



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



EU-ISRAEL RELATIONS: PROMOTING AND ENSURING RESPECT FOR INTERNATIONAL LAW





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LIST OF ACRONYMS USED

ACAA:	Agreement on Conformity Assessment and Acceptance
AFET:	Foreign Affairs Committee of the European Parliament
CFSP:	Common Foreign and Security Policy
CIP:	Competitiveness and Innovation Programme
CSOs:	Civil Society Organisations
EC:	European Commission
ECJ:	European Court of Justice
EEAS:	European External Action Service
EIB:	European Investment Bank
EIDHR:	European Instrument for Democracy and Human Rights
ENP:	European Neighbourhood Policy
ENPI:	European Neighbourhood Partnership Instrument
EP:	European Parliament
EU:	European Union
FAC:	Foreign Affairs Council
FP7:	VIIth Framework Programme for Research and Technological Development
GAERC:	General Affairs and External Relations Council
GATT:	General Agreement on Tariffs and Trade
GDP:	Gross Domestic Product
HRDs:	Human Rights Defenders
ICPC:	International Cooperation Partner Countries
IHL:	International Humanitarian Law
IHRL:	International Human Rights Law
INTA:	International Trade Committee of the European Parliament
MEPP:	Middle East Peace Process
MEP:	Member of the European Parliament
NGO:	Non-Governmental Organisation
OECD:	Organisation for Economic Cooperation and Development
OPT:	occupied Palestinian territory
PA:	Palestinian Authority
PLO:	Palestine Liberation Organisation
TFEU:	Treaty on the Functioning of the European Union
TEU:	Treaty on European Union
UN:	United Nations
WTO:	World Trade Organisation

E U - I S R A E L R E L A T I O N S
P R O M O T I N G A N D E N S U R I N G R E S P E C T F O R I N T E R N A T I O N A L L A W





FOREWORD

THE EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK (EMHRN)

The EMHRN is a network of more than 75 organisations, institutions, and individuals based in 28 countries in the Euro-Mediterranean region and who are committed to universal human rights. It was established in 1997 as a civil society response to the Euro-Mediterranean Partnership. The EMHRN considers human rights to be universal, indivisible, interdependent, interrelated and closely linked to the respect for democratic principles. It also believes that the Euro-Mediterranean Partnership and the European Neighbourhood Policy (ENP) have provided the region with instruments that, when efficiently implemented, can enhance the 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 issues relevant to the Barcelona process and the region, one of these being the working group on Palestine/Israel and the Palestinians. The objective of this working group is to advocate for the need to put human rights at the forefront of the peace process by raising awareness in Europe, Israel, the occupied Palestinian territories (OPT) and the Arab region as a whole about the EU's human rights commitments and policies vis-à-vis its relations with Israel and the Palestinian Authority (PA).

The current PIP 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);
- Committee for the Respect of Freedoms and Human Rights in Tunisia (Tunisia);
- Federation of Associations for the Defence and the Promotion of Human Rights (Spain);
- Greek Committee for International Democratic Solidarity (Greece);
- Palestinian Centre for Human Rights (Gaza, Palestine);
- Palestinian Human Rights Organisation (Lebanon);
- Public Committee Against Torture in Israel ((PCATI) Israel);
- Rehabilitation and Research Centre for Torture Victims (Denmark); and the
- Tunisian Association of Democratic Women (Tunisia).

APRODEV

APRODEV is the association of church related (Protestant, Anglican and Orthodox) development agencies based in Europe. Much of APRODEV's work on Israel and the OPT is conducted by members of the Middle-East Working Group (MEWG) which consists of the following organisations:

- Brot für die Welt (Germany);
- Christian Aid (UK & Ireland);
- Church of Sweden (Sweden);
- DanChurchAid (Denmark);
- Diakonia (Sweden);
- EED (Church Development Service, Germany);
- Finn Church Aid (Finland);
- HEKS (Swiss Interchurch Aid, Switzerland);
- ICCO (Interchurch Organisation for Development Cooperation, Netherlands)
- Kerkinactie (Netherlands); and
- Norwegian Church Aid (Norway).

APRODEV agencies seek to eradicate poverty in the world. Their work is based on Christian values of inclusiveness and equality. APRODEV agencies share a vision of peace and justice for all with their partners in Israel and the OPT. This begins with a respect for international law, and deepens with a rights-based recognition of the need for security for all. This includes the equitable sharing of regional resources to allow communities to develop and flourish. It also helps foster participatory and pluralistic systems of governance that allow all individuals to influence the decisions that affect their lives. Challenging injustice and protecting the marginalised in Israel and the OPT requires strengthening civil society, holding all duty-bearers to account and engaging with both policy makers and the general public.

APRODEV agencies support advocacy efforts, aimed at EU institutions, undertaken by the network's secretariat in Brussels. APRODEV agencies use advocacy, including civil society mobilisation activities, in their respective countries, as well as a wide variety of non-violent initiatives in coordination with a range of partner organisations in the Middle East and beyond.



EMHRN, APRODEV AND THE ISRAELI-PALESTINIAN CONFLICT

APRODEV and the EMHRN take the position that respect for international law, international humanitarian law (IHL) and international human rights law (IHRL) by all the parties to the Israeli-Palestinian conflict is a precondition for any just, viable and peaceful solution. Respect for IHL and IHRL is crucial as these frameworks define the rights of protected civilians under occupation and the responsibilities of the Occupying Power. IHL specifically intends to alleviate the effects of armed conflict on civilians in order to avoid unnecessary suffering and destruction. In this sense, its implementation may also improve the prospects for success of a post-conflict settlement.

In addition to monitoring Israeli violations, the EMHRN and its Palestinian member organisations closely monitor violations committed by the Palestinians. Both networks strongly condemn all IHRL and IHL violations committed in Israel and the OPT whether by Israel, the PA, Hamas or other Palestinian factions. All civilians are entitled to live free from fear or persecution regardless of their race, ethnicity or religion.

Many APRODEV agencies and all EMHRN members conduct development and human rights activities in Israel and the OPT. This proximity to the realities on the ground has resulted in these organisations concluding that Israel's policies in the OPT are the main obstacle to the fulfilment of the human rights of the Palestinian people and the realisation of their right to self-determination. Furthermore, these violations pose the primary barriers to economic development in the OPT, and, thus, contribute to poverty amongst the Palestinian population.¹

The goal of this report is to help bring an end to poverty and suffering in the OPT through the realisation of international law. APRODEV and EMHRN consider political pressure to be one of the most important means of confronting and changing policies that perpetuate poverty and human rights violations. This includes advocating for and facilitating a more active role for the EU and its Member States in promoting a just and lasting solution to the Israeli-Palestinian conflict based on respect for IHL and IHRL. It also entails recalling the EU's obligations vis-à-vis the violations of international law in the OPT, such as the duty to ensure respect for IHL in all circumstances.²

Based on these observations, this report focuses on the pressure that the EU can apply on Israel so that both parties can comply with their obligations under international law. This focus in no way absolves the Palestinians of their responsibility to comply with international law and cease any human rights violations.

¹ See, for instance: "Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the occupied Palestinian territory", United Nation Conference on Trade and Development, 15 July 2011, available at http://www.unctad.org/en/docs/tdb58d4_en.pdf. All the websites mentioned in the report were last visited on 1st October 2011.

² Common Article 1 of the Geneva Convention reiterated in the 1977 Protocols: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances"

BACKGROUND: EMHRN REPORTS ON EU-ISRAEL RELATIONS

The present report is the sixth in a series meant to promote and protect human rights by assessing the instruments deployed by the EU in its relations with Israel.³ This report is principally addressed to European decision-makers. In addition, like its predecessors, it aims to offer added value to ongoing human rights work being conducted by civil society organisations in Israel the OPT and in Europe by serving as a rights-based guide to EU-Israel relations. The present report may also be used proactively as a means of building understanding of EU human rights mechanisms and as a tool for advocacy initiatives.

The principal author of this report was Dr. Agnès Bertrand-Sanz, Middle East Policy Officer at APRODEV. Her work has benefited from the research assistance of Mariana Rocha and the report was drafted in close cooperation with Nathalie Stanus, EMHRN Project Coordinator on Palestine, Israel and the Palestinians. The report has also benefited from valuable contributions and comments from a joint steering committee composed of the following EMHRN and APRODEV member organisations:

- William Bell (Christian Aid, UK & Ireland); and
- Signe Fischer Smidt (DanChurchAid, Denmark).
- Søs Nissen (Rehabilitation and Research Centre for Torture Victims, Denmark);
- Maysa Zorob (Al-Haq, OPT);

The research, concluded in October 2011, draws from both primary and secondary sources, as well as information collected through interviews with relevant stakeholders.

3 N. Tocci, The EU and the Palestinian Arab Minority in Israel, Euro-Mediterranean Human Rights Network (2011); N. Tocci, Active but acquiescent: EU's response to the Israeli military offensive on the Gaza Strip, Euro-Mediterranean Human Rights Network (2009); S. Rockwell and C. Shamas, A Human Rights Review of the EU and Israel – Relating Commitments to Actions, 2003-2004, Euro-Mediterranean Human Rights Network (2004); S. Rockwell and C. Shamas, A Human Rights Review on the EU and Israel - Mainstreaming or Selectively Extinguishing of Human Rights?, Euro-Mediterranean Human Rights Network (2005); S. Rockwell and C. Shamas, Third Annual Review on Human Rights in EU-Israel Relations. Accommodating to the "Special" Case of Israel, 2005-2006, Euro-Mediterranean Human Rights Network (2007).



EXECUTIVE SUMMARY

The Israeli occupation of the OPT and the violations of international law associated with it, constitute major obstacles to a just and viable solution between Israelis and Palestinians, stability and security for all and economic development for Palestinians. Since the 1980s, the EU's diplomatic declarations have highlighted how respect for international law is a crucial component of the resolution of the conflict. However, its policy towards the conflict has been characterised by a growing gap between its legal commitments and vision of a peaceful Middle East - based on respect for international law and a two-State solution-, and the implementation of its policies on the ground through its bilateral relations with Israel and the PA.

The current deadlock in the Middle East Peace Process (MEPP), along with the revision of the ENP in the wake of the Arab Revolutions, offers an opportunity to the EU to revise its policy vis-à-vis the Israeli-Palestinian conflict and mainstream IHL and IHRL in its relations with both parties.

When it comes to EU-Israel relations, the report argues that the EU has not utilised all the means at its disposal to promote Israel's compliance with its international legal obligations, nor has it ensured that its contractual relations with Israel are in full compliance with its own obligations under international law. In this report, APRODEV and EMHRN analyse the possibilities for the EU to:

1. Encourage and, when necessary, exert pressure on Israel to respect IHRL and IHL; and
2. Ensure respect for international law in EU-Israel bilateral relations.

The first part of the report analyses Israel's gradual integration into the EU's Internal Market, despite its ongoing violations of international law in the OPT. This pattern shifted slightly in the 2008 EU-Israel upgrade negotiations. For the first time, the EU made a link between Israel's policy in the OPT vis-à-vis their commitment to the MEPP and progress in their bilateral relations with the EU. In 2009, following the Israeli military offensive in Gaza (December 2008 - January 2009) and lack of engagement by the Israeli government with peace negotiations, the EU froze the upgrade. As of 2011, the process remains on hold.

While APRODEV and EMHRN note this development, they still consider that these measures fall short of an approach to EU-Israel relations that is guided by principles of international law. In order to promote respect for international law in its bilateral relations with Israel, certain elements of EU policy contained in the ENP review - as initiated in 2010 and adopted in 2011 - ⁴ should also apply to EU-Israel relations.

⁴ "A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean", Commission Communication, 8 March 2011, COM (2011) 200 final, available at http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/20110308_en.pdf and "A New Response to a Changing Neighbourhood", Joint Communication from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, 25 May 2011, COM (2011) 303, available at http://ec.europa.eu/world/enp/pdf/com_11_303_en.pdf.

These direct the EU to:

1. Condition its relations with Israel on respect for IHRL and IHL;
2. Adopt a coherent and comprehensive reporting mechanism on IHRL and IHL violations;
3. Address Israeli human rights violations in all aspects of its dialogue with Israel; and
4. Protect Israeli and Palestinian civil society organisations and consult with them at all stages of development in EU-Israel relations.

The second part of the report addresses Israel's practise of expanding the scope and implementation of its cooperation instruments with the EU to illegal settlements in the occupied West Bank and to those areas officially annexed, namely East Jerusalem and the Golan Heights. The EU's international legal obligation not to recognise as lawful Israel's settlement and annexation policy compels it to adopt appropriate measures. The report shows that, in most cases, when the issue has been presented to the EU it has tried to adopt corrective measures. However, these have always fallen short of making sure that the illegal settlements and annexed territories do not benefit from cooperation with these instruments.

As such, while the EU maintains its position on the illegality of the settlements, it is missing an opportunity to take effective action. An example of this contradiction can be found in the way that the EU deals with violations of the EU-Israel Association Agreement through Israel's export of settlement products to the EU. The current compromise, based on a technical arrangement agreed with Israel, gives the EU the possibility of imposing custom duties on these products. However, it allows Israel to export settlement products as if they originated from Israel proper, i.e. in its 1967 borders. As EU customs officials cannot effectively check all Israeli products entering the market, not all settlement products are taxed. Similarly, the EU has been unable to fully exclude all Israeli entities based in, or operating from, settlements and annexed territories from participating in one of the EU's Community Programmes, the 7th Framework Programme for Research and Technological Development (FP7).

Based on the EU's obligation to comply with the duty of non-recognition, its position on the illegality of settlements and the need for consistency between diplomatic declaration and action, the EMHRN and APRODEV call on the EU to:

1. Include safeguard clauses in all EU-Israel cooperation agreements that allow only Israeli entities with headquarters, branches and subsidiaries registered and established in Israel proper and conducting activities over the same territory to participate in EU agencies and programmes;
2. Include relevant provisions in any agreement with Israel to explicitly limit the territorial application of the agreement to Israel proper; and
3. Amend the technical arrangement to ensure that Israel makes the distinction between products coming from Israel proper with those from settlements.



1. INTRODUCTION

The Israeli occupation of the OPT since 1967 and the violations of international law connected to it are the primary obstacles to a just and viable solution between Israelis and Palestinians, the long term stability and security for both people and the economic development so needed by the Palestinians. While Israel, as the Occupying Power, is the primary duty bearer of international humanitarian and human rights obligations vis-à-vis the Occupied Population, states which are not party to the conflict, such as EU Member States, also have obligations under international law. As High Contracting Parties to the Geneva Conventions of 1949, they have the obligation to respect and ensure respect for these Conventions in all circumstances.⁵ Furthermore, according to the international legal principles of "Third State responsibility", states have the obligation not to aid, assist or not to recognise as legal (hereinafter duty of non-recognition) and to cooperate to put an end to serious violations of IHRL and IHL, even if they do not directly affect them.⁶

⁵ Common Article 1 of the Geneva Convention reiterated in the 1977 Protocols.

⁶ This was enunciated in the Advisory Opinion of the International Court of Justice (ICJ) on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Rep. (2004), pp. 199-200 (para. 155-159). These obligations were reiterated by the UN International Law Commission in its works on State responsibility. See Article 41 of the International Law Commission Articles on States Responsibility: States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.



The EU has defined the promotion of human rights and international law as a significant objective in its external policy.⁷ The European Security Strategy, adopted in 2003 and reviewed in 2008, states that:

“(t)he development of a stronger international society, well functioning international institutions and a rule-based international order is our objective. *We are committed to upholding and developing international law.*” (Emphasis added.)⁸

According to its written pledges, the EU has committed itself to building relations with its partners based on the respect for human rights through the inclusion of “human rights clauses” in all its partnership, association and cooperation agreements with third countries. In addition, the human rights dimension of the ENP is established on the principle that the achievement of

⁷ Article 21 of the treaty of Lisbon states:

“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations”.

⁸ A Secure Europe in a Better World, European Security Strategy Document, 12 December 2003, Brussels, p. 9, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.



reforms and progress in the field of human rights and democracy should be conditions for the enhancement of cooperation and the extension of the privileges granted by the EU.⁹ The EU has developed a set of positive measures with its partners in order to uphold its commitment to promote human rights, such as dialogue, financial incentives to governments and financial support to CSOs. The EU Guidelines on promoting compliance with IHL also clearly indicate the EU's willingness to contribute to the promotion of and the compliance with IHL.¹⁰

Since the 1980s, the EU's diplomatic declarations have highlighted respect for international law as a crucial step towards resolving the Israeli-Palestinian conflict. Respect for international law and the call for a two-State solution have become the two pillars of the EU's position.¹¹ In its 2003 communication on "Reinvigorating Human Rights in the Mediterranean Area", the Commission stated that

"(t)here 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 central factor in the efforts to put the Middle-East peace process back on track".¹²

The EU's declarations and prioritisation of issues may not always have been consistent with international law.¹³ However, the EU's declared approach, combined with the general objectives of its external policy and its obligations, have created an expectation that the EU will respect and promote respect for international law in implementing its policy and agreements towards Israel and the Palestinians.

The EMHRN and APRODEV have consistently highlighted a growing gap between the EU's legal commitments and stated objectives in the region and the actual implementation of its policy vis-à-vis its bilateral relations with Israel and the Palestinians. While the EU has been actively pursuing a two-State solution, it has increasingly acquiesced to the IHRL and IHL violations committed by the parties.¹⁴ The bulk of the EU's activity has been directed at supporting diplomatic negotiations between the PA and Israel, as well as providing financial assistance to the former without taking any measures against the occupation.¹⁵ Meanwhile, the IHRL and IHL violations committed in the OPT are actually detrimental to the EU's stated objectives. They constitute key threats to development in the OPT and the viability of a future Palestinian State. They also prevent the fulfilment of the EU's aid objectives and the implementation of its contractual relations with the Palestinians, notably through the EU-Palestinian Liberation

9 "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", Commission Communication, 11 March 2003, COM (2003) 104 final, p. 9, available at http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf and "A new response to a changing Neighbourhood" (2011), Op. Cit.

10 European Union Guidelines on promoting compliance with international humanitarian law (IHL), Official Journal of the European Union, 23 December 2005, C327/4. The updated version was published in the Official Journal of the European Union 15.12.2009 C 303/12, available at http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QC8308123ENC.pdf.

11 N. Tocci, (2009), Op. Cit.

12 Commission Communication, 21 May 2003, COM (2003) 294 final, p. 5. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0294:FIN:EN:PDF>

13 EU's Position on the Middle East Process – Key Inconsistencies (jointly signed by 15 NGOs including EMHRN and several APRODEV members), 24 September 2009, available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/JBRN-7W7HA9?OpenDocument>.

14 See N. Tocci (2009) and S. Rockwell and C. Shamas (2004, 2005 and 2007), Op. Cit.

15 N. Tocci, (2009), *Ibid.*, p. 75.

Organisation (PLO) Interim Association Agreement.¹⁶

The revision of the European Neighbourhood Policy (ENP), following the Arab revolutions, and the stagnation of the Middle-East peace process provide the EU with an opportunity to revise its policy so that its declared principles and legal commitments are reconciled with its practice on the ground. This new policy requires proper mainstreaming of international law in EU-Israel relations in order for the EU to live up to its commitment to promote and its obligation to ensure respect for the law in all its external and bilateral relations.

This report highlights two key areas where the EU should ensure a proper mainstreaming of international law in its bilateral relations with Israel. The first part of the report analyses Israel's progressive integration into the EU's Internal Market and participation in Community Programmes and agencies, despite its ongoing violations of IHRL and IHL in the OPT. The report pays particular attention to the EU's decision in 2008 to establish a connection between its bilateral relations with Israel and the latter's conduct in the OPT in accordance with its obligations and objectives in the region. The report states that this connection is not firmly founded on the respect for IHRL and IHL. Based on the new ENP, the report offers ways for the EU to effectively promote respect by Israel of its international law obligations through its bilateral relations with Israel.

The second part of the report examines the irregularities in the implementation of EU-Israel cooperation mechanisms that have allowed Israel's illegal settlements to benefit from agreements. The report challenges the adequacy of the measures adopted by the EU to address these irregularities and provides specific recommendations to ensure EU respect for international law in its relations with Israel.

¹⁶ A. Bertrand-Sanz, *The Conflict and EU's Assistance to the Palestinians*, in *European Involvement in the Arab-Israeli Conflict* ed. by E. Bulut, Chaillot Papers, European Union Institute for Security Studies, (2010), available at http://www.iss.europa.eu/uploads/media/cp124-European_Involvement_in_the_Arab-Israeli_Conflict.pdf.



2. EU-ISRAEL RELATIONS: PROMOTING RESPECT FOR INTERNATIONAL LAW

Due to historical and economic circumstances, the EU and Israel have always been close partners. Particularly with the launch of the ENP, Israel has been able to integrate into the Internal Market at a faster rate than its less-economically developed neighbours. This section describes the development of EU-Israel bilateral relations, despite Israel's on-going violations of IHL and IHRL.¹⁷ It puts a particular emphasis on the development of these relations since 2008, the discussions surrounding the upgrading of these relations and its link to the MEPP.

2.1. THE INTEGRATION OF ISRAEL INTO THE EU INTERNAL MARKET

Israel has demonstrated an interest in the European Community since its creation in 1957. For Israel, the EU market is not only the largest and the most lucrative, but is also the closest. Due to the boycott by its surrounding Arab neighbours, Israel needs to integrate into a market beyond the Middle East. In 2010, the EU was Israel's largest trading partner with a total trade amounting to €25.6 billion in goods (excluding diamonds). In the same year, the EU was the number one

¹⁷ The IHL and IHRL violations in the Israeli-Palestinian conflict have been documented extensively by human rights organisations from the OPT, Israel, Western countries and UN bodies, among them the Special Rapporteur of the Commission of Human Rights on the Situation of Human Rights in the OPT since 1967. For a sample of the documentation of these violations, see Al Haq, www.alhaq.org; Al-Mezan Centre for Human Rights, www.mezan.org; the Palestinian Centre for human rights, www.pchrgaza.org; Adalah, www.adalah.org; B'Tselem, www.btselem.org; the Public Committee Against Torture in Israel, www.stoptorture.org.il, Human Rights Watch, www.hrw.org; Amnesty International, www.amnesty.org.



destination for Israeli imports and number two for exports. As for the EU, Israel ranks 26th in terms of imports and 23rd in for exports.¹⁸

The efforts which Israel devoted to strengthen its relations with the European Community led to the conclusion of an agreement in 1964 that lowered customs duties on certain agricultural products.¹⁹ By 1977, the European Community committed itself to the gradual elimination of custom duties on manufactured products from Israel.

In 1994, the European Council at Essen stated that "Israel should enjoy (...) a special status in its relations with the EU on the basis of reciprocity and common interest".²⁰ One year later, in the context of the Euro-Mediterranean Partnership, the EU and Israel signed an Association Agreement,²¹ the objectives of which are the promotion of free-trade, political dialogue and economic cooperation. Article 2 of the Agreement establishes that the relations between

¹⁸ Statistics from DG TRADE, available at: http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113402.pdf.

¹⁹ This agreement was upgraded in 1970 and, in 1975; Israel and the European commission (EC) signed an additional, much broader, agreement that lowered duties by 70 to 90 percent on an extensive range of agricultural products. H. Sachar, *Israel and Europe. An Appraisal in History*, (New York 1999), p. 213.

²⁰ See European Council Meeting of the 9th and 10th December 1994 in Essen, Presidency Conclusions, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00300-1.EN4.htm.

²¹ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, Official Journal of the European Union, 21 June 2000, L 147, p. 3 (entry into force 1 June 2000).



the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the universal declaration on human rights. Moreover, a “non-execution clause”, Article 79, has been included, which states that either party may take appropriate measures to redress the other’s failure to fulfil an obligation under the Agreement. Although, in selecting these measures, priority should be given to those which least disturb the Agreement’s functioning.

Since 1996, Israel has become a full participant in the EU Research and Development Framework Programme. Israel pays significant funds into this programme, which in turn allows their institutes and companies full access to EU research and development funding. So far, Israel has been associated to the IVth, Vth, VIth and VIIth Framework Programmes.²²

Up until 2004, the framework of relations with the EU had revolved essentially around trade in agricultural goods, manufactured products and research and development cooperation. Israel welcomed the EU-Israel Action Plan²³, agreed upon in December 2004 in the framework of the ENP, which seemed to offer a real opportunity to broaden the scope and intensity of EU-Israel relations, as well as the promise of eventually implementing the pledges made at Essen. The objectives of the Action Plan were built upon the EU-Israel Association Agreement and established a work plan for future cooperation.²⁴ Ten technical subcommittees were established under the authority of the EU-Israel Association Committee to discuss EU-Israel cooperation in each of the sectors laid out in the Association Agreement and Action Plan.²⁵

The objective of the ENP is to offer the EU’s neighbouring partner countries the opportunity to gain access to the EU’s Internal Market. Gradual integration into the Internal Market is supposed to be implemented through the involvement in Community programmes and agencies and the signature of further agreements (see below). Being the most developed country of the ENP, a priori, Israel is in a good position to make effective use of the different instruments made available by this policy.²⁶ However, this integration is subject to the demonstration of

22 ‘Framework programmes’ (FPs) are the main financial tools through which the European Union supports research and development activities covering almost all scientific disciplines. FPs are proposed by the European Commission and adopted by Council and the European Parliament following a co-decision procedure. The VIIth FP runs until 2013. See http://cordis.europa.eu/fp7/faq_en.html.

23 The EU-Israel Action Plan is available at http://ec.europa.eu/world/enp/pdf/action_plans/israel_enp_ap_final_en.pdf. It was supposed to last for three years.

24 The Action Plan is a political, rather than legal, document. The Association Agreement remains the legal basis for the EU-Israel bilateral relations. The Action Plan is not an international agreement between the EU and Israel and, as such, its implementation is not governed by the provision of the Vienna Convention on the Laws of Treaties of 1969 and 1986. There are no legal sanctions for failure to implement commitments enshrined in the ENP Action Plans. The Action Plan has been approved by Israel and the 27 Member States. The adoption of an Action Plan does not require the consent of the EP, nor of any of the Member States Parliaments. See also FAQ, “What is the legal status of the Action Plans?”, available at http://ec.europa.eu/world/enp/faq_en.htm#3.5.

25 For the list of the subcommittees see: <http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlan g=en&lng1=en,fr&lng2=cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,sk,sl,sv,&val=408182:cs&page>.

26 Israel has the highest per capita GDP at EUR 21,638,1, with Lebanon in second with EUR 7,576,5 GDP per capita in 2010. Figures available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113402.pdf and http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113412.pdf.

a commitment to respect democratic principles and human rights²⁷, in addition to concrete progress in the implementation of political, economic and institutional reforms – including the alignment of legislation with the *acquis communautaire*.²⁸

With the ENP, the political dialogue with all Southern Mediterranean countries has been reinforced through the establishment of subcommittees on human rights. However, Israel considers itself to be a functioning democracy already and has refused to establish a fully-fledged human rights subcommittee. They instead established an informal ad hoc human rights working group, as well as one on international organisations. Based on a 'gentlemen's agreement' between the EU and Israel, the human rights working group only addresses violations committed in Israel proper, i.e. in its 1967 borders. A subcommittee on political dialogue and cooperation has also been established. During the meetings of this subcommittee, among many other issues, the EU discusses Israeli policies in the OPT. Israeli policies in the OPT are also addressed in the Association Council meeting, the highest forum of EU-Israel relations.

2.1.1. Israel's participation in Community and EU Programmes

Community programmes primarily serve as funding mechanisms to support civil society, research or entrepreneurial projects. ENP countries can participate in some Community programmes that are, in principle, open only to EU Member States.²⁹ Participation is subject to the signature of a protocol attached to the Association Agreement by the Council and the ENP country that is submitted to the EP for a vote of consent.³⁰ On top of that, for an ENP country to participate in any specific Community Programme, its Association Agreement with the EU has to include clauses relevant to the field of the programme in question.

To date, Israel, Morocco, Ukraine and Moldova have concluded protocols on participation in Community programmes. However, only the protocols with Ukraine and Moldova have entered into force following the vote of consent of the EP. Israel's protocol was signed in April 2008, but was then blocked in December of 2008 for political reasons outlined below.³¹

In spite of the fact that Israel is formally blocked from accessing Community programmes, it does participate in two. Even before the signature of the Protocol on Community programmes in November 2007, Israel had already been granted membership in the Competitiveness and

27 The Action Plan states that: "(t)he European Union and Israel share the common values of democracy, respect for human rights and the rule of law and basic freedoms". Furthermore, both parties are to commit to "working together to promote the shared values of democracy, rule of law and respect for human rights and international humanitarian law". EU-Israel Action Plan, European Commission, Brussels, 9 December 2004, available at http://ec.europa.eu/world/enp/pdf/action_plans/israel_enp_ap_final_en.pdf.

28 "Wider Europe (2003), Op. Cit.. "Acquis communautaire" is a French term meaning, essentially, 'the EU as it is' – in other words, the rights and obligations that EU countries share. The 'acquis' includes all the EU's treaties and laws, declarations and resolutions, international agreements on EU affairs and the judgments given by the Court of Justice. See http://europa.eu/abc/eurojargon/index_en.htm.

29 A legislation summary pertaining to ENP participation in programmes and agencies can be found at http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r15015_en.htm.

30 For some specific programmes (such as Youth in Action, civil protection and the FP7), in addition to the protocol attached to the Association Agreement, certain Community programs require an additional agreement, protocol or memorandum of understanding to allow the third country to participate.

31 See below p. 30.



Innovation Programme (CIP), a programme potentially open to ENP countries.³² Also, due to its research capacities, Israel has participated in the IVth, Vth and VIth and now VIIth Framework Programme for Research and Technological Development.³³ This cooperation is based on a specific agreement signed between the EU and Israel.³⁴ Israel does not participate in the same ways as other ENP countries. Indeed, Israel was the first ENP country to be associated with the EU Research and Development Framework Programme all the way back in 1996. This has meant that organisations based in Israel may apply for funding on the same terms as those based in EU Member States. All other ENP countries participate with the status of International Cooperation Partner Countries (ICPC).³⁵ Israel, like other EU Member States, contributes to the programme's resources in proportion to its gross domestic product. Meanwhile, other ENP countries only contribute according to the actual level of participation of their organisations in joint research projects.

The comparatively steadier and larger contribution pays off. It allows Israel to secure considerable funding for its already highly developed research sector under the FP7. Israel is set to contribute over 440 million euros to the overall budget of the FP7 which amounts to 50 billion euros.³⁶ In 2010, Israel contributed as much as 65,7 million euros. In that same year, the total FP7 contribution to Israeli research entities through signed grant agreements was 67,8 million euros, plus an additional 4,1 million euros dedicated to the Marie Curie organisation. In 2010, the total value of FP7 project proposals involving Israeli participants was 477,3 million euros.³⁷

Israel also participates in several EU programmes open only to non-EU countries whose participation is not dependant on the ratification by the EP of the protocol on Community programmes mentioned above (e.g., the Cross-Border Cooperation Programme). Israel also participates in several Euro-Mediterranean programmes like the Euro-Med Youth Action Programme, Euro-Med Audiovisual Programme, UNIMED, ArchiMedes and Euromed Heritage. Israeli academic institutions take part in two higher educational programmes designed to enhance academic cooperation between EU Member States and the rest of the world: Erasmus Mundus and Tempus IV.

³² The CIP promotes innovation, entrepreneurship and growth of small and medium sized businesses. Israel does not take part in the entirety of the programme. It participates to the entrepreneurship and innovation pillar of the CIP and not to the ICT (Information and Communication Technologies) Policy Support, and Intelligent Energy Europe Programmes. More information is available at <http://ec.europa.eu/cip/>.

³³ For the legal basis of FP7 and other relevant documents, see the information available at http://cordis.europa.eu/fp7/find-doc_en.html.

³⁴ Israel's association with the FP7 has a legal basis, namely the 4th EU-Israel Agreement for Scientific and Technical Cooperation of 2007. See Agreement on scientific and technical cooperation between the European Community and the State of Israel - Final Act - Joint Declaration, Official Journal of the European Union, L 220, 25 August 2007, p. 5.

³⁵ The main difference is that for ICPCs, organisations from four different countries have to be involved in each project and one of them has to be an associate or Member State; whereas for associate countries, only three countries have to be involved, and technically, they could be three associate countries without Member State participation.

³⁶ See the information on scientific cooperation published on the website of the EU delegation to Israel available at http://eeas.europa.eu/delegations/israel/eu_israel/scientific_cooperation/scientific_cooperation/index_en.htm.

³⁷ Written answer given by Commissioner Füle to a question asked by Diana Wallis (MEP), 16 February 2011, P001402/2011 available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001402&language=EN>.

In addition, Israeli CSOs benefit from the European Instrument for Democracy and Human Rights (EIDHR),³⁸ and the «Partnership for Peace» Programme.³⁹

2.1.2. Israel's participation in EU agencies

EU agencies are decentralised bodies established to accomplish specific tasks, such as developing scientific and technical knowledge in certain fields or bringing together interest groups to facilitate dialogue at the European and international levels. In principle, the participation of an ENP partner in an EU agency is subject to the signature of an agreement between the parties. In principle, this agreement is subject to the consent procedure of the EP.

Since 2004, Israel has participated in the agency GALILEO.⁴⁰ As of 2011, an agreement between Israel and Europol was in the process of being negotiated.⁴¹ However, the Europol-Israeli cooperation agreement will not be subject to the assent procedure of the EP as an approval was already granted by the EC in 2009, prior to the Lisbon Treaty entering into force.⁴²

2.1.3. The signing of agreements with Israel

The signing of further agreements is another means of deepening integration into the EU Internal Market. Some of these agreements may take the form of protocols to the Association Agreement concerning the implementation of a specific provision. In most cases, these agreements require a consent vote in the EP.⁴³

Currently, Israel and the EU are negotiating a protocol allowing the liberalisation of services, focused primarily on telecommunication and financial services, as well as a comprehensive EU-Israel Euro-Mediterranean Civil Aviation Agreement.⁴⁴ A protocol on Conformity Assessment

38 EIDHR is an instrument which provides financial assistance for the promotion of democracy and human rights to civil society organization rather than to or through State authorities. Israeli CSOs receive about 1.2 million euros per year out of the overall EIDHR annual budget which is of €100-140 million per year. Ten projects were granted funding under the EIDHR. More information available at http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm.

39 The Partnership for Peace is a programme which supports local and international civil society initiatives that promote peace, tolerance and non violence in the Middle East. For more information: http://www.enpi-info.eu/mainmed.php?id=11&id_type=10

40 Galileo is a European system of navigation by satellite which is managed by the European Global Navigation Satellite Systems Supervisory Authority. More information available at http://ec.europa.eu/enterprise/policies/satnav/galileo/index_en.htm

41 Europol is the EU law enforcement agency facilitating the exchange of criminal intelligence between police, customs and security services of the Member States of the EU in order to prevent and combat all forms of serious international crime and terrorism. Since 2000, Europol has entered into cooperation agreements with third States and non-EU related bodies. For more information, see www.europol.europa.eu

42 The EUROPOL-Israeli cooperation agreement will not fall within the ordinary legislative procedure, requiring the Parliament's consent before its final adoption by the Council. On November 2009, a Council decision established the list of third countries with which Europol shall conclude agreements. This decision presents a mandate for negotiation and as it was put forth before the Lisbon treaty entered into force, the procedure for adoption will not entail the consent of the EP and will enter into force upon signature. See Council Decision 2009/935/JHA of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements, 11 December 2009, Official Journal of the European Union, L 325/12.

43 The list of all agreements the EU has already concluded with Israel is available at <http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=2135&countryName=Israel>.

44 A similar agreement was signed with Morocco. Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part, Official Journal of the European Union, 29 December 2006, L 386/57.



and Acceptance of Industry Products (ACAA) was signed in May 2010, but is still awaiting the consent of the EP.⁴⁵ The protocol establishes the mutual recognition of the results of conformity assessments for industrial products. The 2009 ENP progress report for Israel states that “when it (the ACAA) enters into force, this will represent Israel’s first entry into the Single Market” - ⁴⁶ the reason being that, for the first time, the checks performed by the relevant Israeli administrative authorities would have the same value as those administrative acts performed by EU authorities.

Apart from Israel’s early association with the EU Research Framework Programs, there is little in the nature and content of EU-Israel cooperation that can lead one to say that Israel benefits from a “special status”. It is true that, over the years, Israel has developed more ties with the EU compared to other Southern neighbours; but this was mainly due to its more advanced economic development and done within the framework of the Euro-Mediterranean Partnership and ENP.

Thus far, these bilateral relations have developed independently of EU policy toward the Israeli-Palestinian conflict and with total disregard to Israel’s ongoing violations of IHRL and IHL. ⁴⁷ Israel’s request to upgrade its relations allows the EU to revise its policy to address this absence.

2.2. THE UPGRADING OF EU-ISRAEL RELATIONS AND THE LINK TO THE MEPP

In January 2007, Israel submitted its request to upgrade its relation with the EU by recalling the Essen declaration. The EU responded positively and, in March 2007, a “Reflection Group” was established in order to mutually consider ways to upgrade the relationships.⁴⁸

2.2.1. Ambiguous content and loose criteria surrounding the EU-Israel upgrade

On 16 June 2008, at the EU-Israel Association Council, the EU officially announced its intention to upgrade its relationship with Israel. ⁴⁹ The final declaration of the Association Council was subject to intense debate as to whether the EU should connect the upgrading more directly to the MEPP, or whether it should move forward, regardless of the political developments in Israel and the OPT. In the end, the final draft presented abstract connections to the MEPP and a two-State solution:

“The process of developing a closer EU-Israeli partnership needs to be, and to be seen, in the context of a broad range of our common interests and objectives which notably include the resolution of the Israeli-Palestinian conflict through the implementation of the Two-State solution” (emphasis added).⁵⁰

⁴⁵ See below p. 30.

⁴⁶ The annual Progress Reports published by the EEAS analyse the implementation by the Neighbourhood Country of its Action Plan. Implementation of the ENP in 2009: Progress Report Israel, COM (2010) final, available at http://ec.europa.eu/world/enp/pdf/progress2010/sec10_520_en.pdf.

⁴⁷ See previous EMHRN reports as quoted in note 3 above and N. Tocci, *The Widening Gap between Rhetoric and Reality in EU Policy towards the Israeli-Palestinian Conflict* (Centre for European Policy Studies), (Brussels 2005).

⁴⁸ S. Pardo and J. Peters, *Uneasy Neighbours: Israel and the European Union*, (Plymouth, 2010), p. 66.

⁴⁹ 8th EU-Israel Association Council Declaration, Luxembourg, 16 June 2008.

⁵⁰ *Ibid.* It is still important to recall that the implementation of a connection between the MEPP and the development of cooperation with Israel had one precedent. In 1996, both French and Belgian

During the meeting of the General Affairs and External Relations Council (GAERC - now Foreign Affairs Council) on 8 December 2008, the decision to grant the upgrade and to maintain a loose connection with the MEPP and the situation on the ground was confirmed.⁵¹ An annex to the declaration, inserted at the initiative of the French Presidency, outlined several guidelines for the strengthening of political dialogue structures with Israel.⁵² Among other things, the guidelines listed various political and security bodies at the Council level in which Israel could participate on an ad hoc basis and suggested holding an annual Summit. They also foresaw the creation of a sub-committee on human rights to replace the informal working group and the invitation to align to some Common Foreign and Security Policy decisions of the EU.⁵³

The guidelines only offer an indication as to what the political aspects of the upgrade would be. It doesn't give any indication on how Israel will be further integrated into the European Internal Market, agencies and Community Programmes. These details of the upgrade will be contained in a new Action Plan.

Israel's demand for an upgrade was followed by similar demands from other Southern partners (see box below). It seems that, since advanced status and upgrading do not correspond to any status previously offered by the EU to a non-Member State in accordance with the provision of the treaties, upgrading is a process 'in the making', and tailored according to the demands and socio-economic capacities of the ENP countries. As such, it is difficult to assess how it amounts to "more than association" and how it goes beyond the objectives set in the current Action Plans. The political elements entailed by the advanced status like for instance the holding of an annual summit could then differentiate the status of the upgrade or the advanced status, a privilege never granted before to any Southern Mediterranean ENP country.

UPGRADES AND ADVANCED STATUS IN THE SOUTHERN NEIGHBOURHOOD

At almost the same time as Israel's request for the upgrade in 2007, Morocco put forth a request to advance its own status vis-à-vis the EU. An EU-Egypt working group was created in July 2009 to discuss an upgrade, but the process stalled in 2010. An EU-Tunisia working group, also focused on advancing status, began work in September 2010, but was disrupted by the revolution in December 2010. In September 2011, the EU and Tunisia re-opened the discussion on a new EU-Tunisia Action Plan. On 10 December 2008, at the 7th EU-Jordan Association Council, the

parliaments delayed the ratification of the Association Agreement because they wished to make it conditional upon progress in the furtherance of the Peace Process and, in this respect, were not satisfied with the policy of the government headed by Benyamin Netanyahu. They saw the election of the Labour Prime Minister Ehud Barak in 1999 as a signal that the Peace Process would be back on track. R. Miller, "Troubled Neighbours: The EU and Israel" (2006) 12 Israel affairs 642-664, p. 657.

51 Council conclusions, "Strengthening of the European Union's bilateral relations with its Mediterranean partners", 2915th External Relations Council meeting Brussels, 8 and 9 December 2008, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/104571.pdf>.

52 Bernard Kouchner and Tzipi Livni, the then French and Israeli Minister of Foreign Affairs, negotiated an upgrade for Israel in exchange with Israel's participation in the Union for the Mediterranean and acceptance of the Arab League in the project. Interview with European official. March 2011.

53 The "alignment to Common Foreign and Security Policy declarations" (CFSP) consists in inviting a partner country on a case by case basis to bring its foreign policies in line with the ones contained in the declarations, demarches and common positions adopted by the EU in the context of the CFSP. This measure was initially offered to Eastern partners. See the Armenia, Azerbaijan, Georgia, Republic of Moldova and Ukraine Action Plans available at http://ec.europa.eu/world/enp/documents_en.htm.



EU promised an upgrade of its relations with Jordan. In October of 2010, a new Action Plan was agreed upon that gave concrete substance to the “advanced status”. Thus far, this document does not appear to be publicly available.

Morocco is the only Mediterranean country for which the details of its advanced status are available. Morocco and the EU jointly approved the advanced status Roadmap appended to the 2008 Association Council Declaration.⁵⁴ On the institutional side, the Roadmap foresees (as in the case of Israel) regular ad hoc summits, the creation of a joint parliamentary committee and participation in European Security and Defence Policy missions. It also foresees the accession to Council of Europe Conventions (for States that are not currently members), twinning at municipal levels (the Action Plan provides only for national level) and the participation of Moroccan regions in the Committee of the Regions.

Regarding integration into the EU Internal Market, the Roadmap envisages the harmonisation of legislation, including the “progressive adoption of the acquis”, and the participation in several agencies and programmes. It also foresees the signature of a strengthened free trade agreement in coming years.

It is important to note that the 2008 document was a Roadmap towards advanced status, implying that this status would be achieved only once the roadmap is implemented. Several of the proposals in the EU-Morocco Roadmap are aimed at «accelerating» existing schemes. Most of the «enhanced» forms of integration – accession to programmes and European agencies or the harmonisation of legislation – are already provided for in the Association Agreements and Action Plan. Ambiguously, Moroccans and Europeans speak of advanced status as a fait accompli, yet there has been nothing as concrete as the adoption of an agreement or an Action Plan. The negotiations on a new Action Plan have been on-going since 2009.

2.2.2. The “freezing” of the upgrade and the cooling of EU-Israel relations

The decision to upgrade EU-Israel relations was expected to become official at the Association Council meeting of 15 June 2009. The EC was preparing a new Action Plan for the occasion that would detail the content of the upgrade on a technical and political level. However, two developments arose to challenge the official implementation of the upgrade and the adoption of a new Action Plan: the Israeli offensive on the Gaza Strip from December 2008 to January 2009 and the lack of guarantees offered by the newly elected Israeli government of Benjamin Netanyahu to pursue substantive negotiations with the Palestinians.

⁵⁴ The 6th EU-Morocco Association Council of 23 July 2007 charged an ad hoc working group with assessing the possibilities for strengthened relations. On 13 October 2008, the 7th Association Council adopted the working group conclusions as a roadmap to an advanced status. The joint declaration with the Roadmap can be read at: www.europarl.europa.eu/meetdocs/2009_2014/documents/dmag/dv/200/200912/20091201_eustatementmorocco_fr.pdf. The Moroccan government promotes its achievement on a well-resourced website: www.statut-avance.com.

Those developments go along with the consolidation of the EU's position on the Israeli-Palestinian conflict over the past two years.

THE CONSOLIDATION OF THE COUNCIL AND EP'S POSITION SINCE 2009

• From the Council of the EU

Several examples illustrate the solidification of the EU's tone in the past two years regarding its position and declaratory policy vis-à-vis Israel and the Israeli-Palestinian conflict.⁵⁵

The December 2009 declaration of the Foreign Affairs Council explicitly and firmly reiterated the EU's position on several aspects of IHRL and IHL vis-a-vis the Israeli-Palestinian conflict.⁵⁶ For instance, it declared that "settlements, the separation barrier, where built on occupied land, (the) demolition of homes and evictions are illegal under international law (and) constitute an obstacle to peace (that) threatens to make a Two-State solution impossible."⁵⁷ The Foreign Affairs Council articulated a similar position in December 2010.⁵⁸

Furthermore, for the first time, an internal report of the EU Heads of Mission in East-Jerusalem⁵⁹ was discussed in Brussels in early 2010 by the 27 Member States. The leaked ten-page document makes a clear reference to the Israeli government's intention to make the annexation of East Jerusalem into a permanent reality. In February 2011, the Political and Security Committee of the Foreign Affairs Council agreed to adopt most of the report's recommendations as actions to be implemented on the ground immediately.⁶⁰ These discussions did not aim at the adoption of another official, or written, policy, but rather at shaping the EU's practice 'on the ground'.

Notably, the EU countries that are permanent and non-permanent members of the UN Security Council all voted in favour of the Resolution of February 2011 condemning settlements, including the United States.⁶¹

55 Even if an increasing number of EU Member States have been more explicitly signalling their disagreement on several aspects of the illegal policies of Israel vis-à-vis the Palestinians, progress cannot be expected on other aspects of EU policy towards the conflict. For instance, the issue of accountability for violations of international law, and specifically the implementation of the recommendations contained in the Goldstone report, remains very divisive.

56 Council Conclusions on the Middle-East Peace Process, Brussels, 8 December 2009, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/111829.pdf.

57 Ibid. para. 6.

58 Council Conclusions on the Middle-East Peace Process, Brussels, 13 December 2010, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/118448.pdf>.

59 Jerusalem and Ramallah Heads of Mission, Report on East Jerusalem, (Jerusalem, December 2010), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10_01_11_eu_hom_report_on_east_jerusalem.pdf.

60 Interviews with European officials, March and April 2011. The assessment of the implementation of the recommendations contained in the report falls outside of the scope of this report.

61 These countries are France, the United Kingdom, Germany and Portugal. For more details see <http://www.un.org/apps/news/story.asp?NewsID=37572&Cr=palestin&Cr1>.



• *From the EP*

In December 2008, the Foreign Affairs Committee (AFET), froze the consent procedure on the protocol to the Association Agreement that would allow Israel's accession to several Community Programmes.⁶² The decision was made in response to the intensification of the siege on the Gaza Strip - only weeks before the launch of the December 2008 Israeli military offensive on Gaza- as well as Israel's continued settlement-building in the West Bank.

A similar attempt of freezing any progress in EU-Israel relations was made with the Protocol on an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA).⁶³ For similar reasons, the International Trade Committee (INTA) of the EP froze its consent vote for several months.⁶⁴

As a result, the EU presidency decided not to schedule the summit between the EU and Israel. EU Member States were eager to hear what policy and vision Prime Minister Netanyahu would outline during his first visit to the United States in May 2009 before making any decision about the upgrade. The main concern of European diplomats was the willingness of the new government to start negotiations. However, no European official was able to detail what this meant apart from "talking to Abbas".⁶⁵

Finally, at the 9th Association Council, held on 12 June 2009, the EU although ambiguously, suspended the upgrade. Furthermore, they reiterated the link between upgrading relations and the MEPP and introduced an explicit reference to international law. According to the Council:

"That upgrade must be based on the shared values of both parties, and particularly on democracy and respect for human rights, the rule of law and fundamental freedoms, good governance and international humanitarian law. The upgrade needs also to be, and to be seen, in the context of the broad range of our common interests and objectives. These notably include the resolution of the Israel-Palestinian conflict through the implementation of the Two-State solution, the promotion of peace, prosperity and stability in the Middle East and the search

⁶² The majority of parliamentarians requested a postponement of the vote to another date yet to be determined. This decision was requested by the Confederal Group of European United Left and Nordic Green Left (GUE/NGL) and Group of the Greens/European Free Alliance, with the agreement from the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament (S&D), some MEPs of the Group of the Alliance of Liberals and Democrats for Europe (ALDE) and of the European Group of People's Party (EPP) after Members of the European Parliament and EU civil servants had received hundreds of emails from activists across Europe.

⁶³ see p 25 for more information on ACAA.

⁶⁴ The freeze was based on a decision among the political coordinators of INTA not to submit the protocol to a vote in the INTA committee. In March 2011, the Liberal MEPs member of INTA decided to proceed with the vote because they considered that the freeze was decided undemocratically. So far the EPP MEPs were the only ones willing to proceed with ACAA but they were a minority. The decision of the Liberals now allows for the procedure for vote to continue. A new rapporteur, Vital Moreira (S&D) was appointed. Interview with European official, March 2011.

⁶⁵ Summary of advocacy meetings conducted by EMHRN and APRODEV in cooperation with Crisis Action in April 2009.

for joint answers to challenges which could threaten these goals. At this stage the EU proposes that the current Action Plan remain the reference document for our relations until the new instrument is adopted.”⁶⁶

To the general public, the EU communicated that this decision had been arrived at by mutual consent. However, the suspension of the upgrade rebuffed Israel and they did not request the holding of the Association Council in 2010.⁶⁷ Israel also decided not to hold most of the sectorial subcommittee meetings and only one, out of ten, EU-Israel sub-committee meetings was held in the same year. The informal human rights working group took place in September 2010. According to several sources it seemed that Israel entered into a stage of “EU fatigue”, having become frustrated by the intensive efforts of the Brussels mission’s failure to bring about the upgrade.⁶⁸

No new substantial proposals for enhancing the cooperation between the EU and Israel were placed on the agenda for almost a year. However, in October 2010, the Council gave a mandate to Europol to start conducting negotiations with Israel on an operational cooperation agreement. Negotiations between Israel and the EU over a civil aviation agreement were ongoing between 2009 and 2011. The EU and Israel signed the ACAA protocol in May 2010. In November 2009, the EU and Israel signed a protocol that entered into force in January 2010 on the Association Agreement on agricultural, processed agricultural products and fisheries.⁶⁹ The proceeding discussions, leading to the start of these negotiations and to the signatures of these protocols, began before 2009, all having been foreseen by the current EU-Israel Action Plan.

The EU-Israel Association Council was finally held on 22 February 2011. EU Member States decided not to proceed with the upgrade, but “to work on and explore the possibilities left by the current EU-Israel Action Plan”.⁷⁰ Member States almost unanimously agreed that the current context was not favourable to the implementation of the upgrade. Their intention with the February 2011 Association Council appeared to be to want to improve the state of relations with Israel and, at the same time, to send the message that the upgrade was not on the agenda. In fact, the word “upgrade” is not mentioned in the text of the declaration.⁷¹

The exploration of the possibilities left in the current Action Plan already started before the holding of the Association Council of February 2011. In May 2010, the European External Action Service (EEAS) established an inventory of the areas, which could still be explored under the

66 Council of the European Union (2009), “Relations with Israel – Adoption of the European Union’s position for the Association Council’s Ninth meeting”, Luxembourg, 15 June 2009, Brussels, 12 June 2009, available at <http://register.consilium.europa.eu/pdf/en/09/st10/st10709-re03.en09.pdf>.


67 Interview with European official, March 2011.

68 Interview with European officials, March 2011.

69 Agreement in the form of an Exchange of Letters between the European Community and the State of Israel concerning reciprocal liberalisation measures on agricultural products, processed agricultural products and fish and fishery products, the replacement of protocols 1 and 2 and their annexes and amendments to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, Official Journal of the European Union, 28 November 2011, L 313/83.

70 Statement of the EU at the 10th EU-Israel Association Council, Brussels, 22 February 2011, available at http://eeas.europa.eu/delegations/israel/press_corner/all_news/news/2011/20110222_01_en.htm.

71 Interview with European officials, March and April 2011.



current Action Plan.⁷² This was part of the preparatory work to Commissioner Füle's visit to Israel in November 2010, the aim of which was to warm up EU-Israel relations, considered by many to be at a low point. The same areas of cooperation established in May 2010 were listed in the Association Council declaration of February 2011 and include competition policy issues, enhanced cooperation on international marketing standards for fruits and vegetables, the geographical indication of agricultural and processed agricultural products and research. In 2011, most of the subcommittee meetings, as well as the human rights working group meeting, took place.

EU INSTITUTIONAL SETTING REGARDING THE IMPLEMENTATION OF THE ENP ACTION PLAN

In the new structures set by the Treaty of Lisbon, the EEAS, headed by the High Representative and Vice President of the EC, acts as a supervisor and coordinator between the different Directorate Generals on the implementation of the EU-Israel Action Plan. The EEAS identifies which areas of the Action Plan can be advanced and sets the agenda for their implementation. Moreover, it is also contacted by the Commission's Directorate Generals on the feasibility of certain forms of cooperation. The Directorate General on the ENP and Enlargement and its Commissioner are also involved in the implementation and evaluation of the Action Plan.

In the implementation of the Action Plan, the EEAS initiatives are supervised by the Council of the European Union, i.e. by the EU Member States. Additionally, the Council has to give a mandate for negotiations to the EEAS and EC and, subsequently, endorse any new agreement, Action Plan or other form of cooperation.

The EP has a supervisory role. Following the Lisbon Treaty, the EP has more oversight capacity into the elaboration and implementation of the EU's external action. The President of the EC and the High Representative of the Union for Foreign Affairs and Security Policy are to report regularly to the EP on developments in foreign policy and ensure that the latter's views, while not binding, are taken into consideration. Furthermore, among the several new items introduced by the Lisbon Treaty, the application of the ordinary legislative procedure (formerly the co-decision procedure) to all EU's commercial policy translates into the requirement of the EP's consent for the adoption of trade agreements with third countries and is particularly relevant. Although the EP is not entitled to change the text of an agreement, the power to refuse it as a whole implies that their concerns have to be taken into account during negotiations. The EP control over the budgeting of the European Neighbourhood Policy Instrument (ENPI) also allows it to play a role in the implementation of the ENP.

⁷² The EEAS was created by the Lisbon Treaty and serves as a foreign ministry and diplomatic corps, which assists the High Representative of the Union for Foreign Affairs and Security Policy to fulfill her mandate. It was formally launched in December 2010, replacing the Directorate-General for External Relations (DG RELEX) of the European Commission.

2.3. THE ENP REVIEW: AN OPPORTUNITY TO MAINSTREAM IHRL AND IHL

In a context where the EU has systematically delinked its bilateral relations with Israel from the latter's actions in the OPT, the 27 Member States' decision to establish a connection between the upgrade of their relations and the MEPP, stressing the importance of international law, is noticeable.

Nonetheless, several more measures could be taken in order for the EU to effectively promote respect for international law in its relations with Israel. To achieve this objective, certain aspects contained in the review of the ENP, as initiated in 2010 and adopted in 2011 in response to the Arab revolutions, should apply to EU-Israel relations.⁷³ This includes the establishment of a proper conditionality policy based on Israel's respect for its obligations under IHRL and IHL; a coherent and comprehensive EU reporting mechanism on violations committed by Israel in the OPT; more effective use of the EU's overall dialogue with Israel; and a partnership with Israeli and Palestinian CSOs.

2.3.1. Towards the enforcement of an IHRL and IHL conditionality

Despite the fact that the suspension of the upgrade shook the long-established EU practice of delinking its bilateral relations with Israel from Israel's IHRL and IHL record in Israel proper and in the OPT, it was not presented by the EU as a conditionality, but rather as a decision agreed upon with Israel and dictated by an unfavourable political context.⁷⁴ There is no clear position about what EU Member States expect from Israel in order to put the upgrade back on track. In the interviews carried out for this report, when referring to the link between the upgrade and the MEPP, EU diplomats refer to an "overall context" that is essentially characterised by the absence of a clear commitment by the Israeli government to peace negotiations, to discontinue the settlement policy and to end the closure of Gaza.⁷⁵ Given the lack of clear benchmarks for the upgrade to proceed, IHRL and IHL continue to be part of the discourse, but not as a clear objective, *per se*, of the EU's policies towards Israel. Therefore, the EU's commitment to be guided by the principles of universality and indivisibility of human rights and fundamental freedoms under international law in its international relations remains to be fully implemented.⁷⁶

⁷³ The principles guiding the conduct of the reviewed ENP are contained in a joint Communication entitled "A new response to a changing Neighbourhood" (2011), Op. Cit.. On 20 June 2011, the Foreign Affairs Council welcomed this Communication. In its conclusions the Foreign Affairs Council states that "the new approach of the EU will be based on mutual accountability and shared commitment to universal values of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law". The full text of the conclusions is available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/122917.pdf.

⁷⁴ N. Tocci, *The Conflict and EU-Israel Relations*, in *European Involvement in the Arab-Israeli Conflict* ed. By E. Bulut, Chaillot Papers, December 2010, p. 59, available at http://www.iss.europa.eu/uploads/media/cp124-European_Involvement_in_the_Arab-Israeli_Conflict.pdf.

⁷⁵ The same concerns were already expressed by Commissioner Ferrero-Waldner in her op-ed "The offer on the table", published by Haaretz (17 April 2009), available at <http://www.haaretz.com/print-edition/opinion/the-offer-on-the-table-1.274284>.

⁷⁶ Article 21 (1) TEU.



In order to fulfil this commitment, the EU should define clear benchmarks for the upgrade to proceed. In this regard, the review of the ENP and the focus put on positive conditionality and associated benchmarks as a tool to support reforms in neighbouring countries are an important opportunity to rethink EU's bilateral relations with third parties involved in conflicts in the region (see box).

The ENP review and the "more for more" approach

One of the main pillars of this "renewed ENP Policy" is the "more for more" approach, or positive conditionality. This incentive based-approach aims at supporting and giving advantages (e.g. financial assistance; access to EU Single Market; stronger political cooperation; and enhanced mobility for people) to countries that move quickly and further toward the establishment of "deep and sustainable democracy" in their reform agenda. A "less for less" approach has also been included in the May 2011 Communication. However, this approach encountered more resistance from EU Member States. The Council conclusion of June 2011 mildly states that EU support and political cooperation may be reconsidered where reform does not take place. The EEAS and the Commission have been mandated to design the appropriate mechanism and instruments to implement this "new ENP approach".

While the concept of conditionality has been at the core of the ENP since its inception, EU Member States have always lacked the political will to effectively and consistently condition their relations with third countries upon tangible progress in the human rights situation on the ground. However, in its communication of May 2011, for the first time, benchmarks have been developed against which the EU should assess progress made by third countries towards building and consolidating of democracy and respect for the rule of law.⁷⁷ These benchmarks are:

- free and fair elections*
- freedom of association, expression and assembly and a free press and media;*
- the rule of law administered by an independent judiciary and right to a fair trial;*
- fighting against corruption; and*
- security and law enforcement sector reform (including the police) and the establishment of democratic control over armed and security forces.*

⁷⁷ "A new response to a changing Neighbourhood" (2011), Op. Cit. The EMHRN has welcomed the EU's effort to define general benchmarks on the basis of which to establish its support. However it believes it is crucial to add further human rights benchmarks, including the ratification of the main international human rights conventions without reservations and their incorporation into national legislation; the implementation of IHL in situation of conflicts; the equal participation of women in political and public life and the right to equality and non-discrimination including on the basis of race, national belonging, religion, gender and age. " Human rights and Democracy should be at core of the 'renewed' European Neighbourhood Policy (ENP)", EMHRN, October 2011, available at http://www.euromedrights.org/files.php?force&file=EMHRN_statement_on_the_ENP_oct_2011_final_engl_643356700.pdf.

As confirmed by several EU diplomats,⁷⁸ the review of the ENP, the “more for more” approach and associated benchmarks have been drafted with the Arab revolutions in mind and, thereby, primarily aim to support democratisation processes in Arab countries. Hence, the benchmarks outlined by EEAS and the Commission do not take into account the existence of protracted conflicts in the region and the obligations of the parties to the conflicts under international law - even though the May 2011 Joint Communication stated that “the lingering protracted conflicts in the region, including in the Middle East, require us to look afresh at the EU’s relationship with our neighbours”.

In order for the reviewed ENP to support the EU’s longstanding objective of peace in the region, the EU should consider including third countries’ contributions to peace in its “more for more” approach through specific benchmarks reflecting the obligations of the parties to the conflicts under international law. Hence, when considering giving Israel greater access to the EU Internal Market and increasing sectorial cooperation, the EU should assess Israel’s respect for its IHRL and IHL obligations in the OPT according to several benchmarks. Furthermore, in order for this approach to be effective, “the EU and Member States policies be much more closely aligned than in the past, in order to deliver the common message and the coherence that will make (the EU’s) actions effective”.⁷⁹

2.3.2. Towards a proper reporting and dialogue on Israel’s violations of international law in the OPT

In the context of the “renewed” ENP policy, the EEAS is in the process of revising the structures of the different ENP instruments, including the Progress Reports, as well as the dialogues and the Action Plans. This revision is an important opportunity to mainstream IHRL and IHL in these instruments in a coherent and comprehensive manner. Moreover, if the EU is to assess Israel’s progress, in terms of respect for IHRL and IHL, in order to determine the scope of its relations with Israel, then it must have a coherent and comprehensive mechanism to report on the latter’s violations in the OPT. At present, the EU has not developed such a mechanism, nor has it used the full potential of its dialogue with Israel to address these violations.

Progress Reports

Although the EU reports annually on human rights violations committed in Israel and the OPT, primarily through the ENP Progress Reports that assess Israel’s implementation of its Action Plan,⁸⁰ these reports contain several shortcomings. While the main Israeli human rights violations committed in Israel are included in the chapter “Democracy, human rights and fundamental freedoms”, human rights violations committed by Israel against Palestinians from the OPT are only partially included under this chapter - only in cases of ill-treatment and torture of Palestinian detainees inside Israel, detention of Palestinian children and administrative detention. When addressed at all, IHL and IHRL violations committed by Israel inside the OPT are mostly found in

⁷⁸ Meetings conducted by APRODEV, CIDSE and EMHRN with European officials, September 2011.

⁷⁹ “A new response to a changing Neighbourhood” (2011), Op. Cit.

⁸⁰ The ENP progress reports for Israel are available at http://ec.europa.eu/world/enp/documents_en.htm.



the “Situation in the Middle East” section. Hence, Israel’s human rights violations within the OPT are not properly scrutinized by the EU in compliance with the Action Plan objective of “working together to promote the shared values of democracy, rule of law and respect for human rights and international humanitarian law”. Instead, the focus is primarily related to the MEPP, where the standards of scrutiny are only partly guided by human rights principles or by IHL and are affected by political considerations. In addition, some Israeli violations in the OPT are, sometimes exclusively, reported under the section on Human Rights and fundamental freedoms of the Progress Report for the OPT⁸¹. This approach dangerously appears to align with Israel’s position that its international human rights treaty obligations do not apply in the OPT.⁸²

Dialogues

The same division exists in the EU’s technical dialogues with Israel, where the human rights working group addresses only the violations committed inside Israel, along with issues related to torture and ill treatment, detention of children and armed conflict. Contrary to the ENP Progress report, this has been agreed upon jointly with Israel, which claims that its human rights obligations do not apply to Palestinians in the OPT. Other Israeli human rights violations committed in the OPT are exclusively addressed in the political subcommittee. Several Member States have raised concerns regarding this approach as it seems to be more in line with Israel’s vision of its obligation towards the OPT, rather than a coherent approach of the EU based on IHL and IHRL.⁸³

The EU guidelines on the promotion of compliance with IHL states that:

“whenever relevant, EU Heads of Mission, and other appropriate EU representatives (...) should include an assessment of the IHL situation in their reports on a given country or conflict” and that, “where relevant, the issue of compliance with IHL should be brought up in dialogues with third States”.

The revised ENP also calls on the EU to “reinforce human rights dialogues”. Therefore, the EU should systematically, coherently and comprehensively report on Israeli IHRL and IHL violations in the OPT in the next ENP Progress Reports and address violations in its dialogue with Israel. A systematic and legally based examination would ensure that Israel’s responsibilities towards protected persons under its effective control in the OPT under international law are reaffirmed by the EU and would reflect the EU’s own positions on certain Israeli practices which violate international law.⁸⁴

⁸¹ The ENP progress reports for the OPT are available at http://ec.europa.eu/world/enp/documents_en.htm. These reports cover the implementation of the EU Action Plan by the PA.

⁸² Israel’s position, namely that its international human rights treaty obligations do not apply in the OPT, has been rejected by several UN bodies. See for instance: the Committee on Economic, Social and Cultural Rights (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/426/00/PDF/G0342600.pdf?OpenElement>), the Human Rights Committee (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/426/00/PDF/G0342600.pdf?OpenElement>), and by the International Court of Justice in its Advisory Opinion on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, Op. Cit., para. 106-113.

⁸³ Interview with European officials, September 2011.

⁸⁴ For example, the EU Council Conclusions on the MEPP of December 2009 state that “settlements, the separation barrier where built on occupied land, the demolition of homes and evictions are illegal under international law”. EU Council Conclusions on the Middle East Peace Process, 8 December 2009, Op. Cit.

2.3.3. Towards an improved partnership with CSOs

Another important pillar of the new ENP is the emphasis put on civil society. Acknowledging civil society's contribution to policy-making and holding governments to account, the 2011 ENP Joint Communication commits to supporting a greater role for CSOs by helping them develop their advocacy capacity, enhance their ability to monitor reform and strengthen their role in implementing, monitoring and evaluating EU programmes.⁸⁵ Within this context, a new package of grant support for the region was adopted by the EC on 26 September 2011, including the creation of the Civil Society Facility for the Neighbourhood (both Southern and Eastern).⁸⁶

In the context of EU-Israel relations, a real partnership with CSOs includes the latter's monitoring of the development of bilateral relations. While the EU delegations are in regular contact with CSOs in Israel and the OPT, they have not been systematically consulted ahead of, or debriefed after, the EU-Israel political or technical dialogues dealing with human rights, such as Association Councils, Subcommittees or working groups nor in the context of the drafting of the previous Progress Reports and Action Plan.⁸⁷

Furthermore, it is important to remember that a proper partnership with CSOs is possible only on the condition that freedoms of expression, association and assembly are respected in the country where they are based. As stated in the May 2011 ENP Joint communication:

"(a) thriving civil society empowers citizens to express their concerns, contribute to policy-making and hold governments to account. (...) Key to making any of this happen is the guarantee of the freedoms of expression, association and assembly."⁸⁸

⁸⁵ "A new response to a changing Neighbourhood" (2011), Op. Cit.

⁸⁶ For more information on the Civil Society Facility, see EU's response to the Arab Spring: the Civil Society Facility, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/638&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁸⁷ The recent debriefing of Israeli CSOs in Tel Aviv following the EU-Israel human rights working group in September 2011 is a welcome development.

⁸⁸ "A new response to a changing Neighbourhood" (2011), Op. Cit.



Since the election of the Prime Minister Netanyahu's Government in 2009, and in particular since the publication of the report of the UN Fact Finding mission on the Gaza Conflict (also known as the 'Goldstone Report') in September 2009, a broad de-legitimisation and intimidation campaign has been launched against human rights CSOs in Israel. This campaign targets, in particular although not exclusively, those Israeli CSOs that are critical of the Government's policies in the OPT. Several bills aimed at curtailing freedom of association and expression of Israeli CSOs have been tabled in the Knesset.⁸⁹ These recent efforts to interfere with the work of Israeli human rights defenders and organisations follow a pattern of continued harassment by the Israeli Government against Palestinian human rights defenders, encompassing arbitrary arrests and detentions and restrictions to their freedom of movement, including international travel bans. Moreover, Israeli law enforcement authorities and police have increasingly restricted the right to freedom of assembly.⁹⁰ Establishing a real partnership with Israeli and Palestinian CSOs requires increased action by the EU to ensure respect by the Israeli authorities of the freedoms of association, expression and assembly in Israel and the OPT.

⁸⁹ Two laws curtailing freedom of association and expression have been adopted in 2011, namely the Foreign Funding Law and the Anti-Boycott Law. Several other bills are still being considered in the Knesset, including the so-called Universal Jurisdiction/International Criminal Court bill and a bill aiming at severely restrict public foreign funding through taxation and caps. For further information see the Adalah briefing : 'New Discriminatory Laws and Bills in Israel', June 2011, available at http://www.adalah.org/upfiles/2011/New_Discriminatory_Laws.pdf; Adalah news update, November 2011, 'Campaign Against Human Rights NGOs Continues, as Foreign Funding Bill is Revived & Public Petitions to the Israeli Supreme Court are Threatened', available at http://www.adalah.org/eng/pressreleases/29_11_11.html; Press release by Israeli human rights groups, The anti-boycott law harms freedom of expression and targets nonviolent political opposition to the Occupation, 12 July 2011, available at http://www.adalah.org/eng/pressreleases/pr.php?file=12_07_11 and press release by NGOs in Israel, 'Urgent Call Regarding Severely Restrictive Funding Bills', 10 November 2011, available at http://www.adalah.org/eng/pressreleases/10_11_11.html. The EU has raised some public concerns regarding some of the bills, including in the 2010 Progress Report and a statement from a spokesperson of High representative Ashton on the anti-boycott bill. See p. 4 of the Progress Report, available at http://ec.europa.eu/world/enp/pdf/progress2011/sec_11_642_en.pdf and the statement available at http://www.eeas.europa.eu/delegations/israel/press_corner/all_news/news/2011/20110713_01_en.htm. In May 2010, the UN Secretary General included Israel in its report on reprisal against NGO cooperating with UN human rights mechanism, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.19_en.pdf.

⁹⁰ The police regularly ban, prevent or violently disperse legal and peaceful demonstrations in the West Bank against the Wall/Barrier, the practice of house demolition or the eviction of Palestinians in East Jerusalem. For more information on freedom of assembly see the following reports: B'Tselem, The Right to Demonstrate in the Occupied Territories, July 2010, available at http://www.btselem.org/sites/default/files2/publication/20100715_right_to_demonstrate_eng.pdf; B'Tselem, Show of Force: Israeli Military Conduct in Weekly Demonstrations in a-Nabi Saleh, September 2011, available at http://www.btselem.org/sites/default/files2/201109_show_of_force_eng.pdf; Al Haq, Repression of Non-Violent Protest in the Occupied Palestinian Territory: Case Study on the village of al-Nabi Saleh, available at http://www.alhaq.org/publications/publications-index?task=callelement&format=raw&item_id=102&element=304e4493-dc32-44fa-8c5b-57c4d7b529c1&method=download.



3. EU-ISRAEL CONTRACTUAL RELATIONSHIPS: ENSURING RESPECT FOR INTERNATIONAL LAW

In contravention with international law, the State of Israel implements all its international agreements with the EU without making a distinction between its territory and the illegal settlements based in the territories it occupied in 1967. This problem became evident when it was pointed out that Israeli exports originating from the settlements were being treated as products originating from Israel proper, thereby benefiting from preferential tax treatment when entering the EU. The export of settlement products still continues to attract a great amount of political attention, despite attempts by Israel and the EU to agree on a compromise solution. As discussed below, this problem also affects other EU policy areas.

In accordance with the duty of non-recognition (i.e. the obligation not to recognise as legal the illegal Israeli settlement policy),⁹¹ the EU is obligated to rectify the misapplications of its

⁹¹ The ICJ ruled in the Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", that settlements contravene Article 49.6 of the IVth Geneva Convention and might constitute, along with the associated regime imposed a *de facto* annexation. It also established that all States were under an obligation not to recognise the illegal situation resulting from the construction of the wall. Op. Cit., para. 120 and 159. The Security Council resolution on Territories occupied by Israel also stated the obligation of non-recognition of the annexation by Israel of East-Jerusalem, Security Council resolution 478 (1980), 2 August 1980, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/399/71/IMG/NR039971.pdf?OpenElement>. The objective of the duty not to recognise is to counteract the effects brought about by an illegal situation and prevent the consolidation of an illegal claim. On the duty of non-recognition, see for instance, S. Talmon, The Duty Not to "Recognise as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without real Substance?, In J.-M. Thouvenin and C. Tomuschat (eds.), *The Fundamental Rules of the International Legal Order*, (Leiden, Boston 2005), pp. 99-125.



contractual relations with Israel. Rectifying this situation also presents the EU with an opportunity to ensure coherence between its official policy regarding the settlements and its actions in practise. While there is a growing acknowledgement in the EU of the existence of this problem, as well as a will to tackle it; the measures adopted so far fall short of ensuring a complete exclusion of the settlements as beneficiaries of EU-Israel trade agreements and cooperation.

3.1. THE IMPORT OF SETTLEMENT PRODUCE THROUGH THE EU-ISRAEL ASSOCIATION AGREEMENT

The export of settlement produce to the EU market has been a contentious issue in EU-Israel relations for a long time. The adoption of a technical arrangement between the EU and Israel in 2004 attempted to regulate the situation. However, recent actions by CSOs and the United Kingdom government have exposed the limitations of the technical arrangement.



3.1.1. Background

The Association Agreement signed by the EU and Israel in 1995 stipulates that preferential treatment is given only to products “produced or substantially modified” in the territory of the Member States of the EU and the territory of the State of Israel (Protocol 4 of the Association Agreement between the EU and Israel).⁹²

Shortly after signing the agreement, the Mattin Group⁹³ supported by several European NGOs, pointed out that Israel exported products from the settlements and that, upon their arrival to the common market with an Israeli certificate of origin EUR1, they benefitted from a preferential customs tariff.⁹⁴ Although imports from settlements represent a fairly insignificant portion of total Israeli exports to the EU, it has become an extremely controversial issue.⁹⁵

In 2004, Israel and the EU agreed on a technical arrangement in which the certificates of origin for Israeli products exported to the European market would, henceforth, include the postcode of their place of origin. This arrangement would allow for EU customs services to be able to distinguish between settlements goods and those coming from Israel proper. This compromise arrangement enables the EU to maintain its stance that the settlements are illegal and are not a part of Israel and, therefore, settlement products should not benefit from preferential treatment. It allows Israel not to have to recognise in any official document that the products from the settlements are not Israeli products, thus keeping the connection between its own territory and its settlements.⁹⁶

The problem came before the European Court of Justice (ECJ) in the Brita case (see box). The Court solidified the EU’s position by establishing that Israeli products originating from the West Bank should not enjoy preferential treatment under the EU-Israel association agreement.⁹⁷

92 For the purpose of the application of this rule, the agreement details in article 83: “This agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European and Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand to the State of Israel”.

93 The Mattin group is an NGO based in Ramallah and specialised in EU external relations.

94 Certificate EUR1 is the name of the certificate of origin used by exporters established in countries signatory of an Association Agreement with the EU and which proves that the exported goods are entitled to duty free treatment because they comply with rules of origin inscribed in the agreement.

95 The volume of settlement products coming directly from the settlements and exported to the European market is estimated at 100 million euros per year and the total customs duty payable on these products is estimated at 7 million per year. G. Harpaz, “The Effectiveness of Europe’s Economic and ‘Soft’ Power Instruments in its Relations with the State of Israel” (2005), Cambridge Yearbook on European Legal Studies, n° 7 p. 183. These figures date from 2005 and it has not been possible to find more recent ones.

96 R. Frid and G. Harpaz, “Israel: Exported Products to the EU – An Agreement reached Over the Treatment of Products Exported to the EU From the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip (the Territories)” (2004), International Trade Law and Regulation n° 10, p. 32.

97 Case C-386/08 Brita GmbH. v. Hauptzollamt Hamburg-Hafen, European Court of Justice, 29 October 2009.

The Brita Case

On 10 July 2006, Brita, a German company importing products originating from an Israeli settlement, challenged the ruling of a German court confirming the decision of German customs officers to impose duties on these goods. The customs officers demanded these taxes because it could not be established conclusively that the imported goods fell within the scope of the EU-Israel Association Agreement. The Court of Appeal, the Finanzgericht Hamburg, referred a number of prejudicial questions to the ECJ. It asked whether the EU-PLO and EU-Israel Association Agreement could be applied without distinction to goods certified as being of Israeli origin, but which prove to originate from the OPT, more specifically the West Bank.

In response to these questions, the ECJ affirmed that the EU-Israel Association Agreement and the Interim EU-PLO Association Agreement apply to two distinct territories, the former to the territory of the State of Israel and the latter to the West Bank and the Gaza strip. The court held that to acknowledge that the Israeli custom authorities could issue certificates of origin for products originating in the West Bank would amount to forcing the Palestinian custom authorities to abstain from exercising the competences conferred to them by the EU-PLO Interim Association Agreement. This situation would be tantamount to imposing on them an obligation without their consent, which is contrary to the provisions of the Vienna Convention on the Law of Treaties.⁹⁸

The ruling of the ECJ establishes that Israeli custom authorities cannot issue valid certificates for products originating from the West Bank.⁹⁹ Therefore, it implies that the Palestinian customs authorities would have the exclusive competence to issue certificates of origin for products coming from the settlements, although the ECJ did not use the word settlements and it did not refer to the 4th Geneva Convention. The ruling is confronted with the reality on the ground where the PA does not recognise the legitimacy of the settlements or have the possibility to exercise its jurisdiction over these areas.

The fact that the certificates of origin are not valid because they have not been issued by the competent authority is not an impediment for the products in question to enter the EU market. The proof of origin assigns an “economic nationality” to a product and determines which rules of taxation it falls into. Therefore, if the proof

⁹⁸ The Court referred to article 34 of the Vienna Convention, which provides: “A treaty does not create either obligations or rights for a third State without its consent”.

⁹⁹ See para. 57 of the Case: “It is clear, both from Article 17 of the EC-Israel Protocol and from Article 15 of the EC-PLO Protocol, that proof of origin must be produced in respect of products originating in the territories of the contracting parties if they are to qualify for the preferential treatment. That requirement of valid proof of origin issued by the competent authority cannot be considered to be a mere formality that may be overlooked as long as the place of origin is established by means of other evidence. In this respect, the Court has already held that the validity of certificates issued by authorities other than those designated by name in the relevant Association Agreement cannot be accepted (see, to that effect, Case C-432/92 Anastasiou and Others [1994] ECR I-3087, paragraphs 37 to 41)”.
43



of origin has been issued by the wrong authorities, the product is considered as coming from a State which has not signed any specific trade agreement with the EU and should be fully taxed.

3.1.2. The limitations of the technical arrangements

The technical arrangement, as it has been conceived, does not guarantee that all products coming from the settlements will be taxed. In July 2008, the British government investigated agricultural products exported under the EU-Israel Association Agreement. It suspected that some products from the settlements were exported carrying postcodes from cities located in Israel. The Minister of Finance – or Exchequer Secretary to the Treasury – detailed the findings of this investigation during a debate at the House of Commons in January 2010. The UK Border Agency, which had checked shipments of fruits and vegetables from Israel, had identified settlement produce that were wrongly claiming preference. In some cases, a settlement postcode was given on the custom documents, but it was still claiming preference, and sometimes the produce was in packages that clearly indicated a settlement address but the custom documents had claimed preference. In other cases, the postcode given referred to a head office in Israel and not the actual place of production in the OPT.¹⁰⁰

It appears from this investigation that a number of settlement products are evading import duty and that this is mainly due to the inability of European customs officials to inspect all certificates of origin on Israeli shipments. Theoretically, it is their responsibility to read every form in detail, to distinguish those shipments containing products from the settlements and ensure that these products do not benefit from a preferential treatment. But, due to the higher priority given to ensuring the free movement of goods and the limited resources of the European custom officers to check every single consignment, inevitably some batches and settlement products manage to pass through the cracks.¹⁰¹

3.1.3. What more can be done on the issue of settlement produce?

There is a will from some Member States to reinforce the EU's actions vis-à-vis settlement products and ensure that the problem is not buried.¹⁰² This argument is supported by the Jerusalem Heads of Mission Report of 2010. According to its recommendations, Member States should:

“8) Ensure that the EU-Israel Association Agreement is not used to allow the export to the EU of products manufactured in settlements in East Jerusalem.

“9) Raise public awareness about settlement products, for instance by providing guidance on origin labelling for settlement products to major EU retailers.”¹⁰³

¹⁰⁰Debate at the House of Commons on the EU-Israel Trade, 27 January 2010, Column 313 WH, available at <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/chan31.pdf>.

¹⁰¹Ibid.

¹⁰²Interview with European officials, March 2011.

¹⁰³Jerusalem and Ramallah Heads of Mission, Report on East Jerusalem, (Jerusalem, December 2010). Available at: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10_01_11_eu_hom_report_on_east_jerusalem.pdf.

To date, and according to the available information, the EU and its Member States have not taken any specific steps to implement these recommendations. Several options remain.

- *Invert the burden of proof*

In principle, one way to solve the problem would be for Israel to make the distinction between settlement products and products coming from Israel proper, thereby exporting settlement products as if they were coming from a third country without a EUR 1 certificate. This would require, as a first step, that the EU reopen the case of the problem of interpretation of the Association Agreement at the Association Council and for Israel to accept the deal. That would be an opportunity for the EU to assert its position on the interpretation of the territorial clause of the Association Agreement. In the eventuality that the EU wants to amend the technical arrangement and Israel refuses, this leaves open the possibility, in theory, to have recourse to an arbitration procedure.¹⁰⁴

There are also other, more unilateral, measures available to the EU and its Member States to address this issue and to assert their position on the illegality of settlements.

- *Restrictive measures on settlement trade*

In line with EU and Member States' duty of non-recognition, one option would be for the EU, or any individual or group of Member States, to impose restrictive measures on these products or on the companies that export them. Even if the practical implementation of these measures would a priori face similar difficulties as the implementation of the technical arrangements in terms of identifying settlement products that enter the EU market, it would create a very strong deterrent for the exporters of settlement products. If the EU or a Member State took restrictive measures against settlement goods, a few exemplary prosecutions of importers who imported settlement goods would be needed for the most reputable importers to stop. Given its likely effects and the very strong political signal it would send towards Israel's illegal settlement policy, this option should not be ruled out.

LEGAL CONSIDERATIONS ON RESTRICTIVE MEASURES AGAINST SETTLEMENT PRODUCTS

While the adoption of restrictive measures is, in theory, enforceable either by the EU itself or by Member States, the adoption of these measures is surrounded by political considerations and legal uncertainties when it comes to international trade law (i.e. World Trade Organisation rules).

Under EU law, article 215(5) of the Treaty on the functioning of the European Union (TFEU) authorises the use of sanctions/restrictive measures against natural or legal

¹⁰⁴According to article 75 of the EU-Israel Association Agreement, if it is not possible for the parties to settle a dispute by referring it to the Association Council, they might have recourse to an arbitration procedure. The arbitration procedure entails the appointment of an arbitrator by each of the parties to the agreement. A third arbitrator is appointed by the Association Council.



persons, groups, or non-State entities. These measures include arms embargoes, visa bans, restrictions on financial transactions and bans on imports. In line with the EU's practice of adopting restrictive measures to advance its foreign policy, the EU's strong stand on the illegality of the settlements could set the basis for the adoption of sanctions targeted at Israeli companies exporting and producing goods from those areas.

The procedure for the adoption of such measures under the Treaty on European Union (TEU) requires that a proposal by a Member State or the High Representative be adopted unanimously by the European Council.¹⁰⁵ Even if sanctions have been increasingly used by the EU and can be adopted in theory, the unanimity requirement greatly hinders the adoption of restrictive measures in relation to Israeli companies or products coming from the settlements.

Another possibility is the adoption of restrictive measures by individual Member States. Although international trade is a competence of the EU, article 24 (2) of Regulation n 260/2009 authorises restrictions on import on grounds of public morality, public policy or public security, given that it does not infringe EU law. It remains to be seen if respect for IHL could fall into the realm of public policy in the law of the country enforcing the ban.

Additionally, if the EU were to adopt restrictive measures against Israeli companies trading products from the settlements or the import of settlement products, the legality of this measure could eventually be put before the WTO. If a challenge on sanctions would pass the preliminary test of jurisdiction under the General Agreement on Tariffs and Trade (GATT), it's not clear whether Israel has jurisdiction over the OPT under WTO rules.¹⁰⁶ This would have to be analysed in light of GATT article XX, which provides for the general exceptions to the non-discrimination rule.

Considering the absence of references to human rights in the WTO's case law and the precedent set by the *Brita* case, the strongest ground for restrictive measures is found in GATT article XX(d). This article authorises restrictive measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement (...)".

Since both the Israeli and PA Association Agreements are part of EU legislation, and the *Brita* case clarified that each of these agreements has its own territorial scope where exclusive jurisdiction is exercised, the EU could argue the adoption of restrictive measures to enforce the implementation of the agreements. Doing so

¹⁰⁵See Articles 215 of the TFEU and articles 24 and 30 TEU.

¹⁰⁶Article XXVI (5) (a), GATT stipulates that the agreement applies to the "metropolitan territory and of the other territories for which it has international responsibility" of contracting parties.

would mean that the EU would come further into compliance with the obligation not to recognise an illegal situation.

- *Ensuring the correct labelling of these products*

Alternatively and as recommended by the Heads of Mission report on East Jerusalem, ensuring the correct labelling of settlement products when sold within the European market would also provide a means to address this issue. Beyond guaranteeing consumers' rights-by allowing purchasers to make an informed choice about buying products from settlements, in adopting this measure, Member States would reinforce the EU's position that products from settlements are not products from Israel.

This practice has already been implemented at the UK level in relation to agricultural goods. In line with EU Directive 2000/13 which establishes that origin labelling, where present, must be accurate,¹⁰⁷ the UK government issued guidelines for retailers on the labelling of agricultural produce grown in the OPT.¹⁰⁸ These guide retailers on how to indicate whether a product is coming from the West Bank originates from a Palestinian producer or an Israeli settlement and add the appropriate description.

Expert sources confirm that, despite the fact that the guidelines are non-binding, all but one of the major UK supermarkets no longer stock settlement goods. Those retailers that do are very clearly labelling them in line with the government guidelines.¹⁰⁹ These Guidelines have proven to be a strong deterrent and other Member States could adopt measures in line with the UK model.¹¹⁰

¹⁰⁷Directive 2000/13/EC 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 Union, 6 May 2000, L 109/29, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:109:0029:0042:EN:PDF>.

¹⁰⁸Labelling Guidelines, Department for Environment, Food & Rural Affairs 10 December 2009, available at <http://archive.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf>.

¹⁰⁹Interview with Phyllis Starkey, former Member of the UK Parliament, June 2011.

¹¹⁰It is worth noting that in September 2010, several MEPs issued a Written Declaration on the labelling of goods from the OPT calling for such guidelines. However, it did not gather the required number of MEP's support. Available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+WDECL+P7-DCL-2010-0064+0+DOC+PDF+V0//EN&language=EN.



3.2. OTHER CASES OF MISAPPLICATION OF EU-ISRAEL COOPERATION INSTRUMENTS AND THE EU'S RESPONSE

As stated above, the problem of the extension by Israel of the implementation of its external agreements to the OPT is not confined to EU-Israel association agreement. To date, the EU has had to deal with the problems of Israel's territorial extension in a number of different agencies and networks.

3.2.1. Adjustments to existing agreements and forms of cooperation

The following cases assess the steps that the EU has taken when the problem of territorial extension of its cooperation instruments with Israel was exposed.

- *Israel's participation in the Vth, VIth and VIIth Framework Programme for Research and Development*

The same issues outlined above were raised in 2005 in connection with the Vth and VIth Framework Programme for Research and Development. Pressed by parliamentary questions in 2005, the Commission admitted, although cautiously, that there was participation of entities based in the settlements.¹¹¹ The Commission then took precautionary measures to prevent the same thing from happening with the FP7 by establishing a "filter system"¹¹² to block the participation of settlement-based entities. The Commission's assumption of the administrative burden to try to prevent participation by settlement entities in the programme, and the "practical arrangement" it has made with its Israeli counterpart, repeats the approach worked out with Israel on rules of origin. According to an EMHRN report, the system put in place does not constitute an efficient filter of settlement-based entities.¹¹³ Reviewing the details of all legal entities in all contracts imposes an unmanageable administrative burden on the Commission. Moreover, the arrangement does not extend to companies affiliated with the Ministry of Industry and Research in Israel. Additionally, a company registered in Israel, but whose premises or core activities are located in the settlements can participate without any problem. This is precisely what happened with the FP7. The company Ahava Dead Sea Laboratories is a legal entity registered in Israel, yet its factory, research laboratories and visitors' centre are located in the OPT at Mitzpe Shalem, about 1 km from the west shore of the Dead Sea and 10km north of the 'Green Line'. Ahava participates in three research projects sponsored by the FP7. It received a total of EUR 1.13 million.¹¹⁴

¹¹¹In response to a question to the Commission by MEP Graham Watson (ALDE) inquiring about the reported participation of Israeli settlement-based entities in FP5 and FP6, Commissioner Ferraro-Waldner replied that "the Commission is looking into suggestions that settlement-based entities have participated in bilateral co-operation programmes with the State of Israel, in the light of the contractual obligations entered into", 12 December 2005, E-4633/05, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2005-4633&language=EN>.

¹¹²"Armed with the settlement address lists compiled by the Commission for the implementation of the "technical arrangement" on rules of origin, European Commission Directorate General for Research checks any enterprise address about which it may have "reasonable doubt" against the list. If suspicion remains the Commission consults with ISERD, the Israeli inter-ministerial directorate for the FP programme." S. Rockwell and C. Shamas, (2005), Op. Cit., p. 30.

¹¹³Ibid.

¹¹⁴Answer by the European Commission to a written question by Keith Taylor MEP, 19 July 2011, P-006190/2011, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-006190&language=EN>.

In 2011, in response to a parliamentary question the Commission stated that it is currently scrutinising options to be able to evaluate and potentially address such a situation in the framework of the preparation of the next Framework Programme (HORIZON 2020).¹¹⁵

Notably, no safeguard clause to avoid the participation of entities based in settlements was inserted in the protocol allowing participation of Israel into Community Programmes (other than FP7) –whose assent is still pending at the EP.¹¹⁶ A motion for resolution adopted by the AFET called for “the Commission and the Member States to ensure that the participation of Israeli entities in Community Programmes will be in line with the existing EC legislation and policy, with special regard to measures aimed at preventing the participation of settlement-based companies and organisations in the programmes concerned”.¹¹⁷

- *Israel's participation in the Euro-Med Heritage Programme*

The Israel Antiquities Authority has participated in the first three phases of the Euro-Med Heritage Programme.¹¹⁸ APRODEV drew the EC's attention to the fact that the agency was based in the occupied territory of East Jerusalem and that cooperation with such an entity posed a problem for the EU's obligation of non-recognition. The EC deleted references to the Israeli Antiquities Authority listing its address in East Jerusalem from the EU website. Currently, the Israeli Antiquities Authority does not participate in the Programme.

- *Loans from the European Investment Bank (EIB)*

In 2006, the EIB renewed its cooperation with Israel through two loan contracts. The first contract was a €200 million loan to environmental projects. The second, directed to the funding of small and medium size enterprises in the fields of tourism, health and education, was €75 million.¹¹⁹ The Mattin Group asked the EIB whether it took any precaution to ensure that Bank Hapoalim, the Israeli bank for the loans designated to support small and medium sized enterprises, would not provide EIB-backed financing to entities based in settlements. It also asked whether the EIB would prevent the allocation of environmental programme loans to settlements in the OPT.

¹¹⁵Answer by the European Commission to a written question by Keith Taylor MEP, 13 September, P-007789/2011, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-007789&language=EN>. For more information on HORIZON 2020 see http://ec.europa.eu/research/horizon2020/index_en.cfm.

¹¹⁶See p. 30 above.

¹¹⁷Motion for a Resolution to wind up the debate on statements by the Council and Commission pursuant to Rule 103(2) of the Rules of Procedure by Véronique De Keyser, on behalf of the Committee on Foreign Affairs, on the conclusion of a protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, on a framework agreement between the European Community and the State of Israel on the general principles governing the State of Israel's participation in Community programmes, B6-0616/2008, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2008-0616&language=EN>.

¹¹⁸See evaluation report of Euromed Heritage I, II and III, available at <http://www.euromedheritage.net/intern.cfm?menuID=7>. The Euromed Heritage Programme is a regional programme under the ENP which funds projects on cultural heritage preservation in countries of the Mediterranean Region. Since 1998, it has granted a total of over 50 million euros to different projects.

¹¹⁹See report of activities of the European Investment Bank's Facility for Euro-Mediterranean Investment and Partnership on Financing Operations in Israel (May 2011), available at http://www.eib.org/attachments/country/israel_2011_en.pdf.



Regarding the contract concerning environmental projects, the EIB replied that all sub-projects have to be submitted to the EIB for careful screening and approval, including the provision of full details on the scope and location of the sub-project, before any authorisation of EIB financing is granted. Within this context, the EIB would not accept any sub-projects located in, or helping to develop activities in, any settlement. However, the EIB did not respond to questions concerning the screening mechanisms enforced.¹²⁰

After some investigation by the Mattin group, it seems that the first type of EIB loans were granted to municipalities located in the least-developed areas of Israel, many of which being where the Palestinian Arab minority is concentrated. Concerning the second type of loans, it was very unlikely that Bank Hapoalim would exclude entities based in settlements from the loans without infringing Israeli anti-discrimination regulations that urge equal treatment of all Israeli entities, irrespective of their residence. The EIB relieved this concern by ending the credit facility officially on grounds of disuse.¹²¹

3.2.2. A shift in the EU's approach?

These accounts indicate a tendency among EU institutions to deal with the problem *a posteriori* once it has been exposed to them. However, there are signs of growing recognition by the European institutions of the existence of this problem and willingness by some inside them to tackle it *a priori*. The EU-Israel Association Council statement of 22 February 2011 reflects this shift:

“The elaboration of an operational cooperation agreement between Israel and Europol has also advanced. The first comprehensive draft was submitted for consideration in December 2010. The necessary provisions are made for the correct territorial application of this *and other instruments*”.¹²² (emphasis added)

However, apart from the indication given by this paragraph on the Europol-Israel operational cooperation agreement, the details of which are still unknown, the measures undertaken so far fall short of representing a more active non-recognition policy of the Israeli settlements.

- *The Europol-Israel operational cooperation agreement*

Article 15 of the initial draft of the Europol-Israel cooperation agreement allowed the possibility for “one or more Europol liaison officer(s) to be stationed with the Israel National Police”. In which case, “the Israel National Police shall arrange for all necessary facilities, (...) to be provided to such liaison officers within the premises of the Israel National Police and at its expense.” As the Israeli National Police headquarter is located in occupied East Jerusalem (Sheikh Jarrah), this provision would infringe the EU’s obligation not to recognise the unilateral annexation of occupied territory. Furthermore, this cooperation would run counter to the EU’s internal policy

¹²⁰Correspondence provided by the Mattin Group, Ramallah.

¹²¹Conversation with Charles Shamas, senior partner of the Mattin Group, Ramallah, April 2011.

¹²²Statement of the EU at the 10th EU-Israel Association Council, Op. Cit. para. 38.

obligation not to officially engage Israeli officials in any part of the territory occupied in 1967. The provision (article 15) was deleted in later drafts.

The 2010 ENP progress report on Israel states that:

“In the field of police and judicial cooperation, Europol approved a mandate for negotiations with Israel on an Operational Agreement including a provision that data processing be undertaken in line with international law and that information sourced from the occupied Palestinian territory be marked in advance in a manner identifiable by the EU Member State law enforcement authorities.”¹²³

Since Europol and its Member States are subject to a prohibition against storing and processing data clearly obtained through a violation of human rights,¹²⁴ it is indeed crucial that EU Member States can flag any data they receive from Israel as having been obtained from the OPT or a person illegally removed from the OPT and placed under illegal confinement in the territory of the Occupying Power.

- *Commission decision on adequate protection of personal data*

Another attempt to restate the EU’s position on the status of the OPT can be found in the Commission’s decision of 31 January 2011 on the adequate protection of personal data by the State of Israel.¹²⁵ This Decision permits the cross-border transfer of personal data for commercial purposes. According to article 2.2:

“(t)his Decision shall be applied in accordance with international law. It is without prejudice to the status of the Golan Heights, the Gaza Strip and the West Bank, including East Jerusalem, under the terms of international law”.

Interestingly, paragraph 14 of the preamble states that:

“(t)he adequacy findings pertaining to this Decision refer to the State of Israel, as defined in accordance with international law. Further onward transfers to a recipient outside the State of Israel, as defined in accordance with international law, should be considered as transfers of personal data to a third country”.

¹²³Progress Report, Israel (2010), Op. Cit., p.12-3.

¹²⁴Article 4(4) of the Council Act of 3 November 1998 ‘laying down rules concerning the receipt of information by Europol from third parties’ states: “...information which has been clearly obtained by a third State in obvious violation of human rights shall not be stored in the Europol information system or analysis files.” The same requirement has been reiterated in the Council Decision 2009/934/JHA of 30 November 2009 adopting the implementation rules governing Europol’s relations with partners, including the exchange of personal data and classified information: “Article 20: 4. Without prejudice to Article 31 of the Europol Decision, information which has clearly been obtained by a third State in obvious violation of human rights shall not be processed.”

¹²⁵Commission decision of 31 January 2011 pursuant to Directive 95/46/EC of the European Parliament on the adequate protection of personal data by the State of Israel with regard to automated processing of personal data, Official Journal of the European Union, 1 February 2011, L 27/39.



The impact of these insertions is a step forward in terms of the EU more clearly pointing out that it seeks to be coherent in its position on the status of the Occupied Territories. Nonetheless, it is a limited step, since this “territorial clause” remains subject to the different interpretation of Israel and the EU. Furthermore, it remains to be seen how the EU will render this provision operational.

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THE USE OF ISRAELI STATISTICS IN OECD DOCUMENTS

The addition to the Council decision on personal data follows a similar pattern to the measures agreed during Israel's accession to the Organisation for Economic Cooperation and Development (OECD). Although the OECD is not an EU matter, EU Member States are directly involved in it. After some EU Member States' internal lobbying efforts, OECD Member States agreed on the inclusion of a disclaimer contained in any OECD document where Israeli statistics are used. This disclaimer reads as follows:

“The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.”

The OECD committee on statistics has further suggested that, with the cooperation of the Israeli authorities, it will assess the qualitative impact of including the Golan Heights, East-Jerusalem and the settlements for macro-economic and other specific studies.

The adoption of this disclaimer only represents a timid attempt to express a disagreement vis-à-vis Israel's policy in the OPT - or rather a difference of opinion. The expression “status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law” leaves room for different interpretations and the disclaimer is only a way to acknowledge this difference of interpretation. It fails to reassert the illegality of settlements.

OECD Member States have refused to implement stricter measures which would have been in compliance with their obligation under international law not to recognise Israel's illegal practices. These measures could entail, for instance, the differentiating or disaggregating of statistical indicators that both include and exclude the data concerning East-Jerusalem and the settlements in the OPT.

¹²⁶Data protection is an issue which is not territorial but jurisdictional. The geographical location of the creation of a data does not matter. What matters instead is to which authorities the entities generating and storing data are accountable. Therefore, even the creation of a mechanism which could trace the issuance of a personal data by an entity based in a settlement and prevent its transfer to a European entity would be hazardous since the Decision applies to automated international transfer of data which takes place without public authority supervision. It should be added that this provision does not tackle the possibility of transfer of data generated by a European entity to an entity based in a settlement.

Overall, it remains to be seen whether the right precautionary measures will be adopted in relation to the different EU-Israel agreements that are currently pending. These measures should be based on solid evaluation of the previous attempts by the EU to rectify its practices.



4. CONCLUSION AND RECOMMENDATIONS

This report argues that the EU has not utilised all the means at its disposal to promote Israel's compliance with its international legal obligations, nor has it ensured that its contractual relations with Israel are in full compliance with its own obligations under international law.

APRODEV and EMHRN regret that the EU is still not using all of the instruments at its disposal to exert leverage on its Israeli partner to comply with international law and to enforce the EU's position throughout all its bilateral relations. While APRODEV and the EMHRN note that, recently, with the promise of an upgrade in relations, the EU has established a connection between the deepening of political and economic cooperation and the development of peace negotiations, they also argue that the current review of the ENP offers an opportunity for the EU to revise the conduct of its bilateral relations with Israel. This would entail a proper policy of conditionality with Israel based on the respect for IHRL and IHL; a coherent and comprehensive reporting mechanism on violations committed by Israel in the OPT; the full use of the EU's dialogue with Israel; and a real partnership with Israeli and Palestinian CSOs to promote respect for international law by Israel.

When it comes to the implementation of EU-Israel contractual relations in violations of international law, APRODEV and EMHRN regret that, when presented with this problem, the EU has consistently adopted measures that have fallen short of ensuring a complete exclusion of settlements and annexed territories from EU-Israel cooperation. Thus, it has allowed Israel to



continue its internationally unlawful practices. Despite the fact that there is a growing awareness of this problem among the EU institutions and an attempt to deal with it a priori, it is regrettable that, so far, the measures adopted have not been concrete steps toward effectively preventing the incorporation of settlements and annexed territories in EU cooperation instruments. Instead of accommodating Israel's unlawful policies in the OPT, the EU must implement stricter measures in compliance with its obligation under international law to not recognise Israel's illegal practices.

Based on the EU's commitments and objectives, the EU should develop and implement a strategy that places respect for international law by Israel at the centre of its efforts to put the MEPP back on track. This strategy should both increase EU's capacity to promote respect of international law, while at the same time ensuring that it respect its own obligations in its relations with Israel. This approach would entail the following elements:



4. 1. INCREASE THE EU'S CAPACITY TO PROMOTE ISRAEL'S COMPLIANCE WITH INTERNATIONAL LAW IN THE OPT

4.1.1. Apply conditionality based on IHRL and IHL

In line with elements contained in the ENP Review and the EU Guidelines on the promotion of compliance with IHL, the EU should make use of the "more for more" approach to promote a just and durable peace in the region. In order to do so, the EU should condition the strengthening of its relations with Israel to progress in terms of respect for IHRL and IHL. For this to be possible, the EU must first develop IHRL and IHL benchmarks that outline Israel's obligations under international law.

Those benchmarks should reflect, among others, the following Israeli obligations:

IHRL and IHL Benchmarks:

- Ensure respect for the protection of civilians in accordance with the basic norms and principles of IHRL and IHL. With regard to the latter, the fundamental principles of distinction, military necessity and proportionality must be respected.***
- Ensure respect for the right to life and immediately cease illegal practices of extra-judicial killings and of torture, as well as other forms of cruel, inhuman and degrading treatment of prisoners and detainees.***
- Ensure respect for the freedom of movement of people and goods within and between the West Bank, including East Jerusalem, and the Gaza Strip, as well as in and out of the OPT.***
- Ensure that the Palestinians' economic, social and cultural rights, such as the right to health, education, work, sources of livelihoods and adequate standard of living, are respected. In this respect, Israel should ensure the unimpeded access to the delivery of aid in the OPT. Additionally, Israel should lift all obstacles to the implementation of the EU's development and economic instruments directed at Palestinians, particularly the EU-PLO Interim Association Agreement.***
- Ensure respect for the prohibition under international law to bring about a fundamental demographic change in the composition of the occupied***



The fulfilment by Israel of the obligations contained in these benchmarks should be assessed at the following occasions:

- When considering Israel's increased access to the EU Market and enhanced sectorial cooperation, like in the context of the upgrade, the EU should systematically and coherently assess Israel's respect for its obligations as an Occupying Power under IHRL and IHL against the above benchmarks.¹²⁷
- When giving its consent vote on agreements signed between the EU and Israel, the EP should apply the same benchmarks.

As such, the EP should maintain the current "freeze" of its consent vote procedure on the Protocol regarding Israel's participation in Community programs and the protocol on Conformity Assessment and Acceptance of Industry Products (ACAA) until the above benchmarks are respected.

4.1.2. Include Israel's IHRL and IHL obligations in the OPT in the EU Human Rights Country Strategy for Israel

In order to ensure Israel's compliance with the IHRL and IHL benchmarks, the EU should include respect for these benchmarks as a priority in its EU human rights country strategy for Israel.¹²⁸ The EU, in cooperation with local Israeli and Palestinian CSOs, should develop strategies and programs to promote Israel's compliance with international law. The respect of the freedoms of association, expression and assembly by Israel should also be a priority of the EU's human rights country strategy.

4.1.3. Include Israel's IHRL and IHL obligations in future EU-Israel Action Plan

Any future EU-Israel Action Plan should reflect Israel's obligations as an Occupying Power under international law. In the event of the drafting of a new Action Plan, the objective to "work together to promote the shared values of democracy, rule of law and respect for human rights and international humanitarian law" contained in the current one should be translated into concrete objectives, actions and programmes, in line with the benchmarks mentioned above.

¹²⁷When considering pursuing an upgrade of its relations with Israel, the EU should also assess Israel's respect for human rights inside Israel, including respect for the rights of the Palestinian Arab Minority and freedom of association, expression and assembly. Regarding the EU's tools to promote the rights of the Arab Minority see the EMHRN report "The EU and the Palestinian Arab Minority in Israel", February 2011, available at: http://www.euromedrights.org/files.php?force&file=2011_EMHRN_Adalah_HRA_Report__EU__Arab_minority_in_Israel_415492201.pdf.

¹²⁸The EU is in the process of adopting human rights country strategies for third countries, which identify the top priorities for the EU action on human rights and democracy in the country for the next three years. A strategy for Israel and for the OPT is currently being finalised. The EU will revise these strategies on an annual basis. While the template of the strategy submitted to EU delegation around the world covers the different human rights topics for which the EU has adopted Human Rights Guidelines, it omits the IHL Guidelines.

4.1.4. Ensure coherent and comprehensive reporting on Israel's IHRL and IHL violations in the OPT

In line with the EU-Israel Action Plan objective of promoting respect for human rights and IHL and the EU Guidelines on the promotion of IHL, future ENP Progress Reports on Israel should include a specific section on alleged violations committed by Israel in the OPT. This should be done in line with the above mentioned benchmarks, as well as the recommendations made by UN human rights treaty bodies related to the OPT. This section should serve as a tool to assess the progress made by Israel towards the implementation of its obligations under international law in the context of the strengthening of EU-Israel relations.¹²⁹ The EU should ensure that the progress reports are action-oriented and identify priorities on which the EU's dialogue with Israel and Israel's reform efforts should focus.

4.1.5. Ensure coherent and comprehensive dialogue on Israel's IHRL and IHL violations in the OPT

In line with the ENP review's aim of reinforcing EU human rights dialogue with the neighbouring countries and the EU Guidelines on Human Rights dialogues, the EU should engage in a proper dialogue with Israel on its international law violations at all levels and ensure progress in their respect, in particular regarding the recommendations made by UN human rights treaty bodies as they relate to the OPT. In this regard:

- The EU should systematically remind Israel of its obligations as Occupying Power under international law and address Israel's violations in the OPT in the annual **EU-Israel human rights working group**. These annual meetings should be extended to a full day, as recommended by the EU Guidelines on human rights dialogues¹³⁰, and should produce clear commitments for Israel to abide by. Moreover, the EU should continue to insist on the immediate establishment of a full-fledged human rights subcommittee with Israel which should cover both violations committed in Israel and in the OPT. The EU should continue to de-link the establishment of such a subcommittee from the overall upgrade process. In between the annual meetings of the human rights working group/subcommittee, regular follow-up meetings should be held between the EU delegation and the Israeli authorities to ensure implementation of Israel's obligations under international law. The EU should consider inviting international law experts to these meetings.
- The **EU-Israel subcommittee on political dialogue and cooperation** should continue to address alleged IHL and IHRL violations in the OPT and follow-up on the discussions taking place in the human rights working group and other technical subcommittees.

¹²⁹EMHRN, APRODEV, CIDSE joint submission for the ENP Progress Report on Israel, "Mainstreaming IHL and IHRL in the ENP Progress Report on Israel", 1 December 2012, available at <http://www.euromedrights.org/en/about/working-groups-en/palestine-israel-and-palestinians-en/10884.html>.

¹³⁰European Union Guidelines on Human Rights Dialogues, approved by the Council on 13 December 2001, updated on 19 January 2009, available at http://www.consilium.europa.eu/uedocs/cmsUpload/14469EN_HR.pdf.



- Other relevant **EU-Israel technical subcommittees** should also address the EU's concerns related to Israel's violations in the OPT as well as the problems relating to Israel's inclusion of its illegal settlements in the EU-Israel cooperation agreements. These include the subcommittees on: justice and legal affairs; transport, energy and environment; research, innovation, information society, education and culture; industry, trade and services; customs cooperation and taxation; and economic and financial matters.
- In addition to the discussions taking place at technical level in the subcommittees and the human rights working group, Israeli violations should be raised at the highest political level, including at the **EU-Israel Association Council** meetings and by the High Representative of the Union and the Special Representative for the MEPP when meeting with Israeli officials.
- Israeli violations committed in the OPT should also be at the core of the **meetings of Members of the EP and Member State parliaments** with their counterpart Knesset members and other representatives of the Israeli government.

4.1.6. Establish a partnership with civil society in Israel and the OPT

In line with the ENP review's aim to establish partnership with civil society, it is crucial that Israeli and Palestinian CSOs are closely involved in the development, implementation and assessment of EU instruments that can have an impact on the promotion of compliance with international law in the OPT, including dialogues, progress reports, human rights country strategies and the future Action Plan. The EU should also support those CSOs engaged in the promotion of compliance with international law and condemn any attacks against them. In addition, the EU should promote respect for the freedom of association, expression and assembly in Israel and the OPT. The EU must ensure that Israel and Palestinian CSOs benefit from the new Civil Society Facility.

4.1.7. Ensure consistency between EU and individual Member States' policies

In line with the EU guidelines on human rights dialogue and the ENP review, EU Member States should ensure consistency between their bilateral relation with Israel and the one conducted by the EU. In the context of the bilateral relations between Israel and individual Member States, the latter should ensure that the implementation of the abovementioned IHRL and IHL benchmarks are central. Member States should comply with the provisions of the EU Common Position on arms trade, which provides that an importing country's compliance with IHL should be considered before licences to export to that country are granted. They should also, as recommended by the EU Guidelines on promoting compliance with IHL, make use of universal jurisdiction in cases of impunity. Core issues of the EU's declaratory policy regarding the violations of IHRL and IHL should be systematically conveyed by individual Member States in their bilateral relations with Israel. Member States should follow up on human rights issues discussed in the EU-Israel dialogue by raising them in the course of these relations.

4.2. ENSURE RESPECT OF EU'S OBLIGATIONS UNDER INTERNATIONAL LAW IN EU-ISRAEL CONTRACTUAL RELATIONS

In order for the EU to ensure that its contractual relations with Israel comply with its own obligations under international law, the EU should adopt the following measures:

4.2.1. Based on the EU's international legal obligation of non-recognition, it must prevent any political authority, public institution or private actor, which directly participates in, actively facilitates, or actively derives benefit from Israel's illegal settlement policy, from participating in any form of cooperation with the EU. To this effect, the EU should include safeguard clauses in all EU-Israel cooperation instruments that would allow only Israeli entities with headquarters, branches, subsidiaries registered and established in Israel proper and who conduct activities over the same territory, to participate in EU agencies and programmes.

For example, this means that:

- In the case that any protocol allowing Israel to participate in Community Programmes coming back on the agenda of the EP in the future, the Parliament should ensure that such a safeguard clause is included.
- The EU, including the EP should ensure that such a safeguard clause or mechanism is included in the rule of participation of HORIZON 2020, successor of the FP7.

4.2.2. The EU should include the relevant provisions in any agreement to be signed with Israel that explicitly limits the territorial application of the agreement to Israel proper. The deficiencies related to the previous forms of cooperation should also be rectified.

4.2.3. Concerning the import of products originating from the settlements, the EU and its Member States should adopt stronger and more efficient measures than the ones currently implemented in order to reassert their position on the illegality of settlements and fulfil their duty of non-recognition. The EU should envisage amending the technical arrangement to ensure that Israel makes the distinction between products coming from Israel proper and products coming from the settlements. Alternatively, the EU and its Member States could consider measures outlined in this report that would create a strong deterrent for settlement products to enter the EU market.¹³¹

4.2.4. In the case of the Europol cooperation agreement, the text of the agreement should take into consideration the obligations of Europol and the EU Member States not to store and process data clearly obtained through a violation of human rights. It should also contain measures enabling Europol to detect when personal data has been obtained unlawfully in the OPT or from a resident of the OPT.

¹³¹ See pages 44-47.



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