international actor it is sometimes necessary to tie them. In promoting respect for human rights and compliance with international humanitarian law, the first problem is not to decide what a partner country should or should not be doing, nor what the EU would like it to do. It is to decide what the EU can and can not permit itself to do, given its own obligations - starting with what partner country policies and legislation the EU can permit itself to accept as the basis for a partner country's cooperation with or participation in various Community policies, programmes and agencies.

2) 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. It requires engagement. Opportunities for cooperation, participation and integration are the EU's 'carrots' enabling such engagement.

These opportunities must inevitably come with conditions. When the EU does something together with a third country, Community law lays down what the EU can permit itself to do, what it must not do, and, therefore, what practice it can and cannot accept from the third country. Normally, the closer and deeper the engagement, the more extensively the third country must accommodate the EU's need to conduct it in accordance with Community law, and in accordance with applicable international law as the EU interprets and applies it.

If engagements do not break down, it is because the parties have established, and are applying some clear and stable system of *de facto* expectations regarding how each side will conduct themselves under the engagement and what each can therefore accept from the other. However, the international law that commonly binds and obligates them also functions by establishing a similar system of expectations. Like any law-abiding state, the EU is *expected* to appropriately restrict or break off an engagement when it recognizes that it is being willfully used by a partner state 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

¹⁰⁵ 'Compelling Law': Obligations arising under peremptory norms of general international law

international law. It is one reason for incorporating 'essential element' clauses in the EU's cooperation and association agreements with third countries.

In its relationship with Israel, the EU apparently does not apply such conditionality, and therefore does not always act as law-abiding states are expected to act. Rather, it has established *de facto* expectations of accommodation on Israel's part that are contrary to the expectations that must exist for the law to function. The result has often been negative socialisation. The harm done in such cases is compounded when the EU declares that it cannot accept certain internationally unlawful practices, like Israel's application of its domestic jurisdiction and treaty-making authority to occupied territories, while doing nothing to prevent Israel from carrying out such practices under its engagements with the EU.

The EU-Israel engagements examined in this Review have each entailed a measure of negative socialization.

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 represents 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 respect for human rights in third countries.

The time may have finally come for the EU institutions to reflect more carefully about how to promote compliance with IHL, and what interests are really at stake.

The EMHRN's 2004-05 EU Israel human rights review concluded:

The critical importance 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 concerted defection of states from their responsibilities under IHL is similarly overlooked. Such concerted defection, like the failure of a state itself, 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 organize '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.

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. Israel's use of closure measures was escalated throughout the oPt, paralyzing local administration and economic life, often rendering essential services unavailable to 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 Palestinian Authority, 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.

The international boycott of the PA aggravated these problems and helped Israel maintain its own non-compliance with its basic obligations as an occupying power. The EU did make major efforts to ease the siege, ensure the supply of essential goods, health care and subsistence allowances to much of the stricken Palestinian population, induce Israel to release the Palestinian revenues it was holding, and 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 the EU BAM in implementing Israeli decisions to close the Rafah border crossing also associated the EU with the siege, contrary to its own stated position and intent. Perceptions grew among ordinary people throughout the region that the same EU that champions the norms of the international order and its rule of law had defected from these commitments in the case of Israel and was now punishing the Palestinian public for electing a government that refused to be bound by those norms.

In considering its response to the election of Hamas, the EU does not appear to have taken account of the likelihood that the absence of any tangible demonstration of commitment by states to ensuring Israel's respect for IHL may have done more than anything else to destroy Palestinian political horizons, discredit the rules of the MEPP and promote the Hamas election victory.

Nor is it clear that the EU considered that the effective suspension and paralysis of the system of administration established under the Oslo Process was likely to further empower armed non-state actors operating outside the law as the only available and prospective sources of protection for large parts of the Palestinian public.

One of the objectives of IHL is to ensure that the essential protective services of a sovereign, including those that rely on the political use of force (justice and defence), continue to be provided to that sovereign's dependents at all times by some responsible state. The interests that states have in this, is not simply the welfare of the civilian populations stricken by war or placed under occupation. The failure of states to provide lawful and effective administration in the manner that states are uniquely capable of providing opens the way to non-state actors to take up these functions. The threats posed by the emergence of such non-state actors and their ability to command obedience and support from populations throughout the region are of great concern to the EU, and also to the human rights community.

These considerations should be considered relevant to developing the strategy and action plan mentioned in the EU's declaration for the June 2006 EU Israel Association Council meeting:

The EU is convinced that in order to be effective in the long run the response to terrorism must also address the factors contributing to radicalisation and recruitment into terrorism and has undertaken to develop a strategy and an action plan to address these factors, while striving to contribute to the protection and promotion of democracy, human rights and fundamental freedoms and the resolution of regional conflicts.¹⁰⁶

The Commission has identified strengthening respect for IHL as an 'important mission'. However, the EU does not appear to have indicated to Israel, or acknowledged to itself, that failures of the international community to provide effective protection against abusive state authorities promote the emergence of non-state actors that in a globalised world are increasingly likely to operate, follow rules, and define their goals and values in opposition to those of the state-based order itself.

¹⁰⁶ 10025/06, paragraph 28

[..]another important mission for the future is supporting international humanitarian law. Faced with massive violations and the apparently limited power of the international community to prevent this from happening, the protection of civilians during conflict is a matter of great concern.[..]

We need to focus on strengthening respect for international law, through public pressure and diplomacy; fighting impunity; and ensuring there are effective oversight mechanisms. The European Union has a good track record of support for international mechanisms, such as the International Criminal Court. We should build on that experience and turn our attention to this new challenge¹⁰⁷

Promoting respect for human rights, and compliance with IHL under the ENP

As has been argued in this review, 'ensuring there are effective oversight mechanisms' begins at home. It starts with determining what partner country policies and legislation the EU can permit itself to accept as the *de facto* basis for a partner country's cooperation with or participation in various Community policies, programmes and agencies. Demonstrating more diligence in protecting the integrity of its own cooperation and participation instruments would help EU become perceived as a 'true political actor' in the MEPP -- and not only a 'charitable funding source'¹⁰⁸.

As has also been argued in this Review, from both a human rights standpoint and a conflict resolution standpoint, the architecture of the MEPP is seriously flawed. Little progress can be expected while putting out the fires that those flaws have inevitably generated. The MEPP can not work if the two strategic and internationally unlawful pillars that Israel has erected within it are not removed. Israel's attempts to divest itself of its obligations as an occupying power should not be accommodated by the EU; nor should the EU continue to accommodate Israel's extra-territorial application of Israeli domestic legislation, political authority and international agreements in the oPt.

The Review describes several situations in which the EU is confronted with Israeli practices addressed to it, or involving it, that are carried out under one or another of these unlawful pillars. If cooperation must come at the expense of defending norms and applying conditions, the EU should consider more carefully the consequences to its human rights commitments, and to its crisis management and conflict prevention interests, of the balance it strikes between them under the EU-Israel relationship.

Recognizing the feasibility and necessity of bringing its pattern of accommodation to Israel's unlawful practices and policies to an end under the European Neighbourhood Policy, and on the other fronts covered in this Review, can transform the EU-Israel relationship and greatly strengthen the effectiveness of EU efforts to promote respect for human rights in Israel and in the territories it has occupied since 1967.

¹⁰⁷ SPEECH/06/636, p. 4

¹⁰⁸ From comments made by European Commissioner for Development and Humanitarian Aid Louis Michel during a conference entitled Moving Forward the Middle East Peace Process: Humanitarian Challenges, Jerusalem, 27 April 2007

Annex I Common Foreign and Security Policy: 'Carrots and Sticks' and 'Protection'

Five approaches are relied upon to influence the political conduct of third country authorities, including conduct that gives rise to serious violations of human rights.

'Carrots'

- **Development assistance and promotion of democracy** - help those wielding power when they are willing in principle to respect or act in support of human rights, but lack critical means or capacities; assist and, when necessary, help defend, elements of indigenous civil societies engaged in defending human rights, promoting institutional reform and empowering disenfranchised, disadvantaged and vulnerable groups to more fully exercise and defend their own rights.
- **Positive conditionality ('carrots')** - motivate those wielding power to implement institutional reforms that respect human rights. Make offers of 'privileged cooperation' (aid, trade, other) conditional on third country progress in carrying out agreed reforms.

'Sticks'

- **Negative conditionality** – dissuade those wielding power from choosing to contravene an existing human rights-related obligation by linking their non-performance of the obligation to some loss of privilege; withdraw (suspend) privileged cooperation.
- **Sanctions or 'restrictive measures'** - obstruct the commission of serious wrongful acts, weaken the ability of those wielding power to continue committing them, penalise the responsible parties' interests until they desist and comply with the obligations that bind them.

'Protection'

- repress predatory abuses of power, mitigate harm and alleviate suffering, impose penal justice and exact reparations.

All action pursuant to any of these approaches must be carried out in conformity with applicable Community law and international law. However, decisions to take such action depend on politically-informed judgments and political will.

Legal Bases in the Treaty Establishing the European Community (TEC) and the Treaty on European Union (TEU) for Measures aimed at influencing the political behavior of Third Countries

I. The 'Task' of the European Community

a) As set out in Article 2 of the TEC, the 'task' of the European Community is nothing less, and nothing more than:

...to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the

quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

b) Article 3 of the TEC sets out the areas of policy and executive responsibility that the Member States have turned over to the Community and its institutions in order to implement this task. The key to its success is the development of the single European market that operates according to a single set of policies, legislation and administrative norms and standards in each of these areas within the Community.

The only justification for creating additional Community legislation within each of these areas is therefore the tangible contribution it is expected to make to accomplishing the Community's appointed 'task'.

This includes the Community legislation establishing the legal basis for concluding external agreements with political authorities of third countries under such policies as the European Neighbourhood Policy (ENP)

II. Normative Obligations the Community Must Respect in External Actions

a) General Principle of European Community Law as set out by the European Court of Justice:
'The European Community shall respect international law in the exercise of its powers..

Apart from this general principle of Community law, only two provisions of the Treaty Establishing the European Community assign any political responsibility to the Community itself *vis à vis* its actions involving third countries.

b) Articles 170 and 181a of the Treaty Establishing the European Community (TEC) stipulate that Community external policies involving economic, financial and technical cooperation, as well as development cooperation, 'shall contribute to the objective of respecting human rights and fundamental freedoms.'

Article 181a (on Economic, Financial and Technical Cooperation Measures With Third Countries):
Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.

Article 177a (on Development Cooperation):

1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:
 - The sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them,
 - The smooth and gradual integration of the developing countries into the world economy,
 - The campaign against poverty in the developing countries.

2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

3. The Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

In addition, all Internal and External Policies and Actions must 'Respect Human Rights'

Article 6, paragraph 2 of the Treaty on European Union (TEU) specifically obligates the EU, including the European Community 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."

On matters concerning the interpretation of those fundamental rights and the application of international law to their implementation (including international human rights law and international humanitarian law), the EU institutions refer to the jurisprudence of the European Court of Human Rights - the authoritative interpreter of the European Convention.

III. Objectives of the Common Foreign and Security Policy (CFSP) - the EU's 'Second Pillar'

a) Article 11(1) Treaty of the European Union (TEU):

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
- to strengthen the security of the Union in all ways,
- to preserve peace and strengthen international security [...]
- to promote international cooperation,
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

In pursuit of these objectives, the general goals which common strategies, common positions and joint actions adopted under CFSP can address include:

- ❖ Promoting Respect for Human Rights and Democratic Principles in Third Countries
- ❖ Promoting Compliance with International Humanitarian Law - by Third States and by Non-State actors Operating in Third States
- ❖ Conflict Prevention and Crisis management

IV. Deciding What to Do and How to Do It Under CFSP

Article 12 TEU

The Union shall pursue the objectives set out in Article 11 by:

- defining the principles of and general guidelines for the common foreign and security policy,
- deciding on common strategies,
- adopting joint actions,
- adopting common positions,
- strengthening systematic cooperation between Member States in the conduct of policy.

Article 15 TEU: The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.

V. Kinds of Measures with Tangible Effects on Economic and Political Interests

that can be invoked and, if necessary, adopted under CFSP to influence third state policies and behaviour in support of these goals

Carrots'

Conditioning offers to conclude agreements conferring tangible benefits sought by a third state's government or body politic - e.g. financial aid, technical assistance, preferential trade, lending.

The new European Neighbourhood Policy multiplies the 'carrots' that the EU can decide to offer the 'Neighbourhood' countries, opening the door to participation in the Community's services and public procurement markets, as well as in virtually all Community programmes and agencies. Owing to Israel's highly developed economic, military, scientific and security capabilities, it is positioned to benefit more extensively than any other Neighbourhood country from such opportunities.

'Sticks'

Suspension of association, and cooperation and partnership, agreements with third states.

Article 2 of the Association Agreements concluded by the EU with the Mediterranean countries, including Israel, establishes the parties' 'respect for human rights and democratic principles' as an 'essential element' of each agreement - a condition on which the entire agreement rests. Each party therefore has the right to suspend an agreement on the grounds that the other has violated its 'essential element'.

Article 2 of the EU-Israel Association Agreement:

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.

More 'Sticks'

Sanctions ('restrictive measures') targeting individuals, entities, or third states.

The range of restrictive measures set out in Council Guidelines includes:

- diplomatic sanctions (expulsion of diplomats, severing of diplomatic ties, suspension of official visits);
- suspension of cooperation with a third country;
- boycotts of sport or cultural events;
- trade sanctions (general or specific trade sanctions, arms embargoes);
- financial sanctions (freezing of funds or economic resources, prohibition on financial transactions, restrictions on export credits or investment);
- flight bans;
- restrictions on admission into EU territory.

Legal Principles Governing the EU's Use of Sanctions

- The EU can only impose sanctions to contribute to further a CFSP objective, unless the sanctions have been mandated by the UNSC under Chapter VII of the UN Charter.
- The Council must unanimously adopt a 'common position' under Article 15 of the TEU mandating particular restrictive measures.
- The measures must be proportionate to their objective and should target as closely as possible the individuals and entities responsible for the undesirable policies and actions, minimising adverse effects on others.
- Their introduction and implementation must be in accordance with applicable laws, including international law.
- They must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy.

Legal Basis in Community Law for Launching Economic Sanctions

Article 301 TEC

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures.

Assignment of Authority to Conclude and Suspend Agreements

Article 300 TEC

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organizations [...]
2. [...] the conclusion of the agreements shall be decided on by the Council.
[...] the same procedures shall apply for a decision to suspend the application of an agreement.
[...]

Assignment of Authority to Impose a Partial or Complete Freeze on State-to-State and Commercial Transactions Targeting a Third Country

Article 60 TEC

1. [...] the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.
2. [...] as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments.

General Conditions

Protocol No 30 - on the application of the principles of subsidiarity and proportionality TEC (1997)

1. In exercising the powers conferred on it, each institution shall ensure... compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

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 ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

ANNEX II EC product labelling requirements and settlement products

The outlined information points below are set out to help clarify the matter of proper labelling of Israeli settlement products in Member State markets:

1) In the European Community product labelling is compulsory only for foodstuffs and then only in certain categories and/or under certain circumstances.

2) For foodstuffs, 'origin is mandatory information where it is clearly connected with one or more characteristics of a foodstuff, as is the case for non-processed fresh products, wine, or products with protected appellation of origin.'¹⁰⁹

3) In cases where foodstuff products are labelled, the relevant EC declaration states:¹¹⁰

Article 2

1. The labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly: (i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production; [..]

Article 3

1. In accordance with Articles 4 to 17 and subject to the exceptions contained therein, indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:[..]

(8) particulars of the place of origin or provenance where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff;[..]

4) Most product labelling is done at the discretion of the private bodies controlling procurement and distribution of the goods. Organic produce, for example, is usually subject to a 'traceability' protocol that includes designating origin and the name of the grower. For the most part these are private sector initiatives and are not subject to state regulatory control. Exceptions may exist when a federation or sector standard is accredited by a governmental authority, but the degree of oversight by that authority would need to be investigated to ascertain its responsibility to the citizen *vis à vis* the commercial initiative.

5) Exporters to the EC are not subject to the same traceability standards as EC producers.

6) Products originating in the Gaza Strip and in Areas A and B of the West Bank should be designated as 'Territories under the Palestinian Authority: West Bank and Gaza Strip.'¹¹¹

7) The 'technical arrangement' [see Review text] worked out between the EU and Israel to enable Member State customs to distinguish Israeli settlement products from products from sovereign Israel concerns the proper granting of preferential treatment. Technically it does not concern product labelling¹¹². Place origin within 'Israel' is listed on the Israeli origin certificate

¹⁰⁹ Commission's answer to MEP question H-0960/05, 15 November 2005

¹¹⁰ Directive 2000/13/E of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, Official Journal of the European Communities 6.5.2000 L 109/29

¹¹¹ Answer given by the Commission to MEP question E-0953/06, 24 April 2006.

¹¹² 'The fact whether the labelling of the relevant goods is correct is not at issue during this verification [of origin]. There does not exist a one-to-one relation between the above-described customs law origin and origin indications on labels.[..]' Answer to Question 5 by Ms Van Gennip, [Netherlands] State Secretary of Economic Affairs, also on behalf of Mr Bot, Minister of Foreign Affairs, Mr Zalm, Minister of Finance and Mr Veerman, Minister of Agriculture, Nature and

accompanying a shipment to the EU to enable national customs to award or deny preferential treatment to the goods in that shipment.¹¹³ The distinction is no longer evident once national customs process the paper work and clear the goods.

8) Most consumer protection regulation remains under Member State competence.

Civil society groups in at least Denmark, Germany, Ireland, the Netherlands, Sweden and the UK have asked their governments and individual retailers for clarification of labelling requirements for Israeli settlement products. Answers vary. After consulting with the Swedish Foreign Ministry, Sweden's state-owned alcohol retail monopoly first labelled Israeli wines from the Golan Heights as 'Israel - Occupied Syrian Territory.' After receiving complaints it categorized the wine as 'other origin' with 'Golan Heights Winery' between brackets.

Denmark's Veterinary and Food Administration asked Danish Customs for the settlement list compiled by the European Commission for the EC-Israel technical arrangement in order to improve its ability to scrutinize Israeli products. At first Danish Customs informed the Veterinary and Food Administration that the list contained information classified as confidential by the Commission and therefore could not be distributed. Danish Customs did later distribute the list. The Danish consumer ombudsman stated 'We share the opinion of the Danish Ministry of Foreign affairs whereby products that do not qualify for preferential treatment under the EU-Israel association agreement's clause on rules of origin cannot be labelled and marketed 'Made in Israel'.'

The Netherlands government is in agreement with the Danish consumer ombudsman.¹¹⁴ One Danish distributor's solution to this problem was to label known settlement foodstuffs as of West Bank origin. While this stopped the misrepresentation of settlement goods as originating within Israel's internationally-recognized borders, it also does not inform the consumer as to whether they are purchasing settlement products or not.

Food Quality to questions of the member Van Bommel (SP) on the labelling of Israeli settlement products, Ref 2060703760, 15 February 2007.

¹¹³ For example, preferential treatment would not be given to products declared as originating in Barkan, a settlement in the West Bank, but would be given to products declared as originating in Tel Aviv.

¹¹⁴ 'I am aware of the statement of the Danish ombudsman.... In any case, it is an established fact that the Golan Heights, the Gaza Strip and the West Bank are to be considered territory occupied by Israel based on international law. The Netherlands therefore does agree with the statement that products originating from these settlements cannot bear the origin brand 'Israel'.' Answer to Question 8, 2060703760.

Annex III Useful Websites

EMHRN - Euro-Mediterranean Human Rights Network (Copenhagen, Denmark)

www.euromedrights.net

Adalah – The Legal Center for Arab Minority Rights in Israel (Israel)

www.adalah.org

Public Committee Against Torture in Israel (PCATI, Israel)

www.stoptorture.org.il

Arab Association for Human Rights (Israel)

www.arabhra.org

B'Tselem – The Israeli Centre for Human Rights in the Occupied Territories (Israel)

www.btselem.org

Al-Haq (The West Bank, Palestine)

www.alhaq.org

Palestinian Centre for Human Rights (PCHR, Gaza, Palestine)

www.pchrgaza.org

Al Mezan Center for Human Rights (Gaza, Palestine)

www.mezan.org