



A Human Rights Review on the EU and Israel – Relating Commitments to Actions

2003-2004

EMHRN March 2005
Edited version

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PROJECT BACKGROUND

The present report is published by the Euro-Mediterranean Human Rights Network (EMHRN), a network of 80 Arab, European, Israeli and Turkish human rights organisations, institutions, and individuals committed to universal human rights and based in more than 20 countries¹ of the Euro-Mediterranean region.

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

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

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

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

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

In February 2004, following EMHRN's 6th General Assembly recommendations, the EMHRN Working Group on Palestine decided to engage in a project that would review the European Union's (EU) human rights obligations and commitments in relation to Israel.

The Review is intended to be the first in a series meant to assess the EU's relations to third countries in the Barcelona process in terms of human rights. It constitutes a further development of EMHRN's work to promote the implementation of human rights commitments in the Euro-Mediterranean Partnership and in bi-lateral association agreements².

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

² Cf. Previous publications are: *Promotion and Protection of Human Rights in the Euro-Mediterranean Region*. Policy Paper on the Occasion of the Stuttgart Summit, April 1999, Copenhagen. *The Role of Human Rights in the EU's Mediterranean Policy: Setting Article 2 in Motion*. Report from the seminar in the EU parliament. Copenhagen 2000. *The MEDA Democracy Programme*. Recommendations to the EU Institutions. Copenhagen 2000; *Guide to Human Rights in the Barcelona Process*. Handbook on the EMP,

The project was outlined during several meetings of the Working Group in the course of 2004 during which it was decided that the Review should focus on the human rights situation in Israel and the Occupied Palestinian Territories in relation to the EU-Israel agreements. In this way it is meant to bring *added value* to current human rights work done in Israel and the Occupied Palestinian Territories by serving as a human rights guide to evaluate EU relations with Israel.

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

Susan Rockwell and Charles Shamas of the MATTIN Group are the co-authors of the text on which the Working Group has based its report.

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

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

The project was steered by:

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

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

Copenhagen 2000. *The Human Rights Implications of the MEDA Programs*, EMHRN 2002. Integrating Women's Rights from the Middle East and North Africa into the Euro-Mediterranean Partnership, EMHRN 2003; Justice in the South and East Mediterranean Region, EMHRN 2004 (forthcoming). Letters and statements published on the occasion of Association Council meeting between the EU and Egypt, Jordan, Israel, Morocco, and Tunisia.

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

EXECUTIVE SUMMARY

Introduction

This review constitutes the first EMHRN annual assessment of European Union (EU) compliance with its own human rights commitments in its relations to a third country in the Barcelona process.

It studies the EU's commitments to respect and promote human rights in relation to its actions with regard to Israel.

It examines actual EU and significant Member State positions and responses to Israeli violations of international human rights and humanitarian law in the occupied Palestinian territories and in Israel.

The review is published by the Euro-Mediterranean Human Rights Network (EMHRN), a network of 80 Arab, European, Israeli and Turkish human rights organisations, institutions, and individuals committed to universal human rights and based in more than 20 countries of the Euro-Mediterranean region.

The review was conducted by Susan Rockwell and Charles Shamas of the MATTIN Group and based on research, case studies, and interviews with European Community officials. The time frame of the review is July 2003 to September 2004. The research and the recommendations in the review were thoroughly discussed by the EMHRN Working Group on Palestine³ in the period from early June to late November 2004.

The conclusions are as follows:

- *Israel implements its agreements with the EU in violation of general international law, and in violation of the agreements themselves. The EU has repeatedly chosen not to prevent this.*
- *To the extent that the EU has addressed questions of international law, the positions that have been taken have been consistent and legally correct, although in the EU's declarative diplomacy⁴ on matters relating to Israel, few if any affirmative references could be found to those elements of international law that assign general responsibilities to states relative to the illegal acts of third states.*

³ The EMHRN as a network is responsible for this review. Members of the EMHRN Palestine working group are from the following organisations: Palestinian Human Rights Organisation (Lebanon), Cairo Institute for Human Rights Studies (Egypt), Public Committee Against Torture in Israel (Israel), B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories (Israel), Adalah – The Legal Center for Arab Minority Rights in Israel (Israel), Bruno Kreisky Foundation (Austria), Swedish Refugee Aid (Sweden), Al-Haq (The West Bank, Palestine), International Commission of Jurists (Sweden), Arab Association for Human Rights (Israel), Palestinian Centre for Human Rights (Gaza, Palestine).

⁴ *Declarative diplomacy* sets out commitments and positions without attaching them to any actual or potential consequences to a third state's interests. EU's declarative diplomacy with regard to Israel is thus the range of declarative acts of the EU institutions and the Member States in response to Israeli policies and practices.

- *In addition, a review of several key elements of the EU's operative diplomacy⁵, including its contractual relations with Israel, reveals a striking lack of coherence with the EU's legally correct declarative diplomacy.*
- *The EU may have actually facilitated Israel's violations of international human rights and humanitarian law by deferring to them in its own dealings with Israel. The review presents several instances where Israel's implementation of its agreements with the EU has been based on its rejection of its key international obligations as an occupying power, and as a state of all its citizens. The EU can not knowingly allow its contractual relations with any third country to operate in this manner without itself violating European Community law and international law.*

The EU's legal obligations

The EU's commitments relative to the promotion of respect of human rights in Israel as well as other third countries are based on legal obligations. Some of the key obligations are presented below:

- The European Union must construct and implement its external relations in accordance with the requirements of general international law, including the provisions of general international law that contribute to the protection of human rights.
- Article 2 of each Euro-Mediterranean Association Agreement commits the European Union and its Member States, as well as each partner country, to base their relations, and the provisions of the agreements themselves, on respect for human rights and democratic principles.
- In their dealings with states engaged in armed conflict or belligerent occupation, such as Israel, all Member States and the EU are bound by the duty established in Article 1 common to the Geneva Conventions of 1949 to 'respect and ensure respect for [those] Conventions in all circumstances'.
- Community policies in the areas of economic, financial and technical cooperation, as well as development cooperation, are required to contribute to the EU's general objective of respecting human rights and fundamental freedoms⁶. The EU's Common Foreign and Security Policy aims to 'develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'⁷. The Member States and the EU institutions therefore bear responsibility for ensuring that all the above-mentioned policies are implemented in a manner that does not weaken the legal and political cogency of the international law that protects human rights.

⁵ *Operative diplomacy* consists of actions taken in the bilateral or multilateral spheres that influence the decisions of a third state by altering its expectations, or actual experience, of consequences affecting its interests. The EU's operative diplomacy towards Israel is the range of engagements and transactions through which the EU seeks to influence the political behaviour of Israel and through which the EU may fulfil, neglect, or even violate the above-mentioned obligations relative to Israel's respect for human rights and international law

⁶ Treaty Establishing the European Community (TEC), articles 170 and 181a.

⁷ Treaty on European Union, article 11.

Main findings of the review

Israel and international law

The most systematic and serious violations of human rights within the territories occupied by Israel since 1967 involve violations of a number of the compulsory rules of international humanitarian law. The rules in question prohibit the transfer of parts of an occupying power's civilian population into occupied territory. They obligate an occupying power to respect and preserve the public life, economic life, and habitat of the protected civilian persons under its effective control. They prevent an occupying power from exploiting its effective control over territory and protected persons to advance its political interests to the loss or damage of the protected persons' well-being and human rights. Israel has characterised these rules as 'political' and has adopted public policies and legal positions rejecting its rightful, *de jure* status and duties as an occupying power in an attempt to escape the need to apply them.

Within Israel, systematic human rights violations against the Palestinian Arab minority result from discriminatory state policies, and from administrative measures that disadvantage, impoverish, disturb and displace established Arab communities.

The review is clear in that Israel violates the rules of general international law in the implementation of its agreements with the EU.

The EU's declarative diplomacy

The EU, including the EU institutions and the Member States, has responded to the above-mentioned policies and practices through a range of declarative acts surveyed in this review. Some of these declarative acts have been carried out in the context of its bilateral dialogue with Israel. Others have been prompted by the need to take positions on matters brought before organs of the United Nations. Still others have been occasioned by the need to respond to requests by parliamentary and civil society actors for clarifications of EU positions on a broad range of legal and political issues arising from Israel's policies and practices and their impact on human rights. To the extent that they have addressed questions of international law, the positions that have been taken have been consistent and legally correct.

However, as shown by reviewing the EU's declarative diplomacy on matters relating to Israel, few if any affirmative references could be found to those elements of international law that assign general responsibilities to states relative to the illegal acts of third states. These include a general duty not to recognise or accept such illegal acts, and not to aid or assist in maintaining the illegal situation resulting from them; and the related duty accepted by all states party to the Geneva Conventions of 1949 to respect and ensure respect for those Conventions in all circumstances. A similar reticence exists regarding those elements of EU policies and European Community law that establish obligations to respect and promote respect for human rights in third countries, including the 'human rights article' included in the Euro-Mediterranean Association Agreements⁸.

The EU's operative diplomacy

⁸ The European Council agreed for the first time on a common European Security Strategy in December 2003 [The European Council, "A Secure Europe in a Better World: European Security Strategy", Brussels 12 December 2003]. The document affirms that a key EU objective is 'upholding and developing International Law', and states that 'there is a price to be paid, including their relationship with the EU' for countries which 'persistently violate international norms'.

The review then examines several elements of the EU's operative diplomacy: the range of engagements and transactions through which the EU seeks to influence the political behaviour of third states, and through which it may fulfil, neglect, or even violate the above-mentioned obligations relative to third-state respect for human rights and international law. The EU's contractual relations with third states, including the relations established under the EU-Israel Association Agreement and several other EU-Israel agreements based on other Community cooperation instruments, are key EU diplomatic and policy instruments in this regard. The rules of international law that serve to protect human rights, and a third state's readiness to comply with them, are reinforced by the fact that to be implemented correctly, such contractual relations must be implemented in accordance with those rules. Hence the care taken by the EU in ensuring that its agreements with Israel are constructed, applied and implemented in accordance with the requirements of public international law is perhaps the most basic, decisive and persuasive implementation of its own general commitment to respect and promote respect for human rights outside its borders.

The review highlights a pattern of EU deference, bordering on legal acquiescence, to Israel's violations of its agreements with the EU, and to Israel's insistence on applying those agreements as its own internationally unlawful policies dictate. Examples are presented in which the EU's interest in preserving, deepening and broadening the privileged EU-Israel relationship is cited as a reason to avoid taking 'positions based on the blind application of legal rules'⁹, or 'prejudicing the positions of any of the parties'¹⁰.

The review clearly shows that the EU's operative diplomacy is inconsistent with its legally-correct declarative diplomacy.

EU's facilitating Israel's violations of international human rights and humanitarian law

In relation to Israel's policy of incorporating the territories occupied in 1967, including East Jerusalem, within the territorial scope of its agreements with the European Community, and its policies mandating the unlawful use of force against civilian persons and the unlawful destruction of civilian property, three cases are presented in which the EU may have actually facilitated Israel's violations of international human rights and humanitarian law. This is done by protecting Israel from legal and political accountability and by helping Israel escape the normal penalties or costs that would ordinarily result from the violations.

The cases presented in the review are:

- The Government of Israel's practice of certifying products originating in settlements as of Israeli origin in violation of the territorial clause of the EU-Israel Association Agreement, and the EU's acquiescent response.
- The European Community's failure to ensure that illegally established settlement entities do not participate in the various spheres of EC-Israel bilateral cooperation additional to the preferential trade relationship, such as scientific and technical research.
- The EU's provision of emergency humanitarian relief and reconstruction and development assistance to the Palestinian population of the occupied territories. The

⁹ Quotation from Commissioner Vitorino's speech on behalf of the Commission to the European Parliament during a plenary debate on the "Irregular Application of the EC-Israel Trade Agreement, 2 March 2000.

¹⁰ Quotation from the Commission's Reply to oral question n. 68 H-0018/00 by Luisa Morgantini, Member of European Parliament, 6 January 2000.

relief is meant to alleviate the effects of the wrongful harm caused by Israel's violations of international humanitarian law. Israel maintains that the harm has not been caused wrongfully. The EU rejects Israel's position, delivers its aid, but stops short of demanding that Israel bear the financial responsibility placed on it by international law.

The review also examines the impact of Israel's institutionalised discrimination against its Palestinian Arab minority on the implementation of EC-Israel cooperation. The review points at the failure from the EU's side to take steps to prevent the effective exclusion of that minority from equitable participation in the benefits of cooperation instruments which are *inter alia* intended to promote respect for human rights and democratic principles.

RECOMMENDATIONS

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

1. The EU should establish a public review mechanism with clear measurable benchmarks that will enable it to assess how its agreements with third countries are being implemented and applied with regard to respect for human rights.
2. The conclusion and implementation of an Action Plan with Israel under the European Neighbourhood Policy (ENP) should be conditioned on a clear acknowledgement by Israel of its status and duties as an Occupying Power, and on the incorporation within the Action Plan of a provision for technical dialogue and practical cooperation aimed at promoting the implementation of international human rights and humanitarian law in occupied Palestinian territory.
3. The EU should push for the establishment of a human rights sub-committee under the EU-Israel Association Agreement. Human rights NGOs should systematically be consulted and informed about the work of such a committee.
4. Members of the European Parliament should pursue dialogue with the European Commission promoting the establishment of clear and transparently applied benchmarks for assessing third country human rights practice in light of the Union's own commitments to human rights. The establishment of such benchmarks would additionally provide an opportunity for parliamentarians to address well-targeted questions to the Commission and the Council regarding Israel's human rights practices and the EU's responses.
5. The European Commission should include relevant civil society organisations among the organisations that it will consult when carrying out periodic human rights reviews of the implementation of the Action Plan and the EU-Israel Association Agreement.
6. Israel considers the territories occupied in 1967, including East Jerusalem, to fall under its treaty-making authority. This interpretation stands in clear contrast to the EC-Israel agreements' stated territorial scope of applicability. The External

Relations Directorate General and the Commission at the highest level should therefore ensure that *all* Directorate Generals are notified of Israel's treaty breaking interpretation and are obliged to take proper action ensuring the agreements' lawful application and implementation, in keeping with the principle of human rights mainstreaming.

In addition the EU should ensure that:

- a. Assistance funds directed through implementing agencies working in the occupied Palestinian territories are not used in contravention to the International Court of Justice's injunction that states not render aid or assistance in maintaining the situation created by the construction of the barrier/wall.
 - b. Entities participating in the illegal construction of infrastructure in occupied territory are not allowed to participate in any EC-Israel cooperation instrument.
 - c. Entities established in illegal Israeli settlements do not participate in any way in the Community's bilateral and regional cooperation instruments provided for in the EC's agreements with Israel or with the Palestinian Authority.
 - d. All EU public procurement tenders stipulate that entities located in Israeli settlements, or entities with branches or subsidiaries in settlements, are not qualified to participate.
7. The 'Olmert Arrangement' should not be formally accepted by the EU nor endorsed by the EU-Israel Association bodies. Adopting the Olmert Arrangement according to the Commission's recommendation would entitle Israel to continue applying the Association Agreement to the occupied territories. For this same reason, the European Union should not act to bring Israel into the Pan-Euro-Mediterranean free trade area while Israel continues to apply the Agreement to the occupied territories and continues to certify products from illegal settlements as originating in Israel.
8. The EU should make increased and regular public reference to illegal actions carried out by the armed forces of Israel that are causing the humanitarian crisis in the occupied Palestinian territory. The EU should call on Israel to stop these illegal actions, reverse their effects to the fullest extent possible, and make correct reparation for the harm they have wrongfully caused.
- The EU should also make it clear to Israel that the EU's provision of humanitarian assistance is within the rules of international humanitarian law and does not release Israel of its responsibilities as an Occupying Power. The EU should demand reimbursement from Israel for all additional costs incurred on the provision of humanitarian relief deliveries as a consequence of access and mobility restrictions imposed unlawfully by Israel's military authorities.
9. In light of the effects of Israel's systematic discriminatory treatment of its Arab citizens on their opportunities for participation in the range of EU-Israel cooperation instruments, the EU should take steps to ensure that its cooperation with Israel is conditioned on concrete and effective steps to end all discriminatory state practice and rectify its effects.

10. Should Israel request a loan facility from the European Investment Bank or any other Community financing instrument, the relevant EU financial institution should make a clear and determined effort to enable minority access to the new lending opportunities. In the case of Community grants, the EU should earmark a substantial share of the funds for minority use.

I INTRODUCTION

Many political authorities of the world, and most political authorities of the southern and eastern Mediterranean, claim to be confronted by exceptional political circumstances and threats to security and stability that necessitate their violation of fundamental human rights. For this reason, one of the most important elements in the defence of human rights is the strict application of the legal rules that have been developed to restrict such claims and prohibit as unjustifiably harmful state acts based on them. These legal rules include the rules of international humanitarian law. Another significant element in the defence of human rights is the principle intrinsic to the entire system of international law according to which no *political* interest can justify going to war or declaring a state of emergency, and no political interest can justify violating fundamental human rights, even in time of war and domestic emergency.

The European Union is confronted throughout the Mediterranean region with widespread arbitrary abuses of human rights, widespread human rights violations based on illegitimate claims of necessity, and the widespread, often deliberately disproportionate, use of force and punitive measures against political opponents. Offending authorities often seek to justify these abuses by invoking their right to apply a different set of rules based on differing definitions of necessity and differing benchmarks of proportionality. However, in no case has the European Union accepted these countries' right to act outside of the legal rules it can recognise and accept.

The question the EU may confront in such cases is whether its own commitments to human rights and to the legal rules being broken render some politically discretionary measure of enforcement, possibly involving a suspension of third country privilege, necessary and appropriate.

In the case of Israel the EU is faced with a challenge of another order. Israeli policies authorising the creation of ethno-religious and demographic 'facts', largely to the detriment of the indigenous Palestinian population, have led to the adoption of other internationally unlawful policies and national legislation.

These policies claim to justify the unlawful use of force and exercise of administrative authority on grounds of necessity and urgent national interest. Since 1967, these exceptional rules have also been applied to a belligerent occupation governed by international humanitarian law.

This has faced the EU with an exceptional problem: how to deal appropriately with an association partner country's insistence on applying its agreements with the EU and implementing its relations under those agreements in a manner determined by policies, legal positions and rules that the EU cannot accept without itself violating international and/or Community law.

In light of the EU's legal and political commitments relative to the promotion and respect of human rights in third countries, this report will review EU responses to several systematic and prominent Israeli practices that violate international human rights and humanitarian law in the occupied Palestinian territories and in Israel. The EU took numerous declarative acts in support of its commitments to promoting human rights and democracy with regard to a range of human rights violations by Israel during 2003-2004. Many of these acts, like statements by the Council of the European Union (made up of representatives of the governments of the Member States) are listed in Annex I. Annex I also makes reference to the European Initiative on Democracy and Human Rights.

The report also presents several cases which consider the possibility that acts of commission and deliberate acts of omission by the EU may have actually facilitated Israel's violations of international human rights and humanitarian law by shielding Israel from legal and political accountability, and by helping it escape the normal penalties or costs that would result ordinarily from the violations.

Some of the actions taken by the EU appear to be inconsistent with what will be referred to as the principle of 'clean hands' as it would apply to human rights and humanitarian law: the duty to refrain from any act that knowingly facilitates violations of human rights and humanitarian law by a third party. Others appear to violate the 'duty of care': the failure to take reasonable precautions when plentiful cause exists to expect that one's action or inaction could facilitate, aggravate, or simply increase the likelihood of serious violations of human rights.

The cases presented are:

- The Government of Israel's (Gol) practice of certifying products originating in illegal Israeli settlements as of Israeli origin in violation of the territorial clause of the EU-Israel Association Agreement, and the EU's irregular operational responses. This will be referred to as 'rules of origin' in the text.
- Related to the above, Gol policy of incorporating the occupied territories within the territorial scope of its agreements with the European Community (EC), and the EC's failure to safeguard its programmes and cooperation instruments against the possibility of participation by settlement entities.
- Gol violations of international humanitarian law in the conduct of its occupation, and EU provision of assistance to the population of the occupied territories within the framework of those violations.

In addition this report examines:

- The human rights clause (Article 2) of the EU-Israel Association Agreement with the aim of clarifying the scope of application of the clause and the factors determining the bases for partial or complete suspension of an association agreement.
- The consequences of Israel's institutionalised discrimination against minority citizens that make it very improbable that the Palestinian Arab minority in Israel will benefit from cooperation instruments under the Framework Programme of the European Community for research, technological development and demonstration activities, and the European Investment Bank.

- Some of the arguments used in the ongoing debate within the European Union as to whether to continue to expand Israel's privileged relationship with the Union in order to exert greater influence over it, or to regulate cooperation with Israel more strictly in order to avoid being drawn into acquiescence or involvement in Israel's violations of international human rights and humanitarian law.

Annex II contains selections of European Union and European Community law integrating human rights into the *acquis communautaire* of the EU and establishing respect for, and promotion of, human rights as objectives of the Union's external relations.

Annex III notes EU institutional references to Article 2.

Annex IV examines the EU's declarative acts with regard to the UN General Assembly resolutions and the International Court of Justice Advisory Opinion on the barrier/wall being constructed by Israel inside occupied territory.

The review covers mainly the time period July 2003 - September 2004 during which the EC expanded its partnership relationship with Israel significantly:

- 4 July 2003: Upgrading of EC-Israel agricultural trade
- 30 April 2004: Agreement on the EC-Israel Scientific and Technological Cooperation Agreement 6th Framework Programme
- 13 July 2004: Agreement on GALILEO, Europe's satellite radio navigation programme

During 2003-04 the EC also continued its dialogue with Israel over resolving the 'rules of origin' dispute under the EU-Israel Association Agreement and incorporating Israel into the new Pan-Euro-Mediterranean system of free trade, and on negotiating an Action Plan with which to usher in Israel's participation in the highest level of partnership available to a non-EU country, the European Neighbourhood Policy (ENP), which will give Israel access to 'everything but the institutions'.

II THE HUMAN RIGHTS ARTICLE OF THE EU-ISRAEL ASSOCIATION AGREEMENT

1. Introduction

The association agreements between the European Union and the countries of the Mediterranean basin are aimed at achieving the broad objectives of the Euro-Mediterranean Partnership (EMP), or the 'Barcelona process', namely promoting 1) peace and security; 2) shared prosperity through, inter alia, the creation of a free trade zone and 3) cross-cultural rapprochement through political, social and people-to-people exchanges¹¹.

The EU-Israel Association Agreement, which entered into force in June 2000, establishes a *contractual* basis for EU-Israel relations designed to promote these broad objectives, both as it operates bilaterally, and by incorporating Israel into a multilateral regional process of dialogue and exchange with the EU's other Mediterranean Partners, including the Palestinian National Authority.

The multilateral process is anchored in three key elements of each Mediterranean Partner Country's bilateral association relationship with the EU: their common system of preferential trade with the EU; their common political commitments in association with the EU; and the common horizons open to them in the sphere of broader commercial, technical and scientific exchange.

Since the early 1990s, all EU bilateral trade, cooperation and association agreements with third countries, including the Euro-Mediterranean Association Agreements, have contained one or another variant of an article establishing certain commitments and undertakings regarding 'respect for human rights and democratic principles' as an 'essential element' of each agreement – i.e. a general condition on which the contractual rights of the parties under the agreement are based.

Article 2 of the EU-Israel Association Agreement, often referred to as the 'human rights' article, or the 'essential element' clause, states:

Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.

Article 2 establishes the right of each party to address the human rights-related conduct of the other in the course of implementing the agreement. It thereby introduces human rights-related concerns into the bilateral political dialogue institutionalised under the agreement. It also establishes a basis for taking positive measures of human rights enforcement with the partner country aimed at promoting its respect for human rights and democratic principles, and for taking negative measures aimed at dissuading it from policies and practices that disrespect human rights.

Positive enforcement measures may include measures of assistance and offers of benefits conditioned on improved human rights practice. Negative enforcement

¹¹ Middle East fact sheet, European Union, EU-US Summit, Dromoland Castle, Ireland 26 June 2004.

measures can extend to threatening and carrying out the partial or full suspension of an agreement -- a measure of retortion equivalent in purpose and effect to a sanction. The original rationale of incorporating an 'essential element' clause in the EU's external cooperation agreements was indeed to enable it to sanction a Partner's disrespect for human rights by unilaterally suspending an agreement. The 'essential element' clause made it possible to do this without violating the agreement itself.

In its Communication of May 2003 on 'Reinvigorating EU actions on Human Rights and Democratisation with Mediterranean Partners,' the European Commission highlighted the application of political dialogue and cooperation reinforced by positive conditionality¹² in relation to the essential element clause¹³:

However, 'essential element' clauses do not necessarily suggest a negative or punitive approach – they can be used to promote dialogue and co-operation between partners through encouraging joint actions for democratisation and Human Rights, including the effective implementation of international Human Rights instruments and the prevention of crises through the establishment of a consistent and long-term co-operative relationship.

In addition, Article 3 of the Association Agreements provides the legal basis for the establishment of regular institutionalised political dialogue between the EU and the partner countries. The EU should continue efforts to deepen the substance of this dialogue on Human Rights and democratisation issues, not only in general terms or related to individual cases, but by focusing on specific operational issues¹⁴.

The Commission's earlier Communication of May 2001 on 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries', spoke more clearly of the need to consider suspension as a measure of last resort.

[..] The most effective way of achieving change is therefore a positive and constructive partnership with governments, based on dialogue, support and encouragement. This should aim to improve mutual understanding and respect, and promote sustainable reform. However a prerequisite for success is that these states are genuinely ready to co-operate. The EU should pursue this approach wherever possible, while recognizing that in some cases, the third country may have no genuine commitment to pursue change through dialogue and consultation, and negative measures may therefore be more appropriate. This is the basis on which the EU's essential agreements, and the 'suspension clauses' operate. All avenues for progress are explored before the EU resorts to sanctions¹⁵.

In fact the EU has applied sanctions against a number of countries outside of the Euro-Mediterranean Partnership, or against their leaders. It has also suspended or partially

¹² Positive conditionality, often referred to as "carrots", relies on conditional offers of benefits as an accompaniment to political dialogue. It can be freely applied to procuring the advancement of the EU's goals and interests. Negative conditionality, often referred to as "sticks", relies on the suspension or withdrawal of benefits, usually as a result of failed political dialogue. It is in principle reserved for situations in which the EU considers it necessary to defend a right or fundamental interest.

¹³ Annex III provides details of EU institutional references to Article 2.

¹⁴ "Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners", Communication from the Commission to the Council and the European Parliament, Com (2003) 294 final, Brussels 21.05.2003, p.10.

¹⁵ "The European Union's Role in Promoting Human Rights and Democratisation in Third Countries", Communication from the Commission to the Council and the European Parliament, COM(2001) 252 final, 8 May 2001, p.8.

suspended agreements outside of the Euro-Mediterranean Partnership in response to serious failures to respect human rights and democratic principles, or in response to violations of the agreements' trade-related provisions.

This has given rise to much political and legal debate concerning the EU's application of the human rights article, or, more precisely, its perceived non-application with respect to Israel.

For countries with which the EU seeks to intensify its engagement, suspension as a punitive measure is considered counterproductive by the EU. In the case of Israel, several additional reasons for not considering suspension as a punitive measure are also put forward within the EU:

- Suspending any one of the Euro-Mediterranean Association Agreements on the basis of Article 2 could open the door to suspending them all, given the general exasperation felt within the EU regarding the pace and the lack of will of most of the states of the region to carry out the reforms it seeks. The first suspension would set an undesired precedent. Since almost every country in the Mediterranean basin has an EU protector state - usually the former colonial power or, in the case of Israel, states burdened by their past policies and actions towards Jews - no EU state wants suspension to start with the state with which it has especially strong ties. In short, EU has settled on a unified policy of *not* suspending any of the Euro-Mediterranean Association Agreements on the basis of the human rights article.
- The EU nurtures the hope of reducing the gap between the influence it has with Israel and the much greater influence commanded by the US. It wishes to 'bring Israel closer to the EU'. It therefore makes little sense for the EU to place all its eggs in the suspension basket, since after suspending the Agreement, it would have no influence. Given the heavy economic and political support provided by the United States to Israel, it is widely believed that if the EU were to 'play hardball' with Israel, Israel would simply say 'goodbye'.
- The EU has a substantial trade surplus with Israel.
- The EU's current efforts to improve its competitive industrial and commercial position *vis à vis* the United States re-enforces its interest in close cooperation with Israel's robust scientific research and development (R&D) sector, particularly in the fields of information technology, optoelectronics, medical research, biotechnology and space technology.

On top of these strategic political considerations, a political decision to apply suspension as a sanction carries with it a considerable burden of legal justification. Sanctions proposed on human rights grounds must be justified by a convincing prospect that they will prove effective. They must also stand the test of proportionality; and the likely extent of their positive impact on a third country's respect for human rights must figure in the calculation of proportionality. None of these constraints apply to positive measures.

The partial or full suspension of an association agreement requires unanimous approval in the Council (all 25 Member States).

Since nothing in Community law or international law actually obligates the EU to initiate a punitive sanction, raising the question of applying suspension as a sanction from a legal standpoint only returns the discussion to politics.

In light of the above it may be reasonable to conclude that nothing short of a broad groundswell of European outrage, the irretrievable collapse of the Israeli-Palestinian peace process, or a major regional upheaval is likely to weaken the EU's strategic and political opposition to the use of the suspension as a sanction on human rights grounds with Israel or any of the EMP countries.

However, the debate on suspension as described above has revolved almost exclusively around the use of suspension as a punitive sanction based on the 'essential element' clause. The second part of this section will consider the resort to suspension in relation to its original purpose in international law, namely to enable a state to protect itself from the unwanted consequences of a treaty partner's violation of essential provisions of a treaty.

Presented with certain internationally unlawful Israeli policies and practices that violate human rights, the 'essential element' clause, the 'non-execution' clause (Article 79), and other elements of Community law can compel an EU response. In such cases, the EU's resort to negative measures would not be aimed at modifying Israel's human rights conduct, but at fulfilling human rights-related requirements of Community law. Ironically, the fact that the EU would be compelled to act by its own law, and against its own political preferences, could render such measures more effective than a sanction at persuading Israel of the cogency of the rules of international law it is violating.

2. The Association Agreement as an international agreement

All EU association agreements are at once:

- international agreements governed by and applied in accordance with public international law
- elements of European Community law

As a provision of an international agreement, the 'essential element' clause

- affirms the commitment of each party to conduct their relations and to interpret, apply and implement the Agreement in a manner based on 'respect for human rights', and renders this a basis for all others to interpret the Agreement and each party's obligations under it (including arbitrators and the European Court in adjudicating any dispute);
- affirms the commitment of each party to shape their foreign and domestic policies in a manner that is *guided by* 'respect for human rights';
- subjects each party's conduct, both generally and under the Agreement, to the other's scrutiny in light of the above professed commitments;
- entitles each party to determine whether it considers the other party's conduct to accord with these professed commitments;
- entitles each party to hold the other in material breach of the Agreement should it consider the other party to be acting in contempt of these professed commitments, or to have professed them in bad faith.

'Respect for human rights' is not *per se* part of the Agreement's stated aims¹⁶ ('object or purpose'). However the 'essential element' clause establishes both parties' agreement that 'respect for human rights' is essential to the accomplishment of those aims. The clause also commits the parties to implementing that essential element in two practical spheres over the course of the Agreement's operation:

- 'Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles'
- 'Respect for human rights and democratic principles... guides their internal and international policy...'

Both sides also recognise that the failure of either of the parties to satisfy either of these two conditions can interfere with the accomplishment of the Agreement's aims, even if all the Agreement's other provisions are correctly implemented by both sides. Such a failure could also cause the Agreement to operate in an unanticipated manner, with consequences that one of the parties may not be able to accept. In this sense the 'essential element' clause is a 'provision essential to the accomplishment' of the Agreement's 'object and purpose'.

It is important not to overlook the fact that under the Agreement the EU has bound itself to fulfilling these two conditions. It is also important not to overlook the fact that these conditions are not only commitments made to, and 'enforceable' by, Israel and the host of other third countries with whom the EU has concluded agreements containing an 'essential element' clause. They have also created obligations in Community law that bind the EU institutions.

3. The Association Agreement as an element of European Community law

As a provision of an agreement that is part of Community law, the 'essential element' clause adds a new practical dimension to the human rights-related commitments of the Member States and the Community:

'Relations between the Parties ...shall be based on respect for human rights...'

Other parts of Community law and common policy already establish commitments to the effect that 'respect for human rights and democratic principles... guides [the EU's] internal and international policy...'.¹⁷

¹⁶ Article 1, para 2 of the EU-Israel Association Agreement states:

The aims of this Agreement are:

- to provide an appropriate framework for political dialogue, allowing the development of close political relations between the Parties,
- through the expansion, *inter alia*, of trade in goods and services, the reciprocal liberalisation of the right of establishment, the further progressive liberalisation of public procurement, the free movement of capital and the intensification of cooperation in science and technology to promote the harmonious development of economic relations between the Community and Israel and thus to foster in the Community and in Israel the advance of economic activity, the improvement of living and employment conditions, and increased productivity and financial stability,
- to encourage regional cooperation with a view to the consolidation of peaceful coexistence and economic and political stability,
- to promote cooperation in other areas which are of reciprocal interest.

¹⁷ E.g. Article 6 of the Treaty on European Union and Articles 170 and 181a of the Treaty Establishing the European Community.

In conducting EU-Israel relations, whether under the Agreement or outside of it, any action or deliberate inaction on the part of the Community that could reasonably be expected to aggravate the likelihood, frequency, or severity of human rights violations by Israel (or, for that matter, by the EU) would contravene the 'essential element' clause. Since 'the provisions of the Agreement itself, shall be based on respect for human rights...', and 'respect for human rights' is 'an essential element' of the Agreement, such wrongful action or inaction cannot be justified by invoking any of the other provisions of the Association Agreement.

In this respect the 'essential element' clause aligns Community law with the principle of 'clean hands' and the 'duty of care' referred to in the introduction to this review. It also aligns Community law with the general principles of state responsibility reaffirmed by the International Court of Justice in its 9 July 2004 Advisory Opinion on 'the legal consequences of constructing a wall in the occupied Palestinian territory'.

The 'essential element' clause also narrows the margin otherwise afforded by Community law to disregard a third country's internationally unlawful legislation, policies and practices that violate human rights. Choosing not to prevent the association partner from basing its implementation of its agreements with the EU on such unlawful legislation, policies and practices, or proceeding to conclude new agreements while it does so, would contravene the 'essential element' clause, and action or inaction taken to this effect by the subjects of Community law would be wrongful in Community law.

This in turn lends a new dimension to the interpretation of the responsibilities of the subjects of Community law: the Council of Ministers, Commission, Parliament, Court of Justice and other Community institutions, and the Member States.

The application and enforcement of Community law revolves around ensuring that its subjects avoid 'wrongful action' as well as wrongful 'failures to act', as they apply and implement Community law within their respective areas of competence.

As the EU institutions exercise their respective competences and roles in deciding whether and how the EU shall act in its relations with an association partner, including the conclusion and management of contractual agreements, any act or failure to act that contravenes the 'essential element' clause could therefore be actionable under Community law, especially if the decisions to act or not to act taken by the responsible subjects of Community law:

- were in fact political or negligent – i.e. not dictated by other obligations in Community law;
- had the effect of assisting an association partner to maintain policies and practices that disrespect human rights; and
- were understood to have such an effect.

Each of the Community institutions and the Member States are supposed to apply Community law as they would expect the European Court to apply it. Since they often do not, the law relies for its enforcement on actions brought before the Court by

individual concerned parties – another institution, Member State, or legal persons with standing.

However, in the EU's institutional culture there is a great difference between its tolerance for conducting EU affairs in a *de facto* legally wrongful manner, and its tolerance for persisting in wrongful action or inaction once *legal impropriety* has been made evident, placed under scrutiny and debate within the institutions, and taken up by elements of the European public. For very strong reasons of general self-interest and institutional self-interest, the EU remains attached to its own rule of law. There is broad EU political consensus regarding the importance of not weakening the presumption of rule of law within the Community and as a European Union by conspicuously acting in contempt of it.

4. The 'non-execution' clause as a provision of an international agreement

In the EU-Israel Association Agreement the human rights article exists alongside a so-called 'non-execution clause', Article 79, which states that either Party may take *appropriate measures* to redress the other Party's failure to fulfil an obligation under the Agreement, although in selecting these measures, priority should be given to those which *least disturb the functioning of the Agreement* (emphasis added).

Since the Agreement is an international contractual instrument, the international law of treaties governs the application of the non-execution clause¹⁸. The Vienna Convention on the Law of Treaties (1969) entitles a party to suspend or terminate a treaty should the other party commit a 'material breach'. It defines a material breach as the violation of a provision that is 'essential to the accomplishment of the object or purpose of the treaty'¹⁹.

A party's conclusion that the other has failed to maintain either of the two conditions set out in the 'essential element' clause would therefore entitle it to take 'appropriate measures' up to and including the full suspension of the Agreement.

Viewed in this light, suspension on grounds relating to 'respect for human rights' is not a punishment or sanction aimed at modifying the behaviour of the other party. It is a response of last resort prompted by the refusal of the suspending party to accept its partner's deficient implementation or misapplication of the Agreement. This *refusal to accept* is key.

5. The role of Community law in the Community's application of the 'non-execution' clause

The Community's rule-based legal culture is based on the assumption that it cannot wait for any instance of an agreement's known misapplication or deficient implementation to cause its operation to deviate from its originally agreed object and purpose before acting to put an end to the violations of the rules themselves. Similarly, it cannot allow a partner country's misapplication or deficient implementation of an agreement to cause a prolonged failure of the Community to satisfy the requirements of its own law.

¹⁸ See Barbara Brandtner and Allan Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" from the online European Journal of International Law, Academy of European Law, p.6.

¹⁹ See Article 60 of the Vienna Convention on the Law of Treaties (1969).

In all cases of a partner's deficient implementation or misapplication of an agreement made under Community law, including its failure to fulfil the conditions set out in the human rights article, four paths to a solution are prescribed in international law and under the agreement:

- Resolve deficient execution - through dialogue, cooperation and technical assistance (e.g. Article 70).
- Resolve any underlying differences of interpretation and application – consensually, or failing that, then through compulsory dispute settlement (Article 75).
- Until these problems can be solved, take ‘appropriate measures’ under the Agreement's ‘non-execution’ clause up to and including full suspension of the Agreement in order to protect the EU's own obligations and interests from harm. In selecting the measures, give priority to ‘those which least disturb the functioning of the Agreement’ (Article 79).
- If the above do not produce a solution, terminate the Agreement (Article 82)²⁰.

Application of the non-execution clause leading to the suspension of an agreement is therefore only one possible means to an obligatory end: ensuring that an agreement operates in a manner that satisfies the requirements of Community law - including the ‘essential element’ clause.

EU external agreements are suspended by the EU pursuant to a political decision of the Council taken according to law. The decision must be justifiable under the international law of treaties. That is also a requirement of Community law.

However, agreements *must* be suspended when the EU's competent institutions determine that

- a partner country's misapplication or deficient implementation of the agreement is preventing the Community, its institutions or the Member States from performing their own obligations under Community law and/or international law
- measures short of suspension fail to rectify this problem within a reasonable time and
- a specific measure of suspension would put an end to the problem.

In such cases, the scope of the required suspension must be sufficient to put an end to the violations of Community law resulting from the association partner's malpractice under the agreement.

In the case of Israel, the EU is confronted with Israel's improper execution of the trade-related provisions of its Agreement, based on Israel's internationally unlawful application of the Association Agreement to occupied territory. Israel's application of the Association Agreement to occupied territory is in turn based on its internationally unlawful domestic

²⁰ Article 82 of the EU-Israel Association Agreement entitles either side to terminate the agreement for any reason whatsoever six months after notifying the other side of its decision. Suspension is therefore a measure taken in the context of continued commitment to the Association Agreement.

legislation, and its continued rejection of its status and duties in international law as an occupying power.

The EU is also confronted with Israel's continuing policy-based violations of international human rights and humanitarian law in the occupied territories, based on Israel's rejection of its status and duties in international law as an occupying power.

Under Community law, including the 'essential element clause', the EU must prevent its relations with Israel from being conducted on this basis. The EU's prolonged failure to prevent the Agreement from operating in an internationally unlawful manner violates Community law. If the EU wishes to maintain that the problem arises from Israel's 'different interpretation' of international law or its different interpretation of the term 'respect for human rights', the EU can move to compel the lawful resolution of those 'differences of interpretation' through the Agreement's arbitration mechanism.

The persistence of violations of Community law resulting from Israel's unlawful application and implementation of its agreements with the EU raises the issue of the deficient implementation of Community law by the responsible Community institutions. Behind the EU's overall failure to act are particular institutional wrongful actions and failures to act for which legal responsibility can be assigned.

Once particular responsibility can be determined, any Member State or EU institution with the standing and the will can call on the responsible party to end its particular failure to act or to annul its wrongful act. If this call is not heeded, an action against the responsible institution can be brought before the European Court of Justice. The possibility also exists that persons directly affected by the general failure to act – EU nationals or others – may themselves have standing to bring actions in Community courts.

Getting the 'essential element' clause to operate 'as advertised' in the EU-Israel Association Agreement will therefore either require a sustained law-based battle of detail, a massive mobilisation of European sentiment favouring sanctions, a major expansion of the EU's political leverage with Israel -- which the EU now hopes to achieve under its new Wider Europe Neighbourhood Policy --, or a just and durable resolution of the Israeli-Palestinian conflict. The questions asked by many throughout the human rights community in this connection concern whether either of the last two solutions will prove attainable while the EU allows its contractual relations with Israel to be conducted in a manner that Community law and public international law cannot accept.

III CASES IN WHICH THE EU MAY HAVE FACILITATED ISRAEL'S VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

To a very large extent, the violations of human rights and incitement to violence and conflict that have been chronic features of Israel's prolonged occupation result from Israeli practices that contravene fundamental provisions of international humanitarian law and other elements of public international law governing belligerent occupation.

Much of the debate concerning the role played by the EU in promoting respect for human rights in its relations with Israel and the Palestinian Authority has therefore focused on the extent to which *operative* EU diplomacy²¹, has reinforced the legal and political cogency of those obligatory 'legal rules' – i.e. whether their violation is associated with the expectation of consequences.

The underlying principle, evoked by the International Court of Justice in its Advisory Opinion, and clearly set out in Article One common to the four Geneva Conventions of 1949, is simple: all states have an obligation not to elect any course of action or inaction that facilitates the violation of absolute norms of general international law, including by acting to relieve a violator of the normal or legally prescribed consequences of its violations.

As can be seen in Annex I to this report, the EU has regularly taken correct declarative positions affirming Israel's obligations in international law, and dismissing Israel's rejection of them, albeit with varying degrees of clarity and completeness.

In the course of pursuing its political objective of broadening and deepening EU-Israel privileged relations, the EU has also been careful to construct and interpret its bilateral agreements with Israel in accordance with applicable public international law. It has insisted on excluding the occupied territories from the territorial scope of the application of all EU-Israel agreements, and refused to acquiesce to Israel's position that the international prohibitions against its measures of settlement and annexation did not apply to its actions in occupied territories.

However, in the EU's operative diplomacy, it has failed to satisfy the obligation to refrain from facilitating Israel's violations of international law through deference or acquiescence. Indeed, *in the interest of preserving and expanding its privileged relations with Israel, in several notable instances the EU has violated this obligation with conspicuous deliberateness.*

Nowhere has this been more evident than in connection with the EU's handling of Israel's violation of the origin rules protocol and territorial clause of its trade-related agreements with the EC.

²¹ *Operative diplomacy* consists of actions taken in the bilateral or multilateral spheres that influence the decisions of a third state by altering its expectations, or actual experience, of consequences affecting its interests. *Declarative diplomacy* sets out commitments and positions without attaching them to any actual or potential consequences to a third state's interests.

1. 'Origin Rules'

In the case of the EC-Israel preferential trade agreements, since the first EC-Israel preferential trade agreement was signed in 1975, Israel has applied these agreements with the European Community to the territories it has occupied since 1967 according to the same generally rejected interpretations of public international law on which it bases its rejection of its legal status and obligations as an occupying power. In 1998, Israel confirmed officially its illegal practice under its trade-related agreements to the EC and notified the European Commission of its intention to maintain that practice²².

In implementing its preferential trade agreements, Israel refuses to distinguish between production carried out in occupied territories and production carried out in the territory of the State of Israel. Since it issues proofs of origin under the agreement on this basis, European Union customs authorities have been unable to detect or prevent the granting of European Community preferences (mainly import duty exemption) to products that do not qualify because settlement-based enterprises participate in their production.

The European Council and Commission have acknowledged that the preferential importation of such ineligible products violates Community law. They have also taken the position that Israel's certifying them as eligible for preferential treatment is a violation of the Association Agreement.

However, they have avoided taking the normal measures under the Agreement that would require Israel to put an end to its malpractice. In an attempt to claim that they were satisfying their own responsibilities under Community law to prevent its violation, the Commission and Member States have instead concentrated their efforts on finding ways to demonstrate that they could recover duties on some settlement-related preferential imports while Israel was allowed to continue its own malpractice.

This caused the EU political authorities to impose substantial and highly irregular administrative burdens on their customs authorities, but has not stopped the illegal preferential imports. The problem has dragged on, and EU customs authorities have lost patience with the exceptional administrative burdens they have been required to accept, and with heavy political interference they have experienced in their work as law enforcement agencies.

The EU also launched its new 'European Neighbourhood Policy' (ENP) with Eastern Europe and Mediterranean countries, and Israel has been placed in the first basket of countries with whom an Action Plan on economic and political matters is being negotiated. The Action Plan is expected to be adopted soon and will increase cooperation in many areas. Israel's reluctance to incorporate provisions relating to the non-proliferation of weapons of mass destruction and to the Israeli-Palestinian peace process has delayed its finalisation. However, the implementation of the Action Plan faces another obstacle. To enable Israel's participation in the Pan-Euro-Mediterranean system of free trade - the trade-related backbone of the ENP - the EU must agree to the

²² The Commission's Mission Report of 30 September 1998 based on a visit of the directorates of External Relations, Tax and Customs and Agriculture to Israel and the Palestinian Territories 14 – 20 September 1998.

amendment of the EU-Israel Association Agreement's Protocol on Origin. The EU cannot do this without legalising Israel's malpractice under the Agreement.

This has brought the EU to a point where the Commission and at least certain elements of the Council are moving to implement measures (the 'Olmert Arrangement') by agreement with Israel that will, if carried out as the Commission has proposed, alter the meaning of the EU-Israel Association Agreement in international law, entitling Israel to continue applying the Agreement to the occupied territories for its duration²³.

The prospect therefore exists that the EU will acquiesce to a third country's insistence on applying and implementing a Community agreement in a manner that contravenes public international law. This may be unprecedented. If the Community agrees to implement the 'Olmert Arrangement' as the Commission has proposed, it will be electing to accommodate the illegal public policies and national legislation on which Israel bases its settlement and annexation practices in order to remove a persistent inconvenience to the EU and overcome an obstacle to the inclusion of Israel in the new Euro-Mediterranean free trade area it is constructing. *This development would place the Member States alongside Israel in violating the Fourth Geneva Convention of 1949.*

Here the EU is clearly failing to act in accordance with the human rights mainstreaming commitment set out in the Commission's May 2001 Communication on 'the European Union's Role in Promoting Human Rights and Democratisation in Third Countries.'

2. The Framework Programme for Research, Technical Development and Demonstration Activities

The Framework Programme is the Community's main research funding instrument.

Despite numerous EU statements referring to the illegality of Israeli civilian settlements and the ineligibility of settlement enterprises to participate in Community programmes, the Commission appears not to have made provisions to safeguard its programmes against the participation of illegal settlement entities.

In July 2001, UK Member of Parliament Dr. Phyllis Starkey asked the Secretary of State for Foreign and Commonwealth Affairs Peter Hain:

what safeguards the EU secured from the Israeli authorities that co-operation on (a) scientific and technological, (b) economic, (c) trade and (d) audio-visual and cultural matters, as discussed at the meeting of the EU-Israel Association Committee on 21 May, would give equal access to Arab, Druse and Jewish citizens of Israel and would not include any institutions operating in illegal settlements outside the international borders of Israel.

²³ Following the proposal of Industry and Trade Minister Ehud Olmert, the European Commission has concluded a 'technical arrangement' on customs cooperation with Israel that aims to reduce the administrative burdens imposed on EU customs authorities as a result of Israel's (illegal) application of the EC-Israel Agreement to the territories occupied in 1967. The 'Olmert Arrangement' presumes that Israel will continue to apply that Agreement to its illegal settlements. It does not end the settlement-related import fraud being perpetrated against the European Community as a result of Israel's ongoing malpractice. The Commission has recommended that the arrangement be endorsed by the EU in the EU-Israel Association bodies. The Commission has also agreed with Israel to recommend that the arrangement be considered as satisfying the EU's conditions for bringing Israel into the Pan-Euro-Mediterranean system of cumulation of origin – a new regional system of preferential trade that will embrace the EU's Mediterranean and Eastern European Association partners.

Peter Hain answered:

The EU-Israel Association Agreement provides for co-operation between the EU and Israel in a number of areas, and also allows Israel to participate in a number of EU programmes. The EU operates a non-discrimination policy in deciding which institutions can access these co-operation programmes.

The EU has repeatedly condemned settlement activity in the occupied territories (including east Jerusalem). It is illegal under international law and an obstacle to peace. Therefore, institutions from the Israeli settlements will not be eligible to participate in any EU co-operation or programme²⁴.

Israel became the first non-European country to be associated to the EC's Framework Programme when it joined the Fourth Framework Programme (FP4) in 1996. The Agreement for Scientific and Technical Cooperation associating Israeli enterprises with the Sixth Framework Programme (FP6) (2002-2006) was signed in June 2003 and concluded in April 2004.

An informal search through the Fifth Framework Programme (FP5) database of completed projects delivered a Golan Heights settlement firm that participated in a cooperative research contract under project reference G6ST-CT-2002-50376, and a Jordan Valley settlement firm that participated in a cooperative research contract under project reference QLK5-CT-2001-70496.

The Community's position on the participation of settlement entities in the Scientific and Technical cooperation agreements is that, as in the case of 'origin rules', the Agreement applies to 'the territory of the state of Israel', understood by the Community to mean the territory over which Israel exercises internationally-recognised sovereignty, thereby excluding territory occupied and annexed by Israel. As well, the Fifth Framework Programme permitted only 'legal entities' of the Member States and of the associated state to participate and qualify for EC funding²⁵. Even so, the risk of settlement enterprises participating in the Fourth Framework Programme was reportedly raised as a concern within the Commission, but was not acted upon.

Under the Framework Programme the Commission reportedly has little ability to apply controls given the overwhelming number of proposals it receives, and would be in a quandary if faced with a legal entity²⁶ that in the end 'appears not to be one'. Furthermore, under the Sixth Framework Programme the rules of participation were relaxed to include entities from unaffiliated countries and to lower the number of legal entities required in any project, rendering the controls that the European Commission's Directorate General Research (DG Research) may have used to screen for settlement firms largely useless. Reportedly within DG Research third country human rights policy and practice is perceived as a political issue and the prerogative of the European

²⁴ Foreign and Commonwealth Affairs, Israel, 5 July 2001.

²⁵ Articles 2 and 5(6) of Proposal for a Council Decision concerning the conclusion of the Agreement on Scientific and Technical Cooperation between the European Community and the State of Israel, COM(2003) 568 final, Brussels 29.09.2003.

²⁶ Article 2 ('definitions') of the Regulation concerning the rules for the participation in the implementation of the European Community Sixth Framework Programme states: "Legal entity' means any natural person, or any legal person created under the national law of its place of establishment, under Community law, or international law, having legal personality and being entitled to have rights and obligations of any kind in its own name'.

Commission's External Relations DG (RELEX). Little-to-no operational interest exists as to whether ineligible Israeli settlement firms may be participating in the Framework Programme, despite the Commission's Communication that 'respect for human rights and democracy should be an integral, or 'mainstream', consideration in all EU external policies'²⁷.

In a case where the Commission can reasonably be expected to foresee a risk that that the execution of a program could contribute to increasing the vulnerability of persons to unlawful harm, its failure to take reasonable precautions to reduce this risk clearly violates the Community's duty of care.

3. EU Assistance to the Occupied Palestinian Territories (oPts)

Since September 2000, much of the international assistance provided on behalf of the occupied population in the forms of humanitarian assistance, development aid and welfare support has aimed at offsetting the destabilising effects of the crisis caused by actions taken in contravention of the rules of international humanitarian law.

Between January 2000 and mid-September 2004 the European Commission's Humanitarian Aid Office (ECHO) provided _149.16 million in humanitarian aid. Food security is managed separately by the Commission's EuropeAid Cooperation Office (AIDCO under DG RELEX) under a divided humanitarian and development budget. For the same time period _115.20 million was spent on food security.

The preamble to Council Regulation (EC) No 1257/96 concerning humanitarian aid states:

Whereas civilian operations to protect the victims of fighting or of comparable exceptional circumstances are governed by international humanitarian law and should accordingly be considered part of humanitarian action.

The Commission, through ECHO

has an obligation to ensure that humanitarian activities themselves respect and contribute to the protection of the human rights of the victims of armed conflict, [and has launched] a human rights approach to humanitarian assistance²⁸.

ECHO Director Costanza Adinolfi visited the occupied Palestinian territories in October 2003 and commented that 'the provision of humanitarian relief in no way implies recognition of acts and policies that violate international humanitarian law'²⁹. ECHO has reinforced advocacy efforts aimed at protecting civilians in the occupied Palestinian territories and ensuring humanitarian access through funding of the UN Office for the Coordination of Humanitarian Affairs (UN OCHA) and the International Committee of the Red Cross (ICRC).

The EU's and Member States' duty to respect and ensure respect of the Fourth Geneva Convention is addressed below with reference to:

²⁷ Commission Communication COM(2001) 252 op. cit.

²⁸ Commission Communication COM(2001) 252 op. cit, p.13.

²⁹ Assessing the humanitarian consequences of conflict: ECHO director visits the West Bank 7-10 October 2003, ECHO website.

1. the 'additional costs' on the provision of humanitarian assistance resulting from the access and mobility restrictions imposed by the Israeli military authorities in contravention of Articles 59 and 61 of the Fourth Convention, and the donor community's absorption of these costs
2. EC and Member State provision of unconditioned funds to provide shelter and to rebuild homes destroyed unlawfully by the Israeli military forces

3 a. Additional Costs

In occupied territories, collective relief actions are covered by Articles 59-61 of the Fourth Geneva Convention. Articles 59 and 61 relate to the terms of the provision of relief, stating respectively that the Occupying Power shall facilitate relief schemes 'by all means at its disposal' and that such relief consignments

'shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.'

Significant amounts of EU funding to implementing agencies providing humanitarian and development assistance to the Palestinian population have been expended on the additional costs on the delivery of humanitarian assistance stemming from access and mobility restrictions imposed by the Israeli authorities. The EU referred directly to additional charges on the provision of humanitarian goods in October 2003 when it called on Israel 'to transfer port charges and all additional storage, demurrage and transit duties levied on goods destined for United Nations Relief and Works Agency (UNRWA)³⁰.

In April 2004 Commissioner for External Relations Chris Patten said to the European Parliament 'We should also seek to ensure that humanitarian assistance can be provided as it would be elsewhere; at present it costs more to provide the assistance than in most other places because of the behaviour and activities of the security forces'³¹. Citing governments that fail to comply fully with international humanitarian principles, Commissioner Nielson noted the crises of Darfur, the northern Caucasus and the Palestinian territories, where in the last case 'security and bureaucratic measures by Israeli authorities are estimated to have added 20 per cent to the cost of humanitarian aid operations....The international community must take every opportunity to denounce these violations and demand respect for humanitarian law'³².

UNRWA has made frequent interventions with the Israeli authorities over the subject of additional costs, including urgently in April 2004 in reference to the suspension of its

³⁰ Statement by Counselor Marco Carnelos, Permanent Mission of Italy to the UN on behalf of the European Union – Fourth Committee, Item 83 United Nations Relief and Works Agency for Palestine Refugees in the Near East (New York) October 30, 2003.

³¹ SPEECH/04/188, The Rt. Hon Chris Patten Commissioner for External Relations, Middle East Peace Process, European Parliament Plenary Session, Strasbourg, 21 April 2004. This material is drawn from a draft report on 'Additional Costs on the Provision of Humanitarian Assistance' prepared for UNOCHA OPT by the MATTIN Group, October 2004.

³² Poul Nielson, 'Give relief agencies the space to do their job', Financial Times, 17 June 2004.

relief operations necessitated by the prohibitive cost of storing humanitarian provisions at Ashdod port due to the closure of Gaza Karni border terminal.

Despite the statements made by EC Commissioners, EC and Member State donors continue to provide assistance under conditions contravening the rules governing belligerent occupation. Without making vigorous protest about these conditions, and without taking clear actions aimed at rectifying them, *donors weaken respect for the body of law relied upon by the occupied population for its protection, and violate the principle of clean hands.*

In addition, on another point on the provision of assistance, the EU should ensure that no implementing agency it funds patronises businesses in Israeli settlements, as was the case of one agency using storage facilities in the east Jerusalem settlement industrial zone of Atarot.

3 b. Providing shelter and rebuilding destroyed homes

On 11 August 2004 the Commission announced that it was providing _1.35 million to UNRWA to aid victims of house demolitions in Rafah (Gaza Strip) in addition to a _1 million grant allocated in March.

Commenting on the decision, Commissioner Nielson said:

These funds do not absolve the occupying power of its responsibilities to uphold international humanitarian law. The Israeli authorities must take urgent action to alleviate the suffering of the population in the occupied territories, where the humanitarian situation has alarmingly deteriorated over the past years....As reiterated by the European Union and the United Nations, house demolitions are disproportionate acts that contravene international humanitarian law, in particular the Fourth Geneva Convention, and show a reckless disregard for the lives of civilians³³.

European Commissioner for External Relations Chris Patten said the Union is prepared to continue its humanitarian assistance and support the rebuilding of infrastructure in areas from which the IDF withdraws, 'But I have to say that this time I think we should seek certain guarantees from the Israeli defence forces that they will not destroy again what we build'³⁴.

In addition to failing to hold the Government of Israel accountable for its violations of international law, foreign governments have funded repairs and re-housing after demolitions. Foreign governments have been urged to demand that Israel either pay reparations to victims or compensate donors for funds spent to repair the unlawful destruction³⁵.

By not making a good faith effort to hold Israel accountable, the EC is engaged in a wrongful act of omission. On the ground, implementing agencies are torn between the need to aid victims and alleviate a man-made humanitarian crisis, and concern that by

³³ Commission provides a further _1.35 million in aid for victims of house demolitions in Rafah (Gaza Strip) IP/04/1027, Brussels, 11 August 2004.

³⁴ Quoted in 'Paying for the Mess' in "Razing Rafah: Mass Home Demolitions in the Gaza Strip: VII. Role of the International Community", Human Rights Watch website, October 2004.

³⁵ Ibid.

rendering such assistance while Israel's unlawful use of force and acts of destruction are met by no effective international restraints they will be conveying to Israel that the international community does not expect it to respect such fundamental principles of international humanitarian law as non-combatant immunity and proportionality.

When UNRWA rebuilt destroyed homes in Jenin refugee camp it took a portion of the original area of each destroyed house in order to widen roads so that it will be possible for Israeli tanks to pass more easily. Many camp residents opposed this, saying it should be made more and not less difficult for Israeli tanks to enter the camp. UN officials decided it would be wiser to leave wider roads so that the houses would not be destroyed again³⁶.

³⁶ Gideon Levy, 'Tank lanes built between new Jenin homes', Ha'aretz, 10 June 2004.

IV EXAMPLES OF OTHER AREAS OF COMMUNITY ENGAGEMENT IN WHICH THE COMMUNITY IS VULNERABLE TO COMPLICITY IN ISRAEL'S HUMAN RIGHTS VIOLATIONS

1. Vulnerability to complicity in violations of international humanitarian law

In compliance with the duty of care, the EU and Member State governments will have to ensure that their cooperation instruments and investment promotion schemes do not benefit entities located in illegal settlements.

1 a. EU bilateral cooperation projects

As an example, the Economic and Technological Intelligence project (ETI)

In 2001-02, the Israel Wine Institute and the Israel Council for Wine Grapes cooperated with the Wine Industry Accompaniment Measure (WIAM), an Economic and Technological Intelligence (ETI) project. ETI projects are co-financed by the European Union. The overall objective of WIAM was to assist small- and medium-sized enterprises to participate in EU Research & Development programmes. The settlement winery Barkan is listed as a member of the Israel Wine Institute, which may also serve the Gush Etzion, Hebron and Golan Heights settlement wineries.

1 b. EU Member State Investment Grants

In November 2004 the German chemicals and plastics concern BASF signed an agreement with the Israeli Kibbutz Industries Association (KIA). Under the agreement a number of the Association's companies would move plant facilities or set up production lines at the BASF's plants. The agreement stipulates that kibbutz factories that move or set up production lines at plants in Germany will receive aid in the form of equipment and financial and legal services for obtaining German government investment grants at up to 50% of the investment³⁷. A glance at the Kibbutz companies listed under the plastics and rubber category of the KIA website revealed three settlement enterprises.

2. Vulnerability to complicity in violations of International Human Rights Law

Israeli settlement industries and educational faculties are incorporated under the Israeli 'Law of Enclaves' and operate 'as if' under Israeli law. The law applies to persons, including legal persons, and not to the territory the settlement is established on, which remains subject to military law.

Since the Israeli law incorporating settlement 'legal entities' applies to persons, it is not applicable to the Palestinian employees working in the settlements who are not Israeli citizens.

A Palestinian worker in a settlement enterprise who petitions to receive minimum wage from his Israeli employer can be told that in the area of labour relations, Jordanian law in place in at the time of the 1967 occupation applies, and that while it is 'recommended'

³⁷ Hadas Manor, 'Kibbutz Industries Association, BASF sign strategic agreement', Globes, 23 November 2004.

that West Bank Gaza Palestinians receive minimum wage, it is not required by Israeli law³⁸.

'Why do you think the Erez industrial estate [in Gaza] is still attractive for 200 factories that have stayed put despite all the terrorist attacks?' asked Gabi Bar [the Middle East division manager at the [Israel] industry and trade ministry]. 'The most important motive is the low wages paid to the workers: around 1,500 shekels (\$332) as against 4,500 shekels (\$995), which is the minimum wage in Israel. What is more, the employers don't have to abide by Israeli labour laws'³⁹.

Note should be taken of Israeli government-sanctioned violations of international human rights law as Israeli firms establish operations in industrial estates in occupied territory, either on the 'Israeli' side of the barrier/wall, or in Palestinian industrial estates which invite Israeli enterprises to locate there.

The Commission will have to review carefully the laws governing industrial estates within the occupied territories and the laws applicable to the firms locating in them in order to ensure that any envisaged Community cooperation with such initiatives will in fact contribute to the objective of promoting respect for human rights and fundamental freedoms as required in Community law⁴⁰.

³⁸ Brief of the Attorney General in the matter of appeal 30050/98 quoted in "Builders of Zion' Human Rights Violations of Palestinians from the Occupied Territories Working in Israel and the Settlements", B'Tselem September 1999, p. 76. Israel has ratified the conventions comprising the "International Bill of Rights" as well as other conventions. Under Israeli law, an international treaty is not, as a rule, part of domestic law until the Knesset enacts legislation incorporating the provisions of the treaty into Israeli law. This rule does not apply to agreements that are part of international customary law, which automatically become part of domestic law. Quoted from B'Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, website.

³⁹ Meron Rapoport, 'Israel: industrial estates along the wall', *Le Monde Diplomatique*, June 2004

⁴⁰ Articles 177 [development cooperation] and 181a [economic, financial and technical cooperation with third countries] of the Treaty Establishing the European Community.

V ISRAELI MINORITY RIGHTS, EC AGREEMENTS AND COOPERATION INSTRUMENTS

The EU's 'bilateral relations are based on shared respect for human rights and democratic principles, an essential element of our association agreement as set out in Article 2. The EU seeks to uphold the universality, interdependence and indivisibility of all human rights. The promotion and protection of human rights including rights of persons belonging to minorities as well as fundamental freedoms constitute a major objective of the EU's external relations'⁴¹.

In Israel, the absence of constitutional equality for the Arab minority and the fundamental definition of the state as Jewish have ensured a system of structural and institutional discrimination against the Arab citizens of Israel⁴².

The discriminatory educational and employment obstacles faced by the Palestinian Arab minority in Israel effectively limit their ability to participate in the EC Framework Programmes, and to access financial instruments like the European Investment Bank's global loan programme.

Below are some of the governmental institutional policies that discriminate against Arab citizens in the areas of education and business, and which mean that despite the EU-Israel Association Council's declaration that 'Israeli partners in FP5 (Fifth Framework Programme) cover the whole spectrum of the Israeli society'⁴³, very few of them, if any, will have included the Palestinian Arab minority in Israel. Nor will one of the objectives pursued under the EC-Israel Agreement on Scientific and Technical Cooperation associating Israel with the Framework Programme, to benefit 'the scientific community, the private sector and the general public in Israel,' be entirely realizable.

Examples of discrimination pertinent to education:

Language: Although officially Arabic is a state language, its standing is far lower than both Hebrew - the other state language - and English - a non-state language. Extra points are earned in the *bagrut* (high school graduation exam) for excellence in Hebrew but none are earned for Arabic, making it much harder for Palestinian citizens to enter university⁴⁴.

Education: Israel separates the education of Jews and Arabs until university entry. This is justified on the grounds that the two peoples have different languages and cultures and that they mostly live in separate geographical areas. However, it also justifies separate allocation of resources. Because of higher Arab birth rates, Arab pupils comprise a third of the total school population but their schools receive just seven per cent of the education ministry's budget. This

⁴¹ Declaration of the European Union on the Fourth Meeting of the Association Council EU-Israel, Brussels, 17 – 18 November 2003.

⁴² Shira Kamm, "The Arab Minority in Israel; Implications for the Middle East Conflict", Mossawa, September 2002, p.12.

⁴³ Declaration of the European Union on the Fourth Meeting of the Association Council EU-Israel, op. cit.

⁴⁴ All information below on the Palestinian Arab minority is replicated from a two-part article by Jonathan Cook, 'Democratic and Jewish', Al Ahram, Issue 698 8-14 July 2004 and Issue 699 15-21 July 2004.

unequal funding is compounded by the much lower budget allocations to Arab municipalities, which also contribute to the school budget.

Although there is integrated education at the college and university level, Arab students are still hugely marginalised. Although Arab students comprise about a quarter of Israelis in that age group, they are only eight per cent of the university student body. Entry is made much harder by matriculation exams that use a points system that gives higher value to the Hebrew language than Arabic. Psychometric scores used in selecting candidates also discriminate against Arab students because they are culturally biased against them and rely on the English language, which Arab children learn as a third language, after Arabic and Hebrew. Admissions interviews too are always conducted in Hebrew.

The percentage of Arab lecturers at the universities is even lower than the number of students, standing at only one per cent. The places of many lecturers and professors at the universities are funded by a state security body, the National Security Council, and many lecturers are required to teach at military and police colleges as part of their work.

Examples of discrimination pertinent to employment and private sector government financing:

Large swaths of the Israeli economy are officially off limits to the Palestinian minority on the pretext that the work is security related. This not only covers the main defence industries such as the Rafael Armaments Authority, the nuclear reactor, the secret nuclear weapons factory and the Israeli Aircrafts Industry, but most government corporations such as Bezeq, the telecoms company, which employs only a handful of Palestinian citizens out of a workforce of some 10,000. In an interview in *Haaretz* newspaper in May 2004, Nachman Tal, a former deputy director of the Shin Bet, said such state discrimination was rife: 'I recently checked and found that out of the 13,000 permanent employees in the Israel Electric Corporation, only six are Arabs.'

In May the governor of the Bank of Israel, David Klein, admitted that there was not one Arab among his staff of 800. In its 50-year-long history, the bank has employed only two Arabs, and they oversaw the bank's operation in the occupied Palestinian territories. Both were dismissed when the territories were handed over to the Palestinian Authority in 1994.

A system of 'national priority areas', which offers extra benefits to residents and businesses, is applied almost exclusively to Jewish communities -- even though figures from the Central Bureau of Statistics in May showed 70 per cent of the poorest areas in Israel were Arab. The human rights organisation *Adalah* has been petitioning the court to end this practice, so far without success. At the moment four small Arab villages have been given priority compared with 492 Jewish communities.

There is also no opportunity for hi-tech or investments employment in Arab areas. 35 per cent of Arab male graduates end up as teachers, three times the number of Jewish graduates. Those Arabs who manage to become trained in

science and technological fields usually have no choice but to work abroad or abandon their research.

A researcher in one of the two Arab research and development (R&D) centres in Israel noted that while his centre had good contacts with Israeli research institutes, its ability to participate in the Framework Programme is handicapped by being effectively excluded from governmental provision of information to the network of Israeli universities and institutes that enjoy the Israeli government's support⁴⁵, *indicating that the Palestinian Arab minority in Israel will not benefit equally from the "people-to-people" contacts in Science and Technology [...] proposed by the EU for strengthening under the Action Plan on the European Neighbourhood Policy.*

1. Minority access to and participation in EU financial instruments: EIB

The European Investment Bank (EIB) was set up in 1958 to finance projects that promote the objectives of the European Union. The EIB channelled lines of credit to Israeli small and medium enterprises until 1995 through the state-owned Industrial Development Bank of Israel.

Article 179(2) of the Treaty of the European Community establishes that the EIB shall adopt measures necessary to further the objectives of Article 177(1), which include the campaign against poverty in developing countries.

As noted above, figures from the Israeli Central Bureau of Statistics in May 2004 showed 70 per cent of the poorest areas in Israel were Arab. The question of how the EIB can realise its objectives in the case of a country which discriminates institutionally against its minority populations is reportedly a 'delicate' one. An applicant has to be financially viable and a good risk candidate for a loan, up to 50% of which is provided by EIB and the remainder by the local partner bank. Since it is not a development programme, the EIB does not have tools at its disposal to direct funding to disadvantaged persons, nor is any of its financing in the form of grants. Moreover, since the local bank assumes all credit risk, EIB cannot impose lending criteria. In other locations, for example Macedonia, EIB was able to earmark funds on geographic criteria for disadvantaged ethnic communities living in distinct geographic areas.

Attempts to find out if any of the Israeli companies that received loans via EIB's global loan programme were settlement enterprises or Arab-owned were unsuccessful due to the bank's loan allocation confidentiality policy. The Industrial Development Bank of Israel currently has no Palestinian Arab employees, nor has it had in the past⁴⁶.

⁴⁵ Telephone conversation, Habib Karnary, R&D section, Galilee Society, 23 November 2004.

⁴⁶ Information provided by the Industrial Development Bank to Adalah, The Legal Center for Arab Minority Rights in Israel, on 25 November 2004.

VI TO REGULATE OR EXPAND COOPERATION – EXAMPLES OF DEBATE ON HOW THE EU SHOULD ENGAGE ISRAEL

The European Parliament March 2004 debate on the EC-Israel Scientific and Technological Agreement makes reference to two central ongoing debates in the European Union: 1) to freeze cooperation with Israel or to expand it so as to gain influence; and 2) to attempt to separate economic and political areas of dialogue and cooperation, or to consider that Israeli policy renders even apparently purely technical issues political.

The attempt to separate the economic and technical from the political has been carried forward into the negotiations on the Action Plan for the European Neighbourhood Policy. In the negotiations the political 'basket' includes dialogue on the peace process, terrorism, small arms, non-proliferation of weapons of mass destruction and human rights. The economic basket includes development of cooperation in science, transportation, and the environment⁴⁷.

Those in favour of maintaining or expanding Israel's privileged relationship with the Community argue that expanded EU-Israel cooperation will create greater opportunities for cooperation and dialogue between Israeli and Palestinian entities. They argue that this will in turn contribute to progress in the peace process, and thereby bring about a reduction of violence and violations of human rights.

The very few examples of Palestinian-Israeli joint participation in the Fifth Framework Programme of the European Community for Research, Technological Development and Demonstration Activities (FP5) noted below offer cause to doubt whether expanded EU-Israel cooperation can indeed be expected to stimulate expanded Israeli-Palestinian cooperation, particularly if the highly unequal levels of economic development between the occupied Palestinian territories and Israel is kept in mind.

Such arguments appear to overlook the fact that widespread violations of human rights and international humanitarian law are principal causes of the conflict and not simply their unfortunate result.

The EU Council consulted the European Parliament before concluding the EC-Israel Agreement on Scientific and Technical Cooperation with Israel⁴⁸. The Green/EFA Party's amendment asking for suspension of the Agreement in the 'present situation' was rejected, and the Parliament agreed to the conclusion of the Agreement. The argument put forth by the rapporteur Godelieve Quisthoudt-Rowohl for the debate was that 'shutting doors' prevents further cooperation, which is the only way the EU can influence the peace process. The rapporteur also argued that the increased contacts the Agreement will enable between Palestinian researchers and institutes and their Israeli counterparts will help ease tensions between the two sides⁴⁹.

⁴⁷ Herb Keinon, 'Israel in last-minute talks on entry to EU program', Jerusalem Post, 20 October 2004.

⁴⁸ Article 300 (3) TEC on the consultation procedure.

⁴⁹ Quisthoudt-Rowohl (PPE-DE), Rapporteur, Debates of the European Parliament, Sitting of 10 March 2004, EC-Israel Agreement on Scientific and Technical Cooperation.

The Socialist group likewise raised the prospect of scientific exchange enhancing dialogue between the two sides. The majority of the group decided to approve the Agreement in the hope that 'scientific dialogue, without any endorsement of the Israeli Government's actions, will bring some progress,' with the spokesperson noting that other points can 'be made in political dialogue. There may be cause for action elsewhere'⁵⁰.

Of the 612 Fifth Framework (FP5) projects involving Israeli partners from industry, universities and research centres, 147 were co-ordinated by Israeli partners. In the FP5 (during 1998-2002 when the situation in Israel and the occupied Palestinian territories was relatively better) university and research centres from the occupied Palestinian territories participated in only five projects under the International Cooperation (INCO 2) programme. None of the five projects was coordinated by an Israeli entity.

Ensuring that support for scientific dialogue and cooperation does not spill over into support for the illegal public policies and national legislation under which such cooperation is organised can, however, be particularly difficult. For example Israel's Chief Scientist grants research and development allowances to settlement enterprises, and the laws of incorporation applying to settlement-based academic and commercial enterprises mandate 'legal' discrimination between Jewish and Palestinian employees⁵¹.

Nothing prevents firms involved in constructing state infrastructure in violation of international law from participating in EC – Israel public procurement, scientific and technical and other programmes of cooperation. An Israeli company that participated in a cost-sharing contract for a Fifth Framework project⁵² is building the electronic system for the Jerusalem envelope of the barrier/wall⁵³. One of the 'work packages' for this Fifth Framework project, whose listed end date was 31 August 2004, includes 'development of a robust on-board sensorial system and communication system; implementation of algorithms for sensor and data fusion [..]'

In the case of an association partner that conducts its internal and external relations according to policies and legal positions that the European Union cannot accept, it can never be assumed that cause for action only exists 'elsewhere'. *Responsible engagement in such circumstances entails substantial prudential burdens, if only to ensure that EU-Israel cooperation is not implemented in a manner that consolidates Israel's violations of international human rights and humanitarian law, and contravenes Community law*⁵⁴.

This challenge is multiplied as the frameworks of privileged relations evolve under the European Neighbourhood Policy towards full reciprocity. Under the new European Neighbourhood Policy, the EU envisages constructing its relationship with Israel within a framework of joint ownership and equality. The fact should not be overlooked that *whenever the EU has wanted to expand its engagement with Israel, it has never elected to take the steps required to prevent Israel from applying and implementing the resulting*

⁵⁰ McNally (PSE), Debates of the European Parliament, Sitting of 10 March 2004, op. cit.

⁵¹ Hadas Manor, "Chief Scientist approves 10 new incubator companies", Globes, 12 September 2004. On 'legal' discrimination see section IV2 of this review.

⁵² FP5 Project Reference: IST-2000-28058.

⁵³ Dalia Tal, 'Biri Barashi to build 2 separation fence sections for NIS 60m', Globes, 3 February 2004.

⁵⁴ E.g. Article 11 of the Treaty on European Union and Article 181a of the Treaty Establishing the European Community on promoting respect for human rights; Article 2 of the Association Agreement.

contractual arrangement according to policies and national legislation that Community law and international law do not accept.

This opens up the prospect of an abundant stream of 'technical' problems. How will the objective of enhancing reciprocal access to public procurement markets be achieved while ensuring that Member State enterprises do not participate in Israeli government tenders for infrastructure constructed in violation of international law, such as settlements, settlement-related bypass roads and infrastructure projects related to the barrier/wall? In 2007 Israel will be eligible for Commission financing, and the European Investment Bank will have a new lending mandate the same year. Has the Community considered how it will ensure against its financial participation in entities or activities it regards as illegal?

VII ON IMPROVING PROMOTION OF RESPECT FOR HUMAN RIGHTS

Currently the European Union mainly monitors human rights in third countries through the delegations of the European Commission and EU Member State embassies.

The Commission's 2003 Communication on 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners', approved by the Council, sets out guidelines to better 'promote stable, democratic environments, founded on the full enjoyment of Human Rights'. Most of the areas in which the Communication suggests that existing instruments at the disposal of the EU and its Mediterranean partners could be used to promote these shared objectives rely on MEDA funding, a 'carrot' that Israel doesn't need due to its advanced economy.

About Israel the Communication says:

There is an urgent need to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli/Palestinian conflict as a central factor in the efforts to put the Middle East peace process back on track. This will require a special effort by the EU and the setting up of an appropriate strategy⁵⁵.

When asked whether an appropriate strategy has been set up, the usual answer given by the Commission is that it is intended to establish a human rights sub-committee between the EU and Israel, which will provide a mechanism for dialogue on human rights and democracy issues. However, it is not yet clear if the creation of this committee is planned for in the European Neighbourhood Policy Action Plan.

Reportedly, in the Action Plan priority will be given to promoting protection of human rights 'in the fight against terrorism', as well as the rights of minorities, particularly the Arab and Bedouin communities. However, it seems that protection of human rights will be an extremely weak part of the document.

The following factors are noted within the European Union as contributing to the deficit in the EU's promotion of human rights in its operative diplomacy:

- The absence in the Commission of a **central venue** to coordinate the different services (DGs) as well as the absence of a **response mechanism** delivering an immediate reaction and consequence to human rights violations in any given country.
- The lack of verifiable human rights **benchmarking** procedures under the association agreements. Benchmarking procedures exist for countries with which the EU does not have a contractual basis for relations, e.g. Iran and China. In its 2003 human rights report, the European Parliament 'recalls its demand on the Council to formulate concrete objectives and benchmarks for human rights dialogues and to ensure that its results are regularly evaluated'⁵⁶.
- Along with the need for benchmarks, there is a need for greater **transparency**, particularly on the part of the Council, of what is said and done within political

⁵⁵ Commission Communication COM(2003) 294, op. cit, p.5.

⁵⁶ European Parliament Annual Human Rights Report 2003-2004, p. 10.

dialogue, and why, in the case of Israel, agreements are being implemented in exception to the rules.

In the context of their deliberations on how to advance respect for the rule of law and human rights in confronting the threat of terrorism, European Union policy makers should recall that a state permitted by other states to operate outside of the bounds of humanitarian law creates legitimacy for the resort to the political use of force by non-state actors. Such a state fails to fulfill its side of the social covenant between the state and those under its effective control, and other states fail to offer any lawful and effective protective alternative⁵⁷.

States need each other's cooperation. Notwithstanding the views aired regularly within the EU regarding Israel's alleged insusceptibility to any threat of reduced privilege and cooperation, Israel, like most smaller and more economically developed states, is clearly sensitive to the opportunities and the conditions associated with such cooperation. The EU's cooperation instruments are its principal political instruments. EU Member States have the duty under Article One of the Geneva Conventions 'to respect and ensure respect' for the Conventions. The principles mentioned throughout this review, the 'duty of care' and 'clean hands', describe two aspects of the EU's obligation to refrain from facilitating a third state's violations of international law.

When the EC acts in exception to its own rules, as it has done by accommodating to Israel's certification of settlement products as originating in the sovereign territory of Israel, it signals to the Palestinians and to the Israelis that it does not consider it important that the rules governing the international system operate.

This message, delivered through the EU's handling of its contractual relations with Israel, speaks to the parties much more loudly than all the EU's declarations and demarches calling on Israel to respect international law.

⁵⁷ This threat appears to be acknowledged in some Council statements on Israel's violations of international law: 'Not only are extra-judicial killings contrary to international law, they undermine the concept of the rule of law which is a key element in the fight against terrorism.' Statement of Presidency to the UNSC, March 23 2004.

ANNEX I

Declarative acts of EU institutions in support of promotion and respect of human rights; the European Initiative for Democracy and Human Rights (EIDHR)

Below are representations of declarative acts and political dialogue engaged in by the EU in 2003-2004 in support of its human rights commitments and obligations. It is not meant to be a comprehensive list, particularly with regard to the numerous declarations made by the Council of the European Union and the Presidency of the Council.

Council

Demarches

6 September 2004: EU demarche: 'serious concerns' about construction activities in settlements in the West Bank

Council Statements and Declarations

Extracts on international humanitarian law from the Union's General Affairs and External Relations Council (**GAERC**)

(The Middle East Peace Process (MEPP) is often mentioned in Council statements without reference to international law but the contrary is never the case.)

The main references to actions taken by the Gol 'in conflict or in contradiction to' international humanitarian law and less so international human rights law that were made in Council Conclusions and repeated in Council declarations before the European Parliament, the UN General Assembly, and the UN Security Council between July 2003 and July 2004⁵⁸ were for Israel to:

- End its settlements policy
- End the construction of a separating wall which infringes territories beyond the 1967 limits
- End the policy of selective assassinations [or extra-judicial killings] and other measures contrary to international law

Mentioned starting in the spring of 2004 was:

- Ensuring the full, safe and unfettered access to the occupied territories by humanitarian personnel and assistance in accordance with international law

and, on 17 May in the declaration making the most detailed reference to international humanitarian law:

- Ceasing home demolitions. [..]
- The Council recalled that Israel's legitimate right to self-defence must be exercised within the parameters of international law. The Council condemned the

⁵⁸ 29 September 2003: Middle East – Council Conclusions; 22 March 2004: Middle East – Assassination of Sheikh Ahmed Yassin – Council conclusions; 17 May 2004: Middle East Peace Process – Council Conclusions; 12-13 July 2004: Middle East Peace Process – Council Conclusions.

large scale demolition of Palestinian houses in the Rafah district of Gaza as disproportionate and in conflict with international law and also with Israel's obligations under the Roadmap as recalled by the Quartet on 4 May. The Council called on the Israeli Government to cease such demolitions immediately.

A statement referencing the applicability of the **Fourth Geneva Convention**:

Presidency statement:

March 2004

The European Union reaffirms once more its position that the fourth Geneva Convention relating to the protection of Civilian Persons in time of War is fully applicable to the Occupied Palestinian Territories, including East Jerusalem, and constitutes binding international humanitarian law, vital for ensuring that protection of civilians is afforded in all circumstances. The EU condemns the violations of the Geneva Convention carried out by Israel as occupying power in transferring its own population to the Occupied Territories⁵⁹ [...]

Declaration of EU, EU-Israel Association Council, 13 November 2003:

3. Our bilateral relations are based on shared respect for human rights and democratic principles, an essential element of our association agreement as set out in Article 2. The EU seeks to uphold the universality, interdependence and indivisibility of all human rights. The promotion and protection of human rights including rights of persons belonging to minorities as well as fundamental freedoms constitute a major objective of the EU's external relations [...]

4. [...]The EU recognises Israel's right to protect its citizens from terrorist attacks. It urges the Government of Israel, in exercising this right, to exert maximum effort to avoid civilian casualties and take no action that aggravates the humanitarian and economic plight of the Palestinian people. It also calls on Israel to abstain from any punitive measures which are not in accordance with international law, including extra-judicial killings and destruction of houses. The EU reiterates that actions to remove the elected President of the Palestinian Authority would be contrary to international law and counterproductive to the efforts at reaching a peaceful solution to the conflict⁶⁰.
[...]

Council's **Annual Report on Human Rights**

Demarches against Israel and resolutions noted; extraordinary emergency session held to 'examine the situation in the occupied Palestinian territory as a result of the assassination of 22 March of Sheikh Ahmad Yassin'. The assassination of Abdel Aziz al-Rantissi was not the subject of an extraordinary session.

'This year it was the first time that a European Union initiative on the Israeli settlements was not supported by the OIC (Organisation of Islamic Countries), and was criticised by Israel, the Palestinian Authority and the United States'⁶¹.

⁵⁹ Address delivered by the Presidency, on behalf of the EU, on the Question of the violation of human rights in the Occupied Arab Territories including Palestine before the 60th Session of the United Nations Commission on Human Rights, General Affairs and External Relations, CFSP, 24 March 2004.

⁶⁰ Declaration of the European Union, Fourth Meeting of the Association Council EU-Israel, op. cit.

⁶¹ EU Annual Report on Human Rights, 2004, Council of the European Union, p.53.

European Commission

The Commission presented to the Council and the European Parliament a **Communication** on 'Reinvigorating EU actions on Human Rights and Democratisation with Mediterranean partners; Strategic guidelines.' The Communication was **approved by the Council**. Israel's exceptional status is noted.

The practical measures proposed in this Communication will achieve greater coherence and consistency between Community actions and CFSP [Common Foreign and Security Policy], and allow synergies to be realised on all levels of action: at the level of political dialogue, by bringing a greater Human Rights and democratisation dimension to co-operation programmes, and by enhancing complementarity between the different co-operation instruments at the disposal of the European Union.

[...]

Compared to the other MEDA partners, Israel presents distinct characteristics. It functions as a well established parliamentary democracy, with an effective separation of powers, a functioning system of governance, and active participation of NGOs and civil society in all internal aspects of political and social life. However, Israel's compliance with internationally accepted standards of Human Rights is not satisfactory. Two important specific areas need to be tackled. Firstly, the issue of reconciling the declared Jewish nature of the State of Israel with the rights of Israel's non-Jewish minorities. Secondly, the violation of Human Rights in the context of the occupation of Palestinian territories. There is an urgent need to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli/Palestinian conflict as a central factor in the efforts to put the Middle East peace process back on track. This will require a special effort by the EU and the setting up of an appropriate strategy⁶².

European Parliament

Resolution on the Situation in the Middle East of 10 April 2002 calling for suspension of the EU-Israel Association Agreement

Resolution on Peace and Dignity in the Middle East of 23 October 2003

This act is one of the few calling for use of cooperation and aid instruments within compliance with international humanitarian law, and one of the few mentioning Palestinian prisoners under administrative detention:

38. Calls on the Commission to assess the humanitarian situation and financial needs, and examine how all the important development cooperation and humanitarian aid instruments available to the Union can be used from the outset of Phase I in the Middle East, and in Palestine in particular, while requiring both parties to comply fully and strictly with the rules of international humanitarian law;

39. Expresses its deep concern at the plight of the Palestinian prisoners with regard, in particular, to the ones under administrative detention regime, which violates all the

⁶² Commission Communication Com (2003) 294, op. cit, p.19.

general principles of law; calls on the Israeli authorities to allow the defence to exercise its rights, which implies free access of the lawyer to detainees from the time of their arrest, and ensure that minimum standards of detention are respected;

Draft Resolution on Wider Europe – Neighbourhood 4 November 2003:

[...] 19.

points out that a multilateral, coherent and effective Euro-Mediterranean partnership, in addition to encompassing the socio-economic dimension, must also fully embrace respect for, and the promotion of, human rights...demands that these fundamental principles be applied firmly and consistently in the European Union's relations with its Mediterranean partners, and in particular with the MEDA programmes and current and future association agreements⁶³.

During the consultation procedure regarding approval of the EC-Israel Scientific and Technical Cooperation Agreement, the Greens Party (Verts/ALE) **tabled an amendment** asking for suspension due to 'the present situation' in the occupied Palestinian territories, 10 March 2004

European Parliament **plenary debate**: Achieving the correct implementation of the EC-Israel Association Agreement, 9 March 2004

Debate on the Position of the European Union on the hearing in the International Court of Justice on the Israeli wall, 11 February 2004

Self-initiated **Annual Report on Human Rights** April 2004:

47. Shares the deep concern expressed by the Council at the continuation of illegal settlements and expropriation of land for the construction of the so-called 'security fence', which leads to the violation of a number of basic human rights such as freedom of movement, and the rights to family life, to work, to health, to an adequate standard of living, including adequate food, clothing and housing, and to education; the prohibition on discrimination contained in many international conventions is clearly violated in the closed zone in which Palestinians, but not Israelis, are required to have permits⁶⁴;

Decision to **re-establish a subcommittee on human rights** at the beginning of the 6th parliamentary term⁶⁵.

European Union Member States

UN

In **Resolution 1544** of 19 May 2004, the UN Security Council expressed grave concern about 'the recent demolitions of homes committed by Israel, the occupying Power, in the Rafah refugee camp' and called on Israel 'to respect its obligations under international humanitarian law and insists, in particular, on its obligation not to undertake demolition of homes contrary to that law'.

⁶³ Draft European Parliament Resolution on Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours (2003/2018(INI)), 4 November 2003, p.9.

⁶⁴ Annual Report on human rights in the world in 2003 and the European Union's policy on the matter, Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, A5-0270/2004 Final 13 April 2004, p. 13.

⁶⁵ Ibid., p. 26.

General Assembly **Resolution ES-10/18** on 20 July 2004 on the Wall

Submissions to the International Court of Justice supporting Resolution ES-10/14

E.g. Sweden

National Parliaments

Discretionary acts of national parliaments themselves need to be researched. Owing to the limited competencies of national parliaments, their main function with regard to the EU is to scrutinise and clarify the positions taken by their governments in the Council of the European Union.

84 British **Members of Parliament** supported **Early Day Motion** 1313 expressing grave human rights concerns with Israel's possible decision to renew Israel's Citizenship and Family Unification Law, the 'Nationality and Entry into Israel Law', 16 June 2004

Parliamentary **Questions**, e.g. in the Netherlands and German Parliaments on 'rules of origin'.

The European Initiative for Democracy and Human Rights (EIDHR)

Israeli civil society actors receive funds through the European Initiative for Democracy and Human Rights (**EIDHR**).

Within the framework of calls for EIDHR proposals, the European Commission has targeted the **Arab minority** in Israel as a specific issue to be addressed within the EIDHR, with calls for proposals with the objectives of human rights education, media and public debate, and improved access to the legal system for women, children and the Arab minority.

ANNEX II

EU human rights law references

At the European level, Article 6 of the **Treaty on European Union** (Treaty of Amsterdam) reaffirms that the European Union ‘is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’. In addition the European Convention of Human Rights adopted by the Council of Europe is legally binding in all Member States. Moreover, the European Charter of Fundamental Rights adopted in Nice in December 2000 is the instrument inspiring respect for fundamental rights by the European institutions and the Member States where they act under Union law⁶⁶.

Treaty on European Union:

Article 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

The incorporation of human rights in EU external relations:

Provisions on a Common Foreign and Security Policy

Article 11

The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

[..]

-to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms

[..]

Treaty Establishing the European Community (Treaty of Nice)

Article 177

[..]

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

Article 181a

1. [..]

Community policy in this area [**Economic, Financial and Technical Cooperation with Third Countries**] shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.

Re: the **Fourth Geneva Convention** and the duty to ensure respect for the Convention:

Member States of the European Union are signatories to the Fourth Geneva Convention. The EC as an entity operating within international law is subject to customary

⁶⁶ Promoting a European framework for Corporate Social Responsibility, GREEN PAPER, COM(2001) 366 final, Brussels, 18 July 2001.

international law, which includes the Geneva Conventions.

Common Article One of the Geneva Conventions:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances

Instances in which the High Contracting Parties to Geneva Convention IV have affirmed the inter-state dimension of their obligations under common Article 1⁶⁷:

Preamble paragraph 9 of Resolution XXIII (*Human rights and armed conflict*) adopted by the Tehran International Conference on Human Rights on 12 May 1968 provided:

States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.

Operative paragraph 4 of General Assembly resolution 33/113A (18 December 1978):

Urges once more all States parties to [Geneva Convention IV] to exert all efforts in order to ensure respect for and compliance with the provisions thereof in all the Arab territories occupied by Israel since 1967, including Jerusalem⁶⁸.

In resolutions adopted regarding the 1987 Palestinian uprising, both the Security Council and the General Assembly called upon the High Contracting Parties to the Fourth Geneva Convention, in accordance with their obligations under common Article 1, to ensure respect for the Convention by Israel in the Occupied Palestinian Territory⁶⁹. In the Declaration adopted by Conference of High Contracting Parties to the Fourth Geneva Convention on 5 December 2001, the participating States expressly affirmed this obligation.

Specific to the states of the **European Union**:

The Declaration of the European Council on the Middle East June 1990 states: 'settlements in the territories occupied by Israel since 1967, including East Jerusalem, are illegal under international law.' In addition, the European Council reaffirmed the *de jure* applicability of the 4th Geneva Convention to the occupied territories when it called on Israel to 'adhere to its obligations towards the Palestinian population in the territory under its occupation which is protected by that (Geneva) Convention'⁷⁰.

⁶⁷ Material on Article One from Iain Scobbie, "Smoke, mirrors and killer whales: the International Court's opinion on the Israeli barrier wall", *German Law Journal* Vol. 5 No. 9 – 1 September 2004, p.12.

⁶⁸ The final preambular paragraph of this resolution made express reference to common Article 1, providing: '*Taking into account* that States parties to [Geneva Convention IV] undertake, in accordance with article 1 thereof, not only to respect but also to ensure respect for the Convention in all circumstances.' Quoted in Scobbie, endnote 50.

⁶⁹ Security Council resolution 681 (20 December 1990) and General Assembly resolution 45/69 (6 December 1990). Quoted in Scobbie, endnote 51.

⁷⁰ Declaration of the European Council on the Middle East, Dublin, 25-26 June 1990.

ANNEX III

EU institutional references to Article 2

The text below reviews some of the references made by the EU institutions to Article 2 with regard to violations by Israel of international human rights and humanitarian law, and provides background regarding the ongoing differences between the Commission and the Council's emphasis on the EU's application of the human rights article through a limited set of positive measures (dialogue, declarative opposition and conditional 'carrots') and other actors' insistence on the appropriateness of applying it as a means of sanction.

The creation of the human rights clause and its inclusion beginning in 1995 as an 'essential element' in all the EC's agreements with third countries resulted from the Community wanting to suspend relations with ex-Yugoslavia in 1991 and having to rely on general international law to do so because it lacked the appropriate bilateral legal instrument⁷¹. The wording of the human rights clause is linked to the idea of a 'privileged relationship'. It establishes a lawful means of imposing a sanction in response to a privileged Partner Country's violations of human rights⁷². However, over the last decade, the Community has favoured a more incentive-based and empowerment-based approach to the promotion of human rights. Consequently it now leans toward interpreting the human rights clause as foremost enabling political dialogue on human rights, and as authorising positive measures.

A third country's acceptance of the inclusion of the human rights clause is now required to conclude any bilateral agreement with the EU⁷³. Member of European Parliament (MEP) Cohn-Bendit's December 2003 question on Article 2 and Israel's racist 'Temporary Entry and Nationality into Israel' law⁷⁴, and Commissioner of External Affairs Chris Patten's response, represent a typical exchange between the Parliament and the Commission on possible EU action on Article 2:

Cohn-Bendit: This law directly discriminates against Arab citizens of Israel, as a majority of Israelis married to residents of the Occupied Territories belongs to the Palestinian minority of Israel. Thus it contravenes many international human rights instruments ratified by Israel with regard, in particular, to Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination ratified by Israel in 1979.

⁷¹ Brandtner and Rosas, *op. cit.*, p. 5.

⁷² Lorand Bartels, "A Legal Analysis of Human Rights Clauses in the EU's Euro-Mediterranean Association Agreements", *Mediterranean Politics*, vol 9,3, 2004.

⁷³ The Community adopted a political declaration rather than a trade and cooperation agreement with Australia in 1996 after Australia refused to incorporate the human rights clause in the agreement. From Brandtner and Rosas, *op. cit.*

⁷⁴ According to Adalah's website: On 31 July 2003, the Knesset enacted a new law titled Nationality and Entry into Israel Law (Temporary Order) 2003. This law, first introduced by the government on 4 June 2003, prohibits the granting of any residency or citizenship status to Palestinians from the Occupied Territories who are married to Israeli citizens. The law incorporated the main elements of Government Decision #1813 in effect since 12 May 2002. Adalah has been challenging the constitutionality of this decision, later passed into law, since May 2002. After the passage of the new law, the UN Human Rights Committee, in its concluding observations on Israel, issued 21 August 2003, and the UN Committee on the Elimination of Racial Discrimination, in its decision issued 22 August 2003, have both issued recommendations urging Israel to revoke the law on the grounds that it is discriminatory. The European Commission also issued a press release on 4 August 2003 stating that its concern that the new law "establishes a discriminatory regime to the detriment of Palestinians in the highly sensitive area of family rights."

Is not the Commission of the opinion that this law violates Article 2 of the Association Agreement between the EU and Israel? What steps does the Commission intend to take in order to convince the competent Israeli authorities to abolish this law or not to implement it?

Answer given by Commissioner Patten⁷⁵:

[..]In the Commission's view, this order raises issues of concern in relation to potential discrimination in the highly sensitive area of family rights. The Commission has already expressed these concerns in Israel, and is following carefully the developments relating to the practical modalities of this law [...] Under the Union-Israel Association Agreement, Israeli respect for human rights constitutes an essential element of its relationship with the Union. Matters relating to human rights are discussed in the framework of the political dialogue held between the Union and Israel under the Association Agreement.

Two references hinting at a brandishing of Article 2 by the Union were found. One was President of the Commission Prodi's statement in April 2002 during the Israel Defence Forces 'Operation Defensive Shield' incursion in the West Bank with regard to possible sanction against Israel: 'If the situation does not improve,' he said, 'we will have to consider - among other options - calling an early meeting of the EU-Israel Association Council. This is an instrument of dialogue[...]'⁷⁶.

The second, by the EU's Special Representative to Israel Ambassador Chevallard, referring to the Nationality and Entry into Israel Law and Israel's future participation in the European Neighbourhood Policy (ENP), noted that the EU would examine 'whether the legislation is compatible with international law and basic standards of human rights,' adding that under the Association Agreement, 'Israeli respect for human rights constitutes an essential element of Israel's relationship with the EU'⁷⁷.

Members of the European Parliament, in addition to using questions to the Commission and the Council to scrutinise Community policy with reference to Article 2 and Israel's policies and practices, adopted a Resolution on 10 April 2002 calling on

[8.] [...] the Council and the Commission urgently to convene the EU-Israel Association Council in order to put its position to the Israeli Government, asking it to comply with the latest UN resolutions and make a positive response to the current efforts undertaken by the EU to achieve a peaceful solution to the conflict; calls on the Commission and Council, in this framework, to suspend the EU-Israel Euro-Mediterranean Association Agreement;

In its annual report of 2003 on human rights in the world, the European Parliament noted its regret that its demands for 'serious and non-selective application of so-called 'human rights' clauses appear not to have visible effects on the human rights policies of the Council, the EU Member States and the Commission', and regretted that the Euro-

⁷⁵ Answer to written question E-3943/03 by Daniel Cohn-Bendit (Verts/ALE), 30 January 2004.

⁷⁶ Statement of the President of the Commission Romano Prodi on Middle East and of Commissioner Nielson on humanitarian situation, IP/02/512 Brussels, 8 April 2002.

⁷⁷ Yair Ettinger, Nathan Guttman and Sharon Sadeh, 'ADL criticizes law denying citizenship to Palestinians who marry Israelis, Ha'aretz, 5 August 2003.

Mediterranean Association Agreements lack clearly defined procedures for the implementation of the clause⁷⁸.

⁷⁸ European Parliament, Annual report on human rights in the world in 2003 and the European Union's policy on the matter (2003/2005 (INI)), A5-0270/2004 Final, 13 April 2004, p. 12. An example of a national parliament act is the UK House of Commons May 2004 Early Day Motion calling for suspension of the EU-Israel Association Agreement 'until [Israel] lifts the movement restrictions which it has placed on Palestinian trade'. EDM 1288 26.05.04 (Session 03/04).

ANNEX IV

The Barrier/Wall: the EU's acts in light of the Common Foreign and Security Policy and Member States' Duty to Ensure Respect for the Fourth Geneva Convention

Since 1973 the EU has consistently voiced its recognition and commitment to respect the 'legitimate rights of the Palestinian people'. Since 1989, it has repeatedly re-affirmed the *de jure* applicability of the Fourth Geneva Convention to the occupied territories. In 1990 the European Council stated its resolve to step up 'support for the protection of the human rights of the population of the Occupied Territories'⁷⁹. The Commission's May 2003 'Communication to Council and the European Parliament on Reinvigorating EU actions on Human Rights and democratization with Mediterranean partners', notes 'There is an urgent need to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli/Palestinian conflict as a central factor in the efforts to put the Middle East peace process back on track'⁸⁰.

In short, the EU has vigorously embraced positions consistent with those on which the International Court of Justice based its Advisory Opinion of 9 July 2003 on 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory'.

These positions have also been anchored in the development of the EU's own general policies and *acquis communautaires*. Article 11 of the Treaty on European Union, defines one of the objectives of common foreign and security policy as 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.' In the European Council's first Common European Security Strategy of December 2003, one of its key objectives is defined rather more specifically as 'upholding and developing International Law'⁸¹.

In the EU's declaration prepared for the November 2003 EU-Israel Association Council meeting, the EU publicly took up the matter of the barrier/wall with Israel. It called on Israel 'to stop and reverse the construction of the so-called security fence inside the occupied Palestinian territories, including in and around East Jerusalem, which is in departure of the armistice line of 1949 and is in contradiction to the relevant provisions of international law'⁸². It is noteworthy that this call was accompanied by a call to cease 'punitive measures which are not in accordance with international law, including extra-judicial killings and destruction of houses'.

These calls contrasted markedly with the position put forward by the EU on settlements in the same 2003 Association Council Declaration. The EU termed settlements an 'obstacle to peace' that 'inflames an already volatile situation and is inconsistent with the Road Map'. On this basis it called on Israel to 'reverse [Israel's] settlement policy and activity and end land confiscations', but stopped short of making any reference to international law. The EU has regularly referred to settlements as illegal in international law. However, in its political dialogue with Israel, as well as its management of the bilateral issue of 'origin rules', it now appears to have removed the matter of settlements

⁷⁹ Declaration of the European Council on the Middle East, Dublin, 25-26 June 1990, quoted in Nathalie Tocci, 'The EU-Israel 'Technical Arrangement' and the Common Foreign and Security Policy: Are They Compatible?', unpublished paper, 14 September 2004, p. 5.

⁸⁰ European Commission Communication Com (2003) 294 op. cit, p.19.

⁸¹ European Council (2003) "A Secure Europe in a Better World: European Security Strategy", Brussels, 12 December 2003".

⁸² Declaration of the European Union, Fourth Meeting of the Association Council EU-Israel, op. cit.

from the basket of concerns it addresses as matters of law in order to address them politically.

Like the Oslo Agreements themselves, the Road Map defines settlements as a political rather than a legally determined matter. However, the Road Map says nothing about the construction of a wall in occupied territory, extra-judicial killings or destruction of houses. Referring them to international law did not therefore 'prejudice the positions of any of the parties' on a matter that the Road Map and the Oslo Agreements purport to remove from determination by international law.

Referring the matter of the wall to the International Court of Justice opened up the strong prospect that the EU would have to choose between applying international law within the political confines of the Road Map and applying international law outside those confines as the ICJ would undoubtedly insist, if it chose to render its advice. In addition to placing the question of Israeli settlements back under the determination of international law, the terms of the General Assembly request clearly invited the Court to clarify the legal obligations of third states and international organisations relative to the enforcement of the body of international human rights and humanitarian law it determined was applicable.

This development could not only undermine the positions maintained by Israel with the political support of the Quartet and the Road Map. It would also make it particularly awkward for the EU – a strong advocate of multilateralism and the international institutions – to continue to defer to Israel's implementation of its contractual relations with the EU in a manner that Community law and international law cannot accept. For several years the EU had dealt with this incompatibility between its own international legal commitments and its desire to play a significant political role in the 'peace process' by proclaiming its resolve to avoid 'prejudicing the positions' of any of the parties⁸³ and to avoid 'positions that would result from blindly applying legal rules'⁸⁴.

In December 2003, the UN General Assembly requested an advisory opinion on 'the legal consequences of constructing a wall in the occupied Palestinian territory' from the International Court of Justice, the principal judicial organ of the UN⁸⁵. The EU abstained on the UNGA resolution due to 'the conviction of many Member States that transferring the matter of the Wall to a legal forum would do nothing to advance the political process necessary for peace'⁸⁶.

The EU's abstention on the December resolution was criticised by a Member of the European Parliament (MEP) who noted in a 11 February debate:

It [the wall] has not been negotiated – force has been used to appropriate part of the land. That being the case, I believe that it would be appropriate for the International Court of Justice to give its opinion. I consider that the European Union, which fought, against

⁸³ Quotation from the Commission's Reply to oral question n. 68 H-0018/00, op.cit.

⁸⁴ Quotation from Commissioner Vitorino's speech during a EP plenary debate on the "Irregular Application of the EC-Israel Trade Agreement, op. cit.

⁸⁵ "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?" UNGA Resolution ES-10/14, 8 December 2003.

⁸⁶ Statement by Minister Roche at the European Parliament, on behalf of the Council of Ministers, on the EU position on the hearing at the International Court of Justice on the Israeli Wall, 11 February 2004.

the Americans for example, for this court to be established – and we have always said that we want international law – was ill-advised to abstain on this⁸⁷.

After ‘considerable discussion’ including at the General Affairs External Relations Council (GAERC) on 26 January the EU agreed that a submission to the Court would be prepared by the Presidency on behalf of the EU, and that individual Member States could make national submissions based on established European Union positions⁸⁸. The decision to allow multiple submissions was criticised by another MEP in the same debate:

But you, Mr President-in-Office, have said yourself that the wall has been built deep into Palestinian territory, and the European Union has said the same. Just when it comes to such a step, to an annexation of this kind, and when consideration is being given to whether such border fortification can be the subject of a legal judgment, we simply say ‘sorry, we do not have a view, each state can do whatever it likes’. So what is the point of working towards a Common Foreign and Security Policy if when it comes to the most important questions we just say that we do not have a view⁸⁹?

The EU’s written submission took the form of a letter from the Irish Presidency. It referred to the common position expressed earlier by the EU according to which the construction of the wall in occupied territory was illegal. However, it also stated the EU’s view that the issuance of an advisory opinion by the ICJ would not help the efforts of the two parties to re-launch a political dialogue and was therefore inappropriate. Germany’s and the UK’s submissions focused on the impropriety of the Court’s issuing of such an opinion of the Court, since such interference in the ‘dispute’ between the parties would impede progress towards a negotiated settlement based on the Roadmap. The Netherlands maintained that construction of the wall in occupied Palestinian territory in departure of the 1949 Armistice Line was in contradiction to relevant provisions of international law, but held that the Court’s issuing of an advisory opinion could interfere with the re-launching of a political dialogue between the parties. By contrast, in its submission, the Swedish Government made no such objections and outlined positions that were highly consistent with those resolved upon by the Court itself.

An MEP questioned whether the EU’s opposing the involvement of the International Court in clarifying the legal consequences of an occupying power’s violations of international humanitarian law could reasonably be expected to help promote political negotiations between the occupying power and the political representative of the occupied population:

Those people who say that instead we should be relying on European pressure on Israel should tell me when European pressure alone on Israel has ever yielded any results – it has not. Yet, when there is an international multilateral forum that exists to address this issue, we turn our backs upon it.

Palestinians rightly point to the inconsistency of our position of urging them to give up violence, while simultaneously denying them the chance to seek redress through international legal institutions. A Palestinian negotiator observed that the US, the UK and

⁸⁷ Cohn-Bendit (Verts/ALE), Debates in the European Parliament, Sitting of 11 February 2004, Position of the European Union on the hearing in the International Court of Justice on the Israeli wall.

⁸⁸ Statement by Minister Roche, op. cit.

⁸⁹ Swoboda (PSE), Debates in the European Parliament, Sitting of 11 February 2004, op. cit.

Germany asked the Palestinians not to have recourse to violence, but when the Palestinians have recourse to diplomacy the door is slammed on them⁹⁰.

The Court held in its Advisory Opinion that the Israeli settlements in Occupied Palestinian Territory have been established in breach of international law, that the wall is illegal and that Israel is legally obliged to dismantle it and pay compensation to all persons who have suffered any form of material damage as a result of its construction. The Court also affirmed Israel's status as Occupying Power, and the applicability of the Fourth Geneva Convention and core international human rights covenants to the occupied Palestinian territories. In Paragraph 159 of the Advisory Opinion, the Court held that all states were obligated not to recognise the illegal situation created by the illegal construction of the wall, and not to provide assistance or aid in maintaining it. In addition, the Court emphasised the duty of all states as High Contracting Parties to the Fourth Geneva Convention of 1949 to 'respect and ensure respect' for that Convention, set out in article 1 common to the four Geneva Conventions of 1949:

[..] It follows from that provision [Article 1] that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with⁹¹.

The EU said that the Court's Advisory Opinion would 'need to be studied carefully' and that it was now up to the political bodies of the United Nations to decide how to act upon the Opinion⁹². After intense negotiations, the Member States voted unanimously in support of the UNGA Resolution of 21 July 2004, which signalled that body's acceptance of the key positions taken by the Court. Javier Solana, the EU's Foreign Policy Chief, stated that the vote signified a commitment to the protection of multilateral values and that the EU attributes 'supreme importance to the UN's three basic elements - the General Assembly, the Security Council and the Court - and believe the organization must play a more significant and important role'⁹³. The unanimous vote by the European countries in favour of the resolution shocked Israel.

Since that vote, the EU has made it clear that it does not consider the barrier/wall to be a political matter, or a threat to international peace and security, that should be brought before the United Nations.

'We are not interested to continue dealing with the issue of the separation fence within the parameters of the United Nations,' one EU diplomat said. 'The opinion on the fence given by the International Court of Justice in the Hague is advisory and does not require that deliberations on the issue continue in the General Assembly'⁹⁴.

However, it is also apparent that the EU has not been prepared to address the matter in its purely legal aspect, and has been particularly silent on the implications for the EU-Israel relationship of the Advisory Opinion's dicta regarding the obligations of third states.

⁹⁰ Lucas (Verts/ALE), *ibid.*

⁹¹ Paragraph 158 of Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, 9 July 2004.

⁹² Press-statement by the EU foreign ministers on ICJ advisory opinion, 12 July 2004.

⁹³ Adar Primor, 'EU's Solana at center of the storm', Ha'aretz, 25 July 2004.

⁹⁴ Shlomo Shamir, 'EU opposed to more talks on fence at UN', Ha'aretz, 15 September 2004.