

What Neighbourhood Policy in a Context of Unlawful Occupation?

Israel and the Occupied Palestinian Territory

Nov 16, 2016 by [Ingrid Jaradat](#)

Occupation may be lawful, if it is a regime that maintains public order in a territory seized in war, in conformity with international humanitarian law and temporarily, until the territory is returned to the sovereign. Israel's system of occupation, settlements and *de facto* annexation in the West Bank, East Jerusalem and the Gaza Strip, however, is unlawful.

Permanent conquest of territory through war and occupation is absolutely prohibited. It contradicts universally binding norms (*jus cogens*, *peremptory norms*) which are pillars of the modern international order, such as the prohibitions on aggression, acquisition of territory by force and colonialism and the right to self-determination of peoples. Gross and systematic violation of such norms by any state triggers a legal duty to act for all other states and their organizations: third states are to cooperate to bring to an end by lawful means such breaches of peremptory norms, and third states must not recognise as lawful the situation created with these breaches nor aid or assist in maintaining it.¹

Israel's occupation has always been a case of such serious breaches of international law, before, during and after the peace process. In the period of 1967 – 1980, for example, the UN Security Council regularly reaffirmed the prohibition on acquisition of territory by force in resolutions that condemned Israel's flagrant violations of the Fourth Geneva Convention in the occupied territories, including East Jerusalem.² Many of these resolutions also expressed non-recognition by the Council of the situation resulting from these violations. Furthermore, the Council also called upon "all States not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories" (UNSCR 465, 1 March 1980), and – while calling on Israel to rescind its *de facto* annexation of occupied East Jerusalem – reaffirmed 'its determination in the event of non-compliance by Israel..., to examine practical ways and means in accordance with relevant provisions of the Charter of the United Nations to secure the full implementation of this resolution' (UNSCR 476, 30 June 1980). The UN General Assembly invoked third-state responsibility in the same context when it called for economic and other sanctions against Israel in the 1980s.³

Many years later in 2004 and more important for the current era, the International Court of Justice (ICJ) advisory opinion concluded that the right to self-determination of the Palestinian people in the Occupied Palestinian Territory (OPT), i.e., the West Bank, including East Jerusalem, and the Gaza Strip was universally recognized. The Court concluded further that Israel, with the construction of the Wall in the OPT, is responsible for serious violation of peremptory norms, i.e., *the prohibition on acquisition of territory by force* and the *right to self-*

¹ International customary law codified in the ILC *Draft Articles on the Responsibilities of States in connection with Internationally Wrongful Acts*, annexed to UN General Assembly Resolution A/RES/56/83 (12 December 2001), Articles 40, 41.

² UNSCR 252 (21 May 1968), 267 (3 July 1969), 271 (15 September 1969), 298 (25 September 1971), 465 (1 March 1980), 476 (30 June 1980) and 478 (20 August 1980).

³ UN General Assembly Resolution ES-9/1 (5 February 1982).

determination of the Palestinian people, as well as for grave violations of IHL, including forcible transfer of population (Article 49, Fourth Geneva Convention). On this basis, the ICJ also confirmed that all states have the obligations of non-recognition and cooperation.⁴

As the size of Israel's settler population had by then increased dramatically, other UN reports and independent studies put the focus of analysis onto the system of governance created by Israel for its settlers and Palestinians in the OPT. Finding a system of institutionalised racial discrimination and segregation that deprives the occupied Palestinian population of a wide range of fundamental human rights, these studies concluded that Israel's regime of occupation also results in gross and systematic breaches of human rights treaties and the peremptory norms prohibiting *colonialism* and *apartheid*.⁵

Europe has certainly been aware. European states, among them the UK and France, had voted in favour of many of the above-mentioned Security Council resolutions of 1967 – 1980. The European Union itself supported in 2003 – 2004 the ICJ advisory opinion in the UN General Assembly, and official EU statements have clarified that the EU does not recognize Israeli sovereignty in the OPT and the occupied Syrian Golan Heights. In more general terms, the European Union considers itself bound by international law and requires that positions and commitments of EU bodies must be in conformity with international law. The EU has also committed itself to promote respect of international humanitarian law and human rights by other states and non-state actors.

A review of the past, however, shows that bilateral dialogue and cooperation with Israel, the occupying power, and the Palestinian Authority in the OPT under the European Neighbourhood Policy (ENP) has proceeded for more than a decade as if it were taking place in a separate and parallel world in which the European Union does not know about the unlawful occupation and isn't aware of its own legal obligations and commitments.

In the mid-2000s, the European Union decided to provide practical support through the ENP to the initiative for Israeli-Palestinian peace of the so-called Quartet (United States, Russia, EU and UN). Diplomacy through this initiative had been on-going since 2002 with the aim of re-activating the Israeli-Palestinian peace process on the basis of the 'Oslo agreements' of the early 1990s. The European Union decided that the ENP should support the Quartet's initiative, although the 'Oslo agreements' give recognition to and empower Israel's unlawful occupation, undermine the status of Palestinians in the OPT, and had already contributed to the collapse of the earlier peace process.

⁴ ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory of 9 July 2004.

⁵ See for example: Reports of the UN Special Rapporteurs on Human Rights in the OPT John Dugard, A/HRC/4/17 (29 Jan 2007) and Richard Falk, A/HRC/16/72 (10 January 2011) and A/HRC/25/67 (13 January 2014); CERD, Concluding Observations ISRAEL, CERD/C/ISR/CO/14-16 (9 March 2012); Human Rights Council, Report of the Independent Fact Finding Mission on the Israeli Settlements in the OPT, A/HRC/22/63 (7 February 2013). Also: Diakonia, *Same Game, Different Rules Practices and Policies of Racial Discrimination by the Occupying Power in the Occupied Palestinian Territories*, Legal Brief (May 2016) .

The ‘Oslo agreements’ had been negotiated and signed by Israel and the PLO under the sponsorship of Norway and the United States in the early 1990s. They provided the rules for temporary, limited Palestinian self-rule in the OPT and were to be replaced within five years by the provisions of a comprehensive peace agreement. For the interim period, Israel had agreed to the establishment of the Palestinian Authority (PA); Israel would gradually transfer certain powers and territory to the PA in order to enable it to assume administration of the Palestinian population. In exchange, the PLO had accepted to disregard international law and the earlier Security Council resolutions by conceding to full Israeli control of occupied East Jerusalem and the settlements. In addition, Israel was granted full control over approximately 60% of the land in the occupied West Bank, the so-called ‘Area C’ where many of its settlements were located. In exchange for vague provisions on Palestinian access to the Israeli labour market, the PLO had also signed an economic agreement (Paris Protocol) that kept the Palestinian economy captive to the Israeli economy through a customs union, designation of the Israeli Shekel as currency of the PA, and Israeli control of type and quantity of goods that may be produced, imported and exported by Palestinians. PA police and intelligence, and security coordination with Israel, were established in order to enforce this interim regime in the OPT. Eventually, these ‘Oslo agreements’ contributed more than anything else to the collapse of the peace process of the 1990s. Both, Palestinian freedoms and economy went into decline as Israel utilized its powers to impose unprecedented restrictions on Palestinian movement, withhold transfers of customs and taxes collected on behalf of the PA, suspend an agreed-upon transfer of land in ‘Area C’ to the PA, expand its illegal settlements and double the population of Israeli settlers.

By 2002, when the European Union joined the United States, Russia and the United Nations to form the so-called Quartet that would lead Israeli-Palestinian peace diplomacy from then on, the bilateral Israeli-Palestinian ‘Oslo peace process’ had already collapsed. It had given way to a wave of popular Palestinian protests and armed conflict (second intifada). Israel had reasserted its control of the OPT by means of overwhelming military power, leaving the PA and the occupied Palestinian population in a political and humanitarian crisis. In this context, the EU subscribed to the approach of the Quartet’s Roadmap to Israeli-Palestinian peace which holds that the solution of the conflict should be an ‘independent, democratic, viable and contiguous Palestinian state’ next to Israel and ‘a just, fair, agreed and realistic solution to the refugee question’;⁶ that this solution is to be achieved through negotiations; and that first of all the flawed regime of power sharing created by the ‘Oslo agreements’ must be restored and respected as the framework in which preliminary Palestinian state-building in the OPT can proceed.

Therefore, when the European Union launched the ENP as a means of practical support to the Quartet’s Roadmap, dialogue and cooperation with the Palestinian people under the ENP was given the shape of PA state-building in the OPT within the confines of the ‘Oslo agreements’. By holding Palestinians in the OPT hostage to this framework that gives recognition to and empowers Israel’s deeply unlawful occupation, the ENP has undermined the rights and status of Palestinians under international law and contributed to chronic aid dependency.

⁶ EEAS home page, Middle East Peace Process, at: https://eeas.europa.eu/topics/middle-east-peace-process/337/middle-east-peace-process_en

In parallel, the ENP with Israel was designed as a privileged partnership that absolved Israel from substantial engagement with both its unlawful occupation in the OPT and the Quartet's Road Map to peace. Shaped in this manner, the ENP has been in blatant contradiction with the EU position of non-recognition of Israeli sovereignty in the OPT and international law. By allowing Israel to benefit from both, a privileged economic and political partnership with the EU and its unlawful occupation, the ENP has also served as the strongest possible incentive for Israel to maintain the unlawful occupation rather than seek a comprehensive political solution with the Palestinian people.

A comparison of the two neighbourhood policies illustrates and supports these conclusions.

**The aid recipient, hostage to the Oslo agreements:
Building Palestinian state institutions while recognizing and empowering the unlawful occupation**

Based on an Interim Association Agreement signed in 1997 between the European Commission and the PLO, 'on behalf of the Palestinian Authority of the West Bank and Gaza Strip',⁷ the ENP applicable to Palestinians was launched in 2005 as a framework that incorporates several components: political dialogue with the PLO, direct financial support to UNRWA for assistance to Palestinian refugees in the OPT and the exile,⁸ and – most of all – support for recovery, reform and development of the PA. Complementary humanitarian aid to the Palestinian population in the OPT has been provided through ECHO.

Under the ENP, the European Union has primarily supported the PA in implementation of a series of recovery and development plans through assistance and financial aid of more than € 200 million annually. These PA plans have been supervised and sponsored by a Quartet task force and the Ad Hoc Liaison Committee on Assistance to Palestinians (AHLC), a consortium of states sponsors of the Oslo peace process, the World Bank, the IMF, the UN and, among others, the EU, with the aim of sustaining PA institutions and preparing them for statehood in accordance with the principles of democracy, good governance and a liberal market economy.

Compliance with the Oslo agreements has been a condition for Palestinian state-building. It was imposed in 2006, when the Quartet and members of the AHLC did not recognise the result of the Palestinian elections and withheld aid from the PA national unity government formed by Hamas, contributing, thus, to Palestinian political division and the split of the PA into two parts. Since then, aid and assistance to PA institution building has focused on the occupied West Bank, due to a no-contact policy with the Hamas-led PA in the occupied Gaza Strip, the Israeli blockade and the failure of Palestinian efforts to restore national unity. Since 2014, state sponsors of Palestinian state-building have, moreover, given expression to their condition of compliance with the Oslo agreements and the Quartet's Road map by withholding political support from the

⁷ [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A0716\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A0716(01):EN:HTML)

⁸ The limited scope of this dossier does not allow discussion of issues pertaining to UNRWA and the Palestinian refugees under the ENP.

Palestinian statehood initiative in the United Nations, and by not recognising the State of Palestine, for failure to adhere to their condition.

The PA's first ENP Action Plan was adopted in 2005. It was replaced in 2013 by the presently valid revised plan.⁹ As part of the larger internationally sponsored state-building, annual direct EU financial aid has been provided for recurrent PA expenditure on salaries, pensions and public services, in addition to support of PA development programmes in the fields of governance, private sector and economic development, water and land. PA institutions and civil society from the OPT have been entitled to participate in some EU thematic programmes, for example on local authorities, democracy and peace-building in the region.

Partnership has given way to a relationship of donor to aid recipient in this context. The 2013 Action Plan, for example, no longer speaks about 'dialogue and cooperation' with the EU. It consist, instead, of a listing of tasks, with benchmarks and timelines, for the PA and to a smaller extent the EU to perform. These tasks are grouped in the areas of democracy and rule of law, human rights and fundamental freedoms, financial accountability, sound management of public finances, fiscal consolidation, and approximation of economic legislation and administration to western market economy standards. Performance of the specified tasks is presented as necessary for Palestinian statehood. At the same time, it is made clear that realisation of statehood depends upon the achievement of a two-state solution through peace negotiations with Israel in accordance with the Quartet's Road Map – which is defined as a 'continuous' open-ended objective in the Action Plan.

The Israeli occupation and associated violations of IHL and human rights are mentioned in the PA's Action Plans. The plan of 2005, for example, notes in the introduction that, 'the on-going Israeli-Palestinian conflict and the continuing occupation, including settlement activity, restrictions to movement as a result of the closure policy and the separation barrier' are 'constraints and limitations' that 'affect the scope of actions that can be feasibly undertaken.' Efforts to overcome these constraints, however, are beyond the scope of the ENP. Tasks pertaining to human rights and democracy are included in Action Plans, and implementation has been followed-up by working groups and an EC-PA Subcommittee on Human Rights, Good Governance and the Rule of Law, only to the extent they fall – according to the Oslo agreements - under the jurisdiction of the PA.

Meanwhile, the Quartet has for all practical purposes ceased to play a lead-role in peace diplomacy. PA institutions have been declared fit for statehood for the past five years, and there is concern about the lack of a political horizon and the risk that past achievements may not be sustainable.¹⁰ Faced with the chronic loss of PA revenues due to Israel's withholding of funds collected on the PA's behalf, the loss of vital land and natural resources through appropriation by Israel, in particular in the so-called Area C, forcible displacement and transfer of Palestinian population, the on-going Israeli blockade of the Gaza Strip, the internal division of the PA, and the deteriorating livelihoods and diminishing presence of Palestinians in East Jerusalem,

⁹ <http://www.euneighbours.eu/library/content/eu-palestinian-territories-enp-action-plan>

¹⁰ UNSCO, "Palestinian State Building: an achievement at risk", presented to the AHLC on 18 September 2011.

members of the international state-building consortium, including UN agencies, the World Bank and the EU have been searching for solutions. Nevertheless, the position has remained that such solutions are to be in conformity with the Oslo agreements and must not prejudice the status of any territory which may be subject to negotiations between Palestinians and Israel.¹¹

With state-building in crisis, some new EU commitments were incorporated into the updated 2013 Action Plan. Support of human rights defenders, for example, is part of the agenda of action on human rights; EU political support of Palestinian elections, including in East Jerusalem, and the release of Palestinian legislators from Israeli detention are part of the agenda on democracy, and EU advocacy for the lifting of the Israeli blockade of Gaza and the complete removal of movement restrictions have been promised as part of support to the Palestinian National Development Plan. Two new areas of action were also agreed upon, one supporting the rights of Palestinians in East Jerusalem, including EU financial support of projects, the other supporting Palestinian development in the ‘Area C’, in particular through preparation and submission of Palestinian master plans.

The preparation of such Palestinian master plans has been strongly criticised by civil society, because it entails recognition of Israel’s unlawful planning regime in ‘Area C.’¹² These master plans are submitted to and assessed by the civil arm of the Israeli military government, the so-called Civil Administration. The latter approves these plans only to the extent that they accommodate the illegal Israeli settlement activity in the area. 108 such internationally sponsored master plans had been prepared by April 2016, 85 of them had been submitted, and three had obtained Israeli approval.¹³

Equally criticised is the Gaza Reconstruction Mechanism (GRM), an agreement brokered by the UN (UNSCO) with Israel and the PA over the entry of construction materials into the blockaded Gaza Strip for repair of the massive damage and destruction caused by the Israeli army in the summer of 2014. The European Union, together with other AHLC members, has contributed special aid to the GRM via the PA. Civil society has held UNSCO responsible for implicating the UN and PA in the unlawful Israeli blockade of Gaza with the GRM, and criticised governments and aid agencies for subscribing to Israel’s sweeping dual-use regime, and for absolving Israel from its obligation to make reparation for the damage caused.¹⁴

¹¹ World Bank, *Area C and the Future of the Palestinian Economy*, October 2, 2013. Also: UNSCO Report to the AHLC, Brussels, 14 April 2016.

¹² Palestinian Human Rights Organizations Council (PHROC), “PHROC Raises Serious Concerns Regarding the Development of Master Plans Requiring Israeli Approval in Area C of the West Bank”, 31 December 2014. Also: Diakonia IHL Resource Centre, *Planning to Fail: the Planning Regime in Area C of the West Bank, an International Law Perspective*, September 2013.

¹³ UNSCO Report, 14 April 2006; *supra*.

¹⁴ Aid Watch, Resources and Key Documents; at: <http://www.aidwatch.ps/resources-list/63>

The privileged partnership: benefiting from EU integration and the unlawful occupation

Israel already had a cooperation agreement with the European Union from 1975. A new, full Association Agreement was signed in 1995 and entered into force in 2000. On this basis, Israel's ENP Action Plan was concluded in 2006. This plan has not been updated and is still valid.¹⁵

The European Union regularly affirms the special character of its partnership with Israel, mentioning cultural affinity and the advanced Israeli economy as the basis for mutually beneficial relations. Accordingly, Israel is treated as an equal partner under the ENP: there is 'dialogue and cooperation', not tasks, benchmarks and timelines. Moreover, the Action Plan was designed and has served to facilitate trade and investment, as well as economic, financial, scientific, social and cultural cooperation, with the aim of enhancing Israel's integration into the European Union. More than anyone else in the region, the Israeli public and private sector participates in a wide range of EU sponsored programmes, such as Erasmus+ in the field of higher education and the prestigious programmes on research and innovation, currently Horizon 2020.

This special and privileged partnership under the ENP, however, rests on the systematic omission of Israel's unlawful occupation, and on the failure of the European Union to respect and promote respect by Israel of IHL and human rights in the OPT.

In an act of negligence that is difficult to comprehend, EU bodies responsible for crafting the Action Plan with Israel failed to clarify that the ENP does not apply to the OPT, sending a message that trivializes the unlawful occupation. Such clarification had already been omitted from the Association Agreement with Israel in 1995. Ten years later, the omission was repeated, although those in charge must have been aware of the dispute over the preferential customs status of Israeli settlement products from the OPT that had erupted between the European Commission and Israel soon after the signing of the Association Agreement, and of the ICJ advisory opinion (2004) the EU had supported in the United Nations. Moreover, had EU negotiators of Israel's Action Plan simply forgotten that other EU bodies were at the same time engaged in Quartet peace diplomacy and contributing, under the ENP, to Palestinian state-building in the OPT where Israel is claiming sovereignty?

Moreover, there is total silence about the unlawful occupation in Israel's Action Plan. Whereas Action Plans with the PA mention that the occupation results in 'constraints and limitations', no such constraints and limitations appear in Israel's Plan. Even more so, there is no West Bank, Gaza Strip, no Palestinian territory or population, and the terms 'occupied' or 'occupation' do not appear in the text. The only indications of the existence of a Palestinian population are a few vague references to 'minorities' and an unspecified 'civilian population.'

Instead, the introduction to Israel's Action Plan states sweepingly that 'the EU and Israel share the common values of democracy, respect for human rights and the rule of law and basic freedoms', and that based on an earlier Council conclusion, 'Israel, on account of its high level

¹⁵ <http://www.euneighbours.eu/library/content/eu-israel-enp-action-plan>

of economic development, should enjoy special status in its relations with the EU on the basis of reciprocity and common interest ...’.

Accordingly, there are also no IHL and human rights obligations, or even tasks related to the Quartet’s peace initiative, for Israel and the EU to perform under the ENP. The Action Plan rather provides a basis for political dialogue and cooperation that endorses the sweeping narrative of self-defence, security and counter-terrorism that is regularly put forward by Israel to justify violations of IHL and fundamental human rights of the Palestinian population in the OPT. It does so by relegating issues concerning the OPT to ‘the situation in Middle East’, together with cooperation on security, counter-terrorism, non-proliferation of weapons of mass destruction and illicit trafficking of military equipment for terrorism. More specifically, the EU and Israel agree to work together with the aim of achieving a two-state solution, and to support the PA in eradicating terrorism. Both parties also agree that – “‘while recognizing Israel’s right to self-defence and the importance of adherence to international law’ – there will be facilitation of humanitarian access and freedom of movement of a ‘civilian population,’ and that property institutions and infrastructure will be safeguarded ‘to the maximum possible.’ With language of this sort, the European Union failed to assert the rules of IHL, as well as the basic principle that Israel is not entitled to invoke a right to self-defence against situations it has by itself created with the unlawful occupation (the principle of ‘*ex injuria non oritur ius*’, i.e., no right can be derived from an unlawful act).

Directly related to the above, is the omission of reform of Israeli legislation and administration that contradicts international IHL and human rights standards – in stark contrast to the intensive activity undertaken under the ENP for reform of Israeli economic and financial legislation and administrative standards for the purpose of EU integration.

The European Union should have been concerned in particular about domestic Israel laws which contradict EU law, such as laws claiming Israeli sovereignty in the OPT¹⁶ and authorising annexation of occupied Palestinian territory,¹⁷ and laws authorising arbitrary expropriation of Palestinians, torture, repression of freedom of expression and related rights, and arbitrary interference in the rights to privacy and family.¹⁸ Such domestic Israeli legislation is applied to the Palestinian population in occupied East Jerusalem, as well as to Israel’s Palestinian citizens. Also of concern should have been Israel’s system of military orders in the OPT that exceed by far the IHL entitlements of an occupation regime, while it is also applied in a discriminatory manner to the Palestinian population, but not to the illegal Israeli settlements.

Reform of such Israeli legislation and associated administrative policies should have been addressed in the framework of the ENP, in order to ensure that cooperation with Israel will not result in violation of EU law, and to promote respect of IHL and human rights by Israel in accordance with the EU guidelines.¹⁹ These guidelines provide, for example, that in situations of

¹⁶ Area of Jurisdiction and Powers Ordinance, No. 29 of 5708-1948

¹⁷ Law and Administration Ordinance (1948) Section 11 B (27 June 1967)

¹⁸ Adalah, Discriminatory Laws Database, at: www.adalah.org

¹⁹ *EU Guidelines Human Rights and International Humanitarian Law* (2009), a publication of the Council, at: https://eeas.europa.eu/human_rights/docs/guidelines_en.pdf

grave violations of IHL relevant EU bodies should encourage the responsible state to adopt legislation that will help prevent, suppress and punish such violations.²⁰

Absent an agenda of cooperation for respect of IHL and human rights, there has not been a mechanism to monitor performance. There is no sub-committee on IHL and human rights among the 10 sub-committees established by the EU and Israel to monitor implementation of the Action Plan. Civil society has long called for at least a fully-fledged working group on human rights. Currently, there is only an informal working group that keeps no public record of its meetings, lacks transparency and does not deal with Israeli IHL and human rights violations in the OPT.²¹

Palestinians have been particularly embittered about certain commitments of the EU which constitute direct support of Israel's unlawful occupation, while also encouraging impunity. Among these is the agreement in Israel's Action Plan to cooperate "towards normalisation of Israel's status in international organisations and the reduction in number of Middle East resolutions." Measures adopted in the UN Human Rights Council, such as the EU boycott of the regular session on the OPT (item 7), and EU abstention from a resolution establishing a UN database of companies that support the illegal Israeli settlements through their business operations, are widely seen as measures that have given effect to this commitment. Another example is the omission of all reference to the importance of joining the Rome Statute of the ICC from the Action Plans with both Israel and the PA, although ascension to the Rome Statute is promoted consistently by the EU under the ENP with other states. Apparently no pressure was put on Israel in this matter because EU bodies in charge 'understood' the need to avoid accountability. As for the Palestine, it is most likely the only state that has ratified the Rome Statute despite active discouragement by the EU and member states.

Meanwhile, away from the OPT and with a blind eye for the unlawful occupation, the ENP has been a catalyst for further approximation of Israeli economic and financial standards to those of the EU. Free trade based on the Association Agreement proceeded in accordance with a technical compromise reached in 2004 that cannot guarantee that Israeli companies exporting to the EU do not benefit from privileged customs status for goods originating from the OPT.

Since Israel is unwilling to differentiate between its own territory and its settlements in the OPT, the European Commission and Israel agreed in 2004 that European customs authorities are to determine whether Israeli goods originate from the OPT based on the postal code of the locality of origin provided by Israeli exporters. Legally, the matter was settled by the European Court of Justice in 2010, ruling in the *Brita* case that Israeli produce from the OPT does not fall in the scope of the EU-Israel Association Agreement.²² In practice, however, the matter has never been resolved: Israeli exporters and authorities have been found mixing produce and manipulating information, and there is no mechanism for systematic monitoring.

²⁰ Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law, *Official Journal of the European Union*, 15.12.2009.

²¹ See also: Euro-Mediterranean Human Rights Network and Aprodev, *EU-Israel Relations: Promoting and Ensuring Respect for International Law*, Brussels, 2012.

²² *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*; judgment of the Court (Fourth Chamber) of 25 February 2010, at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-386/08>



Into this scenario came the announcement of the EU-Israel Association Council in June 2008 that it had responded positively to an Israeli request for a significant upgrade of its economic and political relations with the EU in form of a new Action Plan. A year later, the Council put formal upgrading on hold, deeming it inappropriate in light of the destruction and large number of Palestinian civilian casualty inflicted by the Israeli military operation in the occupied Gaza Strip in 2008-9, and because of Israel's ambiguity about engagement in the Quartet's peace process.

From here on, resolutions and statements of the European Union, including the Association Council, became more affirmative of IHL and the human rights of Palestinians, and more critical of Israeli violations of the former. Nevertheless, the Council also informed that it remained committed to upgrading relations with Israel and new areas of economic cooperation were pursued based on the existing 2005 Action Plan. New free trade agreements were signed based on the Association Agreement, including a 2009 agreement on agriculture and the ACAA on pharmaceuticals in 2010. The latter in particular was met by opposition in the European parliament and protested by civil society. In this context, public statements expressing the determination of the EU to not give recognition to Israeli sovereignty in the OPT gained in prominence.

In 2013, EU-internal financing guidelines were issued to ensure that EU bodies would not provide financial support to Israeli entities and activities in the OPT and the occupied Syrian Golan Heights in violation of EU law.²³ By 2014, the EU had informed that it would no longer recognize Israeli veterinary services in these occupied territories, excluding meat, milk and dairy products from the illegal Israeli settlements from entitlement to certification required for import into the EU. Rules for the labelling by EU Member States of Israeli goods from the OPT under consumer protection were adopted in 2015,²⁴ and in January 2016, the Council announced its decision 'to ensure that – in line with international law – all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967.'²⁵

Looking to the future

More than 20 years of failed peacemaking and Palestinian state-building through international aid have resulted in a situation where the stakes are high, for Palestinians, Israelis and the European Union. Continuation of the *status quo* in the OPT will not lead to a one-state solution. The scenario ahead is an entrenched situation of apartheid that will erase the option of a future two-state solution and cause more human suffering and instability. Nevertheless, Europe's investment already made will not be wasted, if there is political will in the era of Brexit and a US presidency under Donald Trump to extract the European Union from destructive peace diplomacy and develop a new ENP framework based on what has been started.

²³ Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, *Official Journal of the European Union*, 19 July 2013.

²⁴ European Commission Brussels, 11.11.2015 C(2015) 7834 final Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967.

²⁵ European Council Conclusion on the Middle East peace process, 18 January 2016.

As the European Union is looking for new ideas, it is also high time to come to terms with the fact that there is no new incentive in form of additional privileges the EU could offer Israel to coax it into conceding a Palestinian state in the OPT, because nothing can trump what has already been offered Israel under the ENP: the economic and political benefits derived from the privileged partnership with the EU and, in addition, the economic benefits derived from the unlawful occupation in form of Palestinian land and natural resources.

The way forward is a revised neighbourhood policy with the Palestinian people and Israel that is appropriate for the context of unlawful occupation in terms of agenda, working groups and monitoring and reporting mechanisms.

The European Union would give full expression to non-recognition of the unlawful Israeli occupation and promote respect of IHL and human rights. Aid, political and economic cooperation under the ENP should also be in conformity with the relevant standards of the UN Guiding Principles on Business and Human Rights and EU human rights and IHL guidelines. The practical measures concerning occupied East Jerusalem long proposed by the Heads of Mission in the OPT,²⁶ and the proposed demand to Israel to refund destroyed EU funded infrastructure in Area C, should be pursued, and measures recommended by civil society should be considered in good faith.

For Palestinians, the revised neighbourhood policy must entail that they are no longer held hostage to the Oslo agreements by aid for state-building in the OPT. A model of aid that is consistent with the above legal principles and standards, including the right to self-determination, should be developed through dialogue and cooperation under the ENP, with the participation of civil society. The EU bodies would have to take the lead in promoting this model among the international state-building donor consortium.

For Israel, the revised neighbourhood policy must have at its core the dismantlement of the unlawful occupation, including the settlements, Wall and the associated regime of laws and military orders, and respect by Israel of its obligations as temporary occupying power. All commitments concerning political, security and economic cooperation by the EU must be in conformity with non-recognition of the unlawful occupation. Israel will certainly resist a new Action Plan that gives effect to this approach. However, the European Union holds the strongest possible card, i.e., the vested interest of the state of Israel and Israeli society in economic, political, social and cultural cooperation with the EU and EU integration.

Only if revised and differentiated in this manner, can an ENP carried out in the context of unlawful occupation contribute to the general objectives and priorities of the new ENP presented in November 2015, such as economic and social stabilization and development, in particular for youth, or prevention of conflict and radicalization and counter-terrorism. In the OPT, it will do so by counter-acting the entrenchment of the unlawful occupation, empowering Palestinian

²⁶ See for example, the EU Heads of Mission Jerusalem Report 2012 at: http://www.eccpalestine.org/wp-content/uploads/2013/02/EU_Homs_Jerusalem_Report_2012-1.pdf

institutions and giving hope to the young generation. In the end, such a revised ENP is also the only ‘incentive’ that may eventually compel Israel to consider a two-state solution.

A number of practical steps are required for the way forward:

First, there is a need for clarification by the EU of the meaning of its position of ‘non-recognition of Israeli sovereignty in the OPT’. Is this position in conformity with the obligation of the EU and member states under international customary law to ‘not recognize as lawful a situation created by a serious breach of a peremptory norm, nor render aid or assistance in maintaining that situation’? The latter is broader than aid and assistance in the commission of the serious breach itself. Aid and assistance are prohibited also if they contribute to the ‘maintenance of the situation’ created by the breach.

Human rights advocates and scholars have repeatedly critiqued the narrow expression given by the EU to non-recognition which appears to be inconsistent with international law. One example is the manner in which the EU applies its 2013 financing guidelines: EU funding of Israeli entities located or operating in the OPT is permitted as long as the latter provide an address in Israel and the specific EU-supported activity or project does not involve the OPT and has a separate bank account. The same criteria are used for the screening of Israeli applicants to Horizon 2020. Consequently, Israeli entities headquartered in occupied East Jerusalem and/or deeply implicated in the unlawful occupation benefit from expertise and supportive relationships through participation in Horizon 2020, for example the Israeli Ministry of Public Security, police, Israeli arms companies such as the Aerospace Industries (IAI) and Elbit, and Israel's national water company Mekorot.

Civil society has also argued that, under non-recognition, Israeli produce from the OPT should be banned from EU markets, instead of just being labelled as such and excluded from privileged customs, and that there should be no investment and business with Israeli banks because this results in fungible revenues for these banks and their operations in the illegal settlements in the OPT.

Secondly, there is a need for the European Union to ensure that all relevant EU bodies and Member States understand and support this approach. The large number and diversity of technical and political bodies involved, in the OPT, Israel and Europe, appears to have obstructed a more informed and coherent ENP with Palestinians and Israel in the past.

Finally, more EU monitoring mechanisms are required to ensure that guidelines and measures adopted to give effect to non-recognition are implemented by relevant EU bodies. Systematic monitoring is required in particular where implementation of non-recognition is based on technical arrangements in which Israeli authorities and export companies inform of or certify the place of origin of Israeli produce, although they do not differentiate between Israel and the OPT in their routine operations and object to such differentiation. Such monitoring must not be left to civil society alone.