Inaction is Complicity:
The European Union, the Donor Community and Israel

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2005
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Abstract

The question of Palestine/Israel is of urgent international concern and international actors are legally required to fulfil their *erga omnes* obligations towards the dispute as affirmed by the International Court of Justice in 2004. The misapplication of the EU-Israel Association Agreement illustrates that in its contractual relations with Israel, the European Union has failed to fulfil its international legal obligations and is furthermore complicit in Israeli violations by failing to counter Israel’s material breaches of the Agreement. Instead of upgrading its bilateral relationship by including Israel in the European Neighbourhood Policy, the EU is legally obligated to suspend the Agreement. The donor community is similarly complicit in Israeli violations by relieving Israel of its obligations as an occupying power. Donors must engage in advocacy and adopt a more robust and confrontational approach to help defy Israeli violations of international law. Both the EU and the donor community are currently supporting a deluxe occupation where Israel receives unconditional benefits from EU cooperation instruments and is allowed to further entrench a military occupation and apartheid system paid for by the international community. States, the United Nations, and civil society must take concrete legal and political action as called for by the ICJ to combat Israeli crimes, international complicity and a situation of lawlessness and impunity.
Acknowledgements

Deep thanks to the Grassroots Anti-Apartheid Wall Campaign, the ElectronicIntifada.net publication team and the Palestine Right to Return Coalition, all of whom the author had the satisfaction of working alongside over the years.
Introduction

All States parties to the Fourth Geneva Convention are obliged to ensure compliance by Israel with the international humanitarian law embodied in this Convention. Israel’s defiance of international law poses a threat not only to the international legal order, but to the international order itself. This is no time for appeasement on the part of the international community.¹

Anyone familiar with the Palestine/Israel “conflict”² is likely to be well versed in Israeli violations of international law. Indeed, the United Nations (UN) along with international, Palestinian and Israeli non-governmental organisations (NGO) draw urgent attention to Israel's blatant disregard of international humanitarian law (IHL), international human rights law, and general principles of international law. Western governments likewise tend to join the chorus of criticism and express their deep dismay at Israel’s deviation from the path to “peace.”³ The Advisory Opinion declared by the International Court of Justice (ICJ) last year affirms perhaps in the strongest possible terms the illegality of Israeli policies in the occupied Palestinian and Arab territories (OPTs). While Israel’s behaviour as a rogue state

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has been established in the eyes of many, less attention has been paid to the active role
the *international community*\textsuperscript{4} plays in supporting such behaviour. Upon closer inspection, it
becomes clear that rather than helping to reconcile the conflict, various international actors
are actively aiding and abetting Israeli violations of international law. By doing so, much of
the international community could be considered culpable for contravening several legal
principles pertaining to Palestine/Israel. While numerous examples could support such a
contention,\textsuperscript{5} this paper will focus on the donor community as well as the European Union
(EU) in terms of its contractual relations with Israel. Analysis will focus exclusively on the
EU-Israel Association Agreement to illustrate how it is implemented by Israel in violation of
international law, EU law, and in violation of the Agreement itself. While this state of affairs
has been recognised by certain Member States and EU bodies, the EU has not acted to
reconcile itself with the legal principles it is said to endorse. By *failing* to ensure that Israel
implements its bilateral agreements in a legal manner, the EU has put itself in a position
where it is *complicit*\textsuperscript{6} in Israeli violations of international law. Instead of taking the

\textsuperscript{4} All italics are by author for emphasis, unless otherwise noted.
\textsuperscript{5} Present day World Bank policy for example, is rooted in its explicit support for Israel’s “disengagement plan” and
despite the ICJ Opinion that instructs the international community not to “render aid or assistance” in maintaining the
situation created by the wall, the World Bank has formulated all its recent policies on the assumption of the continued
presence of the wall, Israel’s closure system, and the overall occupation apparatus. See: The Anti-Apartheid Wall
Campaign, “‘Developing’ Israeli apartheid: The World Bank, international aid, and the ghettoization of Palestine,” 18
May 2005. Available online: //stopthewall.org/analysisanandfeatures/921.shtml ; The Anti-Apartheid Wall Campaign,
“One Year after the ICJ-The G8 and World Bank cementing Israeli apartheid and occupation,” 7 July 2005. Available
online: //stopthewall.org/analysisanandfeatures/960.shtml ; World Bank, “Disengagement, the Palestinian economy and the
\textsuperscript{6} The concept of *complicity* in international law is complex and can arguably be divided into 3 categories: direct, indirect
and silent complicity. International criminal law for example suggests that direct complicity requires intentional
participation, but not necessarily any intention to do harm, only knowledge of foreseeable harmful effects. For example,
the UN Criminal Tribunal for Rwanda in the *Akayesu* case concluded, “anyone who knowing of another’s criminal
purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the
offence.” Paragraph 539, see: www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm. The International
Criminal Tribunal for the Former Yugoslavia in the *Tadic* case also considered forms of complicity, namely to "aid and
abet, counsel and procure." See: www.un.org/icty
According to Sir Geoffrey Chandler, Chair of Amnesty International UK, “Silence or inaction will be seen to provide
comfort to oppression and may be adjudged complicity. Silence is not neutrality. To do nothing is not an option.” As

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appropriate legal and political action, the EU has attempted to conceal clear legal
irregularities by upgrading its agreements with Israel as indicated by the new “European
Neighbourhood Policy” and sustaining if not increasing donor aid and humanitarian
assistance to the Palestinians. In turn, aid agencies have begun to seriously question
whether the continued implementation of such a scheme leaves the donor community itself
unintentionally culpable for contributing to Israel’s disregard for international legal
standards.

This paper will firstly overview Israeli violations of international law by drawing on
various aspects of the ICJ Opinion paying particular attention to the obligations of third
parties and the erga omnes character of the dispute as expressed in Article One common
to all Geneva Conventions, which calls on all parties “to respect and ensure respect” for the
Conventions. The EU-Israel Association Agreement will then be unpacked to highlight two
integral articles, namely the “rules of origin” and the “human rights” clauses, both of which
serve to define the precise character of Israel’s (mis)application of the Agreement. More
importantly however for the purpose of this paper, is a demonstration of the EU’s stark
failure to initiate concrete action to counter what amounts to a material breach of the
Agreement and the serious repercussions of such inaction. The paper will then examine
various routes that the EU is obligated to take in order to bring itself back in line with

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All in all, international law arguably considers intentional participation in an internationally wrongful act as constitutive
of complicity in the breach of international human rights law.

See: James Crawford, “Second report on state responsibility” UN Doc, International Law Commission,
(A/CN.4/498/Add.1) 1 April, 1999 ; International Law Commission “Principles of international law recognized in the
charter of the Nürnberg tribunal and the judgement of the tribunal” adopted at the 2nd session, Yearbook of the
International Law Commission, 1950, vol II, see: www.un.org/law/ilc/texts/nurnberg.htm ; Christopher Kutz,

7 For analysis on Article One, see: Iain Scobie, “Smoke, mirrors, and killer whales: The international court’s opinion on
the Israeli barrier wall,” 5 German Law Journal 9, 1 September 2004.
international law while also serving to push Israel into the realm of legality, a domain historically and presently unfamiliar to the Jewish state. The following section will then overview a related debate within the donor community that is currently questioning the ways in which humanitarian assistance in the OPTs may not only be contravening IHL, but may also be contributing to the continued Israeli occupation and subjugation of the Palestinian people. In light of the realities on the ground, it will be argued that aid agencies need to incorporate political advocacy into their mandate and abandon their traditional role for a more confrontational approach to help bring Israel into that previously unknown domain of legality. Such a change on the part of aid agencies underlines just one way in which the international community can respond to the ICJ’s call for “further action,” an urgent demand that will be examined in the final section by introducing a few alternative legal and non-legal routes available to both states and civil society to help bring not only Israel in line with humane legal standards, but the international community as well.
Israel, International Law and the International Court of Justice

The landmark ICJ ruling of last year was the clearest judicial pronouncement to date on the international legal principles that apply to the Israeli/Palestinian conflict.\(^8\) While at face value the opinion is non-binding, it is nonetheless a declaratory statement of the applicable law by the UN’s chief judicial organ and the highest judicial authority in the world. It draws attention to the violations of the applicable law and the consequences arising from those violations under international law, namely customary rules of state responsibility arising from wrongful acts.\(^9\) The Court stated clearly in essentially unanimous terms\(^{10}\) that all Israeli settlements in the OPTs 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. Furthermore, the Court affirmed Israel’s status as an Occupying Power and the applicability of the Fourth Geneva Convention\(^{11}\) in addition to core international human rights covenants to the OPTs. In Paragraph 159, the Court declared 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. The Opinion

\(^{8}\) For commentary on the ICJ opinion see: Richard Falk, “Towards authoritativeness: The ICJ ruling on Israel’s security wall,” 99 \textit{American Journal of International Law} 1, January 2005.

\(^{9}\) The Advisory Opinion resembles the Court’s judgement in the Namibia case, which determined the territory as occupied and cleared the way for UN organs to take action against South Africa.

\(^{10}\) American judge, Thomas Buergenthal dissented from the group claiming that the Court did not fully explore Israel’s security concerns. However, he agreed on the unconditional applicability of IHL to the OPTs and that Palestinians were entitled to exercise their right of self-determination. Buergenthal also expressed “serious doubt that the wall would…satisfy the proportionality requirement to qualify as legitimate self-defense.” British judge Rosalyn Higgins “whose intellectual force is widely admired in the US” supported the decision. See: Richard Falk, “America Outside Consensus on the Wall,” \textit{Truth Out}, 24 July 2004.

further emphasised the duty of all states\textsuperscript{12} as High Contracting Parties to the Fourth Geneva Convention of 1949 to "respect and ensure respect" for the Convention. Recalling Article One common to all four Geneva Conventions of 1949, the Court pronounced,

\begin{quote}
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 with\textsuperscript{13}.
\end{quote}

Indeed, having established the \textit{erga omnes}\textsuperscript{14} character of the dispute the Court confirmed that states have "additional obligations to ensure Israel's compliance" with the Conventions. The Opinion then declared that the United Nations General Assembly (UNGA) and Security Council should consider "further action" to compel Israel to abide by international law and bring an end to the current "illegal situation" on the ground. While the violent construction of the wall may have added a new dimension to the conflict, overall the Court did not have to invoke any new legal principles to reach its decision and in conceptual terms the Opinion was rather unremarkable, as it simply reaffirmed the countless UN resolutions and other legal documents that have applied to the Palestine/Israel conflict for decades.


\textsuperscript{13} Legal consequences of the construction of a wall in the Occupied Palestinian Territory, ICJ, 9 July 2004, Paragraph 158. \textit{Hereinafter}, ICJ Wall. Case available online: \url{www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf}

\textsuperscript{14} ICJ Wall, Paragraph 155. \textit{"Erga omnes"} is a legal obligation for all. For background information, see: Maurizio Ragazzi, \textit{The Concept of International Obligations Erga Omnes}, Oxford University Press, 2000.
Chapter 1

The EU: Guiding Principles and Palestine

The Treaty of Nice establishing the European Community (EC) states that Community policy “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.”15 The Treaty on the European Union affirms that the body is founded on the principles of “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.”16 Recently, the European Council’s first Common European Security Strategy defines one of its key objectives as “upholding and developing international law.”17 All such proclamations including the European Convention of Human Rights18 are legally binding on all Member States and the European Charter of Fundamental Rights adopted in 2000 is intended to serve as an “instrument inspiring respect for fundamental rights” by European institutions and states. In general terms, the EU as an entity operating within international law is subject to customary international law including the Geneva Conventions to which all Member States are likewise signatory and bound to respect “in all circumstances.” This obligation naturally has an inter-state dimension which has been recognised by the EU on several occasions and it is this dimension which is of greatest concern for this analysis.

18 Charter of Fundamental Rights of the European Union. Available online: www.europarl.eu.int/charter/default_en.htm
Built on such seemingly respectable foundations, the EU has forged an image of itself as a body concerned first and foremost with universally promoting the rule of law and human rights and is therefore also perceived as espousing a relatively “even-handed” approach to the Palestinian/Israeli conflict, a stance which is indeed is substantiated by much of its “declarative diplomacy.” As early as 1973 at the Copenhagen summit, the EU passed a resolution calling on Israel to withdraw from the OPTs, for the respect of sovereignty of states within secure and recognised borders, and for the recognition of the “legitimate rights of the Palestinians.” In 1980, the body expanded its position in the Venice declaration stressing the integral role of the Palestine Liberation Organisation (PLO) and calling on Israel to respect the Palestinian right to self-determination. The Declaration of the European Council on the Middle East issued in 1990 affirmed that, “settlements in the territories occupied by Israel since 1967, including East Jerusalem are illegal under international law.” The Declaration further reaffirmed the de jure applicability of the Fourth Geneva Convention to the OPTs and called on Israel to “adhere to its obligations toward the Palestinian population in the territory under its occupation which is protected by that Geneva Convention.”

As such declarations indicate, the EU and its Member States have, at least on a rhetorical level, been acting in accordance with international legal principles over the

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20 “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 by EU institutions and Member States in response to Israeli policies and practices. As defined by the Euro-Mediterranean Human Rights Network (EMHRN) report, “A Human rights review on the EU and Israel,” December 2004. See: www.euromedrights.net ; Hereinafter, EMHRN Report.
course of several decades. Such political statements combined with the huge amounts of aid directed to the Palestinians would lead one to believe that European states are at the very least, not aggravating the situation on the ground. While the EU’s declarative diplomacy has addressed Israel on the correct legal basis, little regard has been paid to those elements of international law that assign general responsibilities to states relative to the illegal acts of third states. Such an oversight however is not surprising when one recognises that in its contractual relations with Israel, the EU as a third party, is acting in contravention of both its own law and international law. In fact, a closer look at such bilateral relations sharply challenges the EU’s image as a neutral body acting in the best interests of the region and in compliance with international law. The following legal analysis of the EU-Israel Association Agreement reveals that not only is the EU acting outside its own legal parameters, but that it may actually be facilitating Israeli violations of international human rights law and IHL.

EU-Israel Association Agreement

Background

The EU established a bilateral preferential trade agreement with Israel in 1975, which was renewed as a full Association Agreement in 199623 as part of the Barcelona Process.24 This Agreement between EU Member States and Israel essentially provides contracting parties with reductions on customs duties or exemptions in trade relations. As with all such agreements between the EU and non-EU states, it applies to sovereign territory only and follows EU law as well as public international law. Against such a clear

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23 EU-Israel Association Agreement, June 2000. Hereinafter, Association Agreement. Full text available online: www.eu-del.org.il/english/content/eu_and_country/asso_agree_en.pdf

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legal framework, it is a relatively straightforward task to determine and illustrate that the Agreement is being implemented on illegal grounds. In fact, it has been recognised by certain European states and by Israel itself that Israel implements its agreements with the EU in violation of general law and in violation of the agreements themselves. The nature of such violations fall mainly under two umbrella categories: “rules of origin” and “human rights.” The following will overview the nature of such violations and then tackle the inadequacy of the EU response therein as essentially it is the failure to take effective measures to combat such violations that incriminates the EU.

**Trade**

The legal debate surrounding the “rules of origin” clause of the Agreement has received increasing attention in recent years due to pressure by both European member states and NGOs. Apart from official Israeli attempts to distort the issue the equation remains simple: since the beginning of the occupation, Israeli customs services have consistently certified products produced in the OPTs as originating in the “State of Israel.” Amongst the reasons for doing so is the desire to benefit from preferential treatment under the successive agreements governing trade between Israel and the EU. By (mis)labeling

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25 There are several other areas in which Community is vulnerable to complicity in Israel’s human rights violations. See EMHRN Report, pg. 32-33.


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products in this fashion, Israel is openly violating the “territorial scope of the agreement”\textsuperscript{28} and the clause governing “rules of origin.”\textsuperscript{29} The explicit purpose underlying these articles is to make sure that preferential treatment is granted only to products manufactured within the territory of the parties, therefore excluding products wholly or substantially produced in the OPTs. Such provisions serve to ensure that the EU falls in line with international law on belligerent occupation that considers the West Bank including East Jerusalem, Gaza, and the Golan Heights,\textsuperscript{30} Israeli-occupied territory and not part of Israel. As mentioned earlier, the status of these territories as occupied was reaffirmed by the ICJ and the EU has been careful to construct and interpret its bilateral agreements with Israel in accordance with applicable public international law, as illustrated by the Agreement’s territorial clauses.

Despite such attempts however, Israel has consistently applied preferential trade agreements with the EU to the OPTs since 1975. In February 2000, Israel not only confirmed that it engaged in such an illegal practice, but also stated that it would intentionally continue to do so.\textsuperscript{31} Israel refuses to distinguish between products manufactured in the OPTs and those produced in the territory of the State of Israel. Since Israel issues “proofs of origin” that fail to distinguish between both territories, EU customs authorities are unable to detect or prevent the granting of EU preferences to products

\textsuperscript{28} The “territorial scope of the agreement” is stated in Article 83: “The Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the Coal and Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of the State of Israel.” Association Agreement.
\textsuperscript{29} The “rules of origin” clause, or Article 2 of Protocol 4, states: “…the following products shall be considered as (…) originating in Israel: (a) products wholly obtained in Israel within the meaning of Article 4 of this Protocol; (b) products obtained in Israel which contain materials have undergone sufficient working or processing in Israel within the meaning of Article 5 of this Protocol. Association Agreement.
\textsuperscript{30} The Golan Heights and East Jerusalem have been illegally annexed to Israel through domestic legislation. The annexation of East Jerusalem was codified in 1980 by the Israeli “Basic Law: Jerusalem Capital of Israel” which gave “constitutional status” to the violation of the customary prohibition against the unilateral annexation of occupied territory, as reaffirmed by the ICJ. Israel has passed several such Basic Laws that codify acts that violate peremptory principles of international law.
originating in settlement-based enterprises which should not legally receive preferential treatment such as duty import exemptions. Israel’s practice of certifying products produced in the OPTs as “Made in Israel” represents a fraud and violation of EU customs law. All in all, Israel’s incorporation of the OPTs, including East Jerusalem, under its treaty making authority stands in clear contrast to the EU-Israel Agreement’s stated territorial scope of applicability. This illegal interpretation has translated into practice on the ground in areas other than trade\(^\text{32}\) as settlements also participate in other EU-Israel cooperation instruments, such as the Agreement on Scientific and Technical Cooperation.\(^\text{33}\)

On a basic level, such illegal behaviour challenges the underlying aim of the Agreement to promote “harmonious development and economic development between the Community and Israel”\(^\text{34}\) and the EU has not only the right but also the obligation to refuse entitlement of trade preferences to Israeli settlement products and products of doubtful origin.\(^\text{35}\) In more grave terms, the (mis)application of the Agreement due to the (mis)labeling products amounts to a material breach of IHL and the Fourth Geneva Convention in particular, which considers the mere existence of settlements to be

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\(^{32}\) European entities have been and continue to be involved in the construction of illegal infrastructure in the OPTs. EU states are obligated to ensure that companies headquartered in their jurisdiction are not complicit in breaches of IHL and international human rights law in the OPTs. The UN norms on human rights responsibilities of transnational corporations provide the most comprehensive frame of reference in this regard. Failure to do so will undermine commitments that member states have made in the Organisation for Economic Co-operation and Development guidelines for multinational enterprises. See: [www.oecd.org](http://www.oecd.org)

\(^{33}\) For text of Agreement on Scientific and Technical Cooperation.


\(^{34}\) Article One, *Association Agreement*.

\(^{35}\) Article 32 of the *Agreement’s Fourth Protocol* gives the importing state the right to verify the “movement certificates” of products if reasonable doubt as to the authenticity of such documents exists. If the verification responses provided by the exporting country are insufficient, the importing country’s authorities “shall refuse entitlement of preferences irrespective of the real origin of the product in question.” In such cases EU States can then act to recover duties from importers. This procedure is nevertheless practically unsustainable since Israel can dispute the definition of the nature and origin of such products and ultimately has the power to label products as it sees fit. In such a situation Community law does not indicate the appropriate legal recourse.

unequivocally illegal. According to the Vienna Convention on the Law of Treaties, a material breach “consists in the violation of a provision essential to the object or purpose of the treaty.” According to the Vienna Convention on the Law of Treaties, a material breach “consists in the violation of a provision essential to the object or purpose of the treaty.” 36 Israel's illegal application of the Agreement to the OPTs clearly contradicts the stated purpose of the Agreement that aims to achieve “regional cooperation with a view to the consolidation of peaceful coexistence and economic and political stability.” 37 All in all, by labeling products originating from those territories as “Made in Israel,” Israel is acting in violation of the Association Agreement, Community law, and IHL, all of which clearly distinguish between the “State of Israel” and the OPTs. While such a backdrop would presumptively give the EU sufficient reason to adopt measures to ensure Israeli compliance with the Agreement, the EU is also faced with Israeli violations of the Agreement’s “human rights” article bearing in mind that respect for international human rights is also an erga omnes obligation.

**Human Rights**

The “human rights” article or “essential element” clause 38 of the Association Agreement stipulates that relations between Israel and the EU, as well as the Agreement itself, “shall be based on respect for human rights and democratic principles.” 39 Such standards are intended to guide the internal and international policy of both parties and to mirror the general principles of state responsibility reaffirmed by the ICJ. Under the

36 According to the Vienna Convention on the Law of Treaties, a material breach of a treaty consists inter alia in “the violation of a provision essential to the accomplishment of the object or purpose of the treaty” Article 60. Available online: [www.un.org/law/ilc/texts/treaties.htm](http://www.un.org/law/ilc/texts/treaties.htm)

37 See Article One, *Association Agreement* for purposes.

38 The human rights clause was created in 1995 as an ‘essential element’ in all EU bilateral agreements following difficulties faced by the EU in suspending relations with the former Yugoslavia in 1991, in which case the EU had to rely on general international law because it lacked the appropriate legal instrument. See: Lorand Bartels, “A legal analysis of human rights clauses in the EU’s Euro-Mediterranean Association Agreements,” 9 *Mediterranean Politics*, 3, 2004.

39 Article Two, *Association Agreement*. 

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Agreement, the EU is legally bound to ensure that Israel abides by basic human rights and
democratic principles and in addition to the Agreement itself, EU policies in the “areas of
economic, financial and technical cooperation, as well as development cooperation” are
legally required to contribute to the EU’s general objective of respecting human rights and
fundamental freedoms. Despite the inclusion of such principles within the Agreement and
within EU policy in general, this human rights framework is nevertheless difficult to
reconcile with Israel’s widely documented and consolidated practice of violating human
rights law and IHL.

Israel breaches a spectrum of human rights on a daily basis in both its external and
internal policy. The annexation wall and the overall occupation apparatus for example,
violate the right to freedom of movement as well as the rights to adequate housing, food,
family life, education and health. Such rights are enshrined in international treaties and
human rights instruments such as the International Covenant on Civil and Political Rights
and the Convention on the Rights of the Child. Israel is also guilty of systematically
denying the Palestinian people of their right to self-determination. Such grave violations of
human rights are regularly condemned by the UN Commission on Human Rights, the

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41 While this paper is based on a “human rights” framework, as a paradigm it can certainly be critiqued from various
42 Other human rights instruments include; the International Covenant on Economic Social and Cultural Rights, the
Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against
Women. For more information on Israeli violations of Palestinian human rights, see: Palestinian Center for Human
Rights: www.pchrgaza.org
43 See: Antonio Cassese, “The Israel-PLO Agreement and self-determination,” 4 European Journal of International Law
self-determination and right to recapture territory taken by force,” 21 New York University Journal of International Law &
UNGA, and well-established human rights organizations. As affirmed by the ICJ, Israel has also systematically violated several compulsory rules of IHL, by constructing an entire occupation apparatus and failing to respect and preserve the public life, economic life, and habitat of the protected civilian persons under its occupation. Instead of complying with such obligations, Israel is guilty of unlawful use of force against civilians, such as collective punishment and the unlawful destruction of civilian property, such as home demolitions. While the EU may have concluded Association Agreements with other states guilty of violating human rights law, Israel is arguably unique since its violations are not only a consolidated practice, but a practice institutionally codified in Israel’s national laws, which is perhaps most clearly illustrated by the (mis)treatment of Palestinian “citizens” of Israel.

Exclusion: Palestinian “Citizens” of Israel

The definition of Israel as a fundamentally “Jewish State” has translated into a condition of perpetual institutionalised discrimination for Israel’s non-Jewish citizens, the

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46 Article 55 states, “[T]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores, and other articles if the resources of the occupied territory are inadequate.” See text of Convention: www.unhchr.ch/html/menu3/b/92.htm
48 See reports by the Israeli Committee Against House Demolitions: www.icahduk.org
49 Israel has introduced new laws to legalise the construction of the wall and incursions into civilian areas, such as the attack on Rafah in 2004. A range of bureaucratic instruments, such as, zoning, planning, law, and permits have also been used to establish the settlements. In 1984, a comprehensive framework was put in place to apply all Israeli laws to settlers, including national insurance law, army service obligations, and entry on the population register. See: Eyal Benvenisti, Legal Dualism: The Absorption of the Occupied Territories into Israel, Boulder, Colorado/London: Westview Press, 1990, pg. 3-21.
majority of whom are Palestinian who make up 20 percent of Israel’s total population. In terms of the right to political participation for example, a 1985 amendment to the “Basic Law on the Knesset” prevents the participation of any one who denies Israel as “the State of the Jewish people” or denies “the democratic nature of the State.” While Israel’s “Basic Law” on “Human dignity and liberty” establishes “the values of the State of Israel as a Jewish and democratic State,” it conveniently fails to mention the rights of its Palestinian citizens. The apparent contradiction inherent in Israel’s self-definition as a Jewish yet purportedly democratic state in the ethno-democratic mix of contemporary Palestine/Israel is the subject of increasing debate both within Israel and abroad. In the absence of constitutional equality, Palestinian-Israelis face discrimination in education, employment and other fields. These discriminatory state policies and others governing citizenship

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51 See for example a debate entitled “Zionism is the real enemy of the Jews,” held at intelligence² forum, 25 January 2005. Transcript/video available online: www.intelligencesquared.com
52 Two ordinary statutes, the “Compulsory Education Law” (1949) and the “Pupil’s Rights Law” (2000) frame the right to education. The latter institutes two separate school systems, one for Jews and the other for Palestinians. Palestinian schools are discriminated against in budget allocation; Palestinian pupils comprise a third of the total school population but their schools receive just 7% of the education ministry’s budget. As a result, the standards of education are significantly lower in Palestinian schools. See: Human Rights Watch Report, “Second Class,” Human Rights Watch, November 2001. Available online: www.hrw.org/reports/2001/israel2/
53 Large sections of the Israeli economy are officially off limits to Palestinian workers on “security” grounds. This includes government corporations such as Bezeq, the telecoms company, electric companies, State banks, not to mention defence industries such as the Rafael Armaments Authority, the nuclear reactor, the secret nuclear weapons factory and the Israeli aircrafts industry. See: Jonathan Cook, “Democratic and Jewish,” Al-Ahram, Issue 698, 8-14 July & Issue 699 15-21 July 2004; Jonathan Cook, “Arab workers face discrimination in Israel,” Al-Jazeera, 13 March 2004. Available online: //english.aljazeera.net/NR/exeres/33C79FBE-FFEF-4005-AB28-D96DD6C1E82F.htm
54 Israel has instituted a system of “national priority areas,” almost exclusively Jewish communities, where extra benefits are offered to residents and businesses. Over 70% of the poorest areas in Israel today are Arab. See: Shira Kamm, “The Arab Minority in Israel: Implications for the Middle East Conflict, Mossawa, September 2002, pg. 12.
55 Israel’s “Law of return” of 1950 for example allows anyone with Jew “heritage” to immigrate to Israel and automatically be granted Israeli citizenship. While this law guarantees the generous distribution of Israeli citizenship to all Jews, millions of dispossessed Palestinian refugees are denied the right of return to the homes they were forced to flee during the Nakbe of 1948. See: the Palestine Right to Return Coalition: www.al-awda.org

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and landownership rights act to disadvantage, impoverish, disturb, and displace Palestinian-Israelis.

Another recent legislation that has attracted widespread coverage is the “Nationality and Entry into Israel Law,” passed as a “temporary order” in 2003. This law outrightly prohibits the granting of residency or citizenship to Palestinians from the OPTs who are married to Israeli citizens thereby banning family unification. It predominantly targets Palestinian-Israelis as they tend to marry individuals from the OPTs and moreover, the general policy for residency and citizenship status in Israel for all other “foreign spouses” has remained unchanged. Regarding this legislation Member of European Parliament (MEP) Daniel Cohn-Bendit stated,

[This law] 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.

He continued to question former Commissioner of External Affairs, Chris Patten,

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?

Patten responded expressing concern that this law may cause “potential discrimination” in the “highly sensitive area of family rights” and reaffirmed that “Israeli respect for human rights constitutes an essential element” of the Agreement and of its “relationship with the

56 The “Absentees’ Property Law” of 1950 sanctions the outright confiscation without indemnity of all lands owned by those Palestinians expelled by Israel. Palestinian citizens of Israel today continue to suffer from policies of land confiscation, home demolitions, and other forms of “quiet transfer.” Over 100,000 Palestinian Bedouins for instance have been targeted by discriminatory legislation as demonstrated by the “National Planning and Building Law” of 1965. This law essentially “re-zoned” the land in the Negev which housed hundreds of historical Palestinian villages turning it into non-residential agricultural land and open space owned by Israel. Such a law has paved the way for various policies designed to uproot the Palestinian Bedouins. See: “By all means possible,” The Arab Association for Human Rights, July 2004. Available online for download: www.arabhra.org/publications/reports/PDF/NaqabReport_English.pdf
57 This law is also retroactive as it prohibits the granting of legal status to anyone who did not submit such a request before May 2002. The Knesset has extended the law several times, for updates see: “Special report: Ban on family unification,” Adalah: The Legal Center for Arab Minority Rights in Israel; www.adalah.org/eng/famunif.php
Union." These laws demonstrate the explicitly discriminatory purpose behind much Israeli legislation and Patten's statement indicates that the Commission recognises this purpose and further recognises that the EU is walking a rapidly disappearing line when it comes to Israel, human rights, and its bilateral relationship.

Against this backdrop of structural and institutional discrimination, one must evaluate how cooperation instruments such as the EU-Israel Association Agreement could possibly fulfill their aim to “promote respect for human rights and democratic principles.” The EU has declared on several occasions that the promotion and protection of “the rights of minorities as well as fundamental freedoms constitute a major objective of the EU’s external relations.” However, on a basic level, obstacles in fields such as education and employment effectively limit Palestinian-Israeli participation in EU-Framework Programmes including loan programmes. Such exclusion inevitably occurs despite the EU-Israel Association Council's declaration that Israeli partners in such programmes “cover the whole spectrum of the Israeli society.” A main objective of the EC-Israel Agreement on Scientific and Technical Cooperation for example aims to benefit the scientific community, the private sector, and the general public in Israel. While all such agreements are designed to be accessible to all, Palestinian-Israelis remain sidelined since they are ultimately excluded from the huge umbrella of Israeli universities and institutes supported by the Israeli government. As it stands, Palestinian-Israelis have little or no opportunity to participate in

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61 Ibid.
any of the EU-Israel cooperation instruments and the EU has not acted to prevent such exclusion of Israel's Palestinian minority from equitable participation in the supposed benefits of cooperation instruments.
Chapter 2

EU Complicity

In light of the European Council’s key objective to “uphold and develop international law,” one could reasonably expect that the EU would hold Israel accountable for blatantly breaching its legal obligations. However, no concrete action has been taken thus sparking a debate in Brussels which has recently been fueled by the ICJ opinion. As confirmed by a human rights review on the EU-Israel relationship commissioned by the Euro-Mediterranean Human Rights Network (EMHRN), “the EU is confronted with Israel’s improper execution of the trade-related provisions of the Association Agreement, based on Israel’s internationally unlawful application of the Agreement to occupied territory.” The EU is also “confronted with Israel’s continuing policy-based violations of international human rights and humanitarian law in the OPTs” and inside Israel. According to its own Community law, including the “essential element” clause, the EU is legally obligated to prevent its relations with Israel from being conducted on this basis. By not acting to prevent the Agreement from operating in an internationally unlawful manner, the EU stands accused of violating Community law because although the Agreement may be legally correct on paper, it is clearly being implemented in contravention of international law. From another angle, the EU has ended up protecting Israel from legal and political accountability by helping Israel escape the normal penalties or costs that would ordinarily result from such blatant violations. In contrast to its declaratory criticism, the EU’s “operative diplomacy” has thus far failed to satisfy the obligation of refraining from facilitating Israeli violations.

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64 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. See EMHRN, pg. 7.
The EU’s reluctance to engage Israel on its violation of the “rules of origin” and “human rights” clause on a principled legal basis clearly amounts to deference at best or acquiescence. As affirmed by the ICJ, states have 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. However, 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.” The fact that the EU has allowed its contractual relations with Israel to operate in such an illegal manner has not gone unnoticed however and its precarious position is increasingly being challenged.

**Political Pressure**

Against the backdrop of the ICJ opinion, the EU has come under mounting pressure to drastically transform its relationship with Israel in accordance with international law. The UN Special Rapporteur on the Right to Food, Jean Ziegler stated last year,

There is only one possible weapon to fight for the right to food: that’s article 2 of the contract of association between Israel and the EU. Grave violations of the right to food have been recorded, they are clear. This accord must be suspended.

In July 2005, lawyers acting on behalf of campaign group “War on Want” sent letters to European Commission President Jose Manuel Barroso and British Foreign Secretary Jack Straw “challenging them to provide evidence of any action they have taken to curtail human rights abuses against Palestinians living under Israeli military occupation.” A parallel

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request is being made of the British government under the Freedom of Information Act.\textsuperscript{67} Political shifts can also be observed within the EU as illustrated by the body’s position on the wall which arguably underwent a dramatic shift before and after the ruling: before the judgment, the EU abstained on the UNGA Resolution of December 2003\textsuperscript{68} that requested an Opinion from the ICJ 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.”\textsuperscript{69} Following the ruling, Member States voted unanimously in support of the UNGA Resolution of August 2004, which clearly signified the body’s acceptance of the Court’s key positions.\textsuperscript{70} While the significance of such a shift and the effects of sustained political pressure should not be underestimated, the EU remains unprepared to address the conflict from a purely legal perspective and has been particularly silent on the implications for the EU-Israeli relationship of the Opinion’s dicta pertaining to the obligations of third states. While the EU has yet to address the fundamental contradictions and transgressions that overshadow their contractual relations with Israel, several legal

\textsuperscript{67} The group consisting of individuals affected by illegal Israeli policies, a charity, and London solicitors, are formally requesting the European Commission to provide evidence of all written communication with the Israeli government, including minutes of meetings and internal memoranda, regarding the wall since the ICJ ruling. See: “Lawyers challenge EU and UK over inaction on Palestine,” \textit{War on Want}, 20 July 2005. Official letters available: www.waronwant.org/download.php?id=274

\textsuperscript{68} This abstention was criticised by several MEPs, one of whom stated during a Parliament debate, “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 Germany asked the Palestinians not to have recourse to violence, but when the Palestinians have recourse to diplomacy the door is slammed on them.” Lucas (Verts/ALE), Debates in the European Parliament, 11 February 2004, see: www3.europarl.eu.int/cre/cre?FILE=0211mc&LANGUE=EN&LEVEL=DOC&NUMINT=3-132&LEG=L5

\textsuperscript{69} Statement by Minister Roche at the European Parliament on behalf of the Council of Ministers on the EU position on the ICJ hearing, 11 February 2004. See statement: //domino.un.org/UNISPAL.NSF/0/a253b27921f92ddf85256e370054fa9a?OpenDocument

\textsuperscript{70} See GA Resolution ES-10/15 on Advisory Opinion, 2 August 2004. Text available online: //domino.un.org/unispal.nsf/0/f3b95e613518a0ac85256e8b00683444?OpenDocument

In July 2005, the EU’s foreign policy chief Javier Solana stated “We think Israel has the right to defend itself, but we think the ‘fence’ which will stand outside the territory of Israel is not legally proper and it creates also humanitarian problems. Eric Silver, “Palestinians ‘rage’ at proposed ‘fence’ across Jerusalem,” \textit{The Independent}, 12 July 2005.
avenues to do so are available and a starting point could be the Agreement itself which has built-in safeguards in the case of irregular application.

**Suspension: The Human Rights Clause**

The Agreement’s “human rights” clause establishes the right of each party to address the human rights-related conduct of the other and further establishes the basis for taking positive or negative measures to ensure respect for such principles. It offers parties a lawful means of imposing a sanction in response to a partner’s violation of human rights.\(^7_1\) Suspension of the Agreement or the application of sanctions are reasonable negative measures that the EU has previously utilised against several countries or against their leaders. Agreements have been suspended or partially suspended in response to failures to respect human rights and democratic principles,\(^7_2\) or in response to violations of trade-related provisions.\(^7_3\) In view of this precedent and the existence of the “human rights” clause, the EU is evidently treating Israel as an exception to the rule. Thus far, the EU has not considered suspension to be a suitable punitive measure and has justified this position

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\(^7_2\) The EU has adopted sanctions and other negative measures against several countries due to their lack of respect for human rights. While EU measures against Afghanistan, Iraq, Libya and so on were adopted following UN Security Council resolutions, measures against countries including Belarus, Burma, Cuba, Haiti, Indonesia, Moldova, Nigeria, and Zimbabwe have been taken on the EU’s own initiative. For a full list of EU measures taken against third countries, see: [ue.eu.int/PESC/legislation/LISTE%20SANCTIONS.pdf](http://ue.eu.int/PESC/legislation/LISTE%20SANCTIONS.pdf)

\(^7_3\) In April 2003 the European Commission suspended the EC-Serbia and Montenegro free trade agreement and in particular, the zero tariff preference on imported sugar following findings by the European Anti-fraud Office (OLAF) which was unable to verify whether sugar exported to the EC actually originated in the partner country. See: [www.eudelyug.org/en/news/news/final20040120/final20040120.htm](http://www.eudelyug.org/en/news/news/final20040120/final20040120.htm)
The EC-Turkey Euro-Mediterranean Association Agreement also came under scrutiny when EC customs authorities identified Turkey’s non-compliance with rules of origin for canned tuna. As a result of EU pressure, Turkey introduced changes in its national legislation and operational practices and the European Commission resumed regular conditions for tuna imports in June 2004. See: [europa.eu.int/comm/taxation_customs/tuna-EN.pdf](http://europa.eu.int/comm/taxation_customs/tuna-EN.pdf)
The EC also has initiated sanctions against the US by introducing counter-measures on a list of US products in the longstanding WTO dispute on the US Foreign Sales Corporations of March 2004. See: [http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr270204_en.htm](http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr270204_en.htm)

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on several grounds. Such measures are said to be counter-productive since a stated objective is to “bring Israel closer to the EU” and Member States are currently engaged in a debate of whether to freeze cooperation with Israel or expand cooperation in order to gain influence.\(^7^4\) Other reservations highlight the fact that the EU has a substantial trade surplus with Israel as its principal trading partner, well ahead of the United States (US). While initiating some sort of sanction against Israel as a \textit{punitive} measure may seem like an appropriate response to violations of the “human rights” and “rules of origin” clause, the EU is not actually \textit{obligated} to do so under Community law and international law.\(^7^5\) Aside from these articles however, the EU may be obligated to initiate sanctions on other legal grounds.

\textbf{Suspension: To Fulfill EU Law}

The original purpose of suspension in international law is to “enable a state to \textit{protect itself} from the unwanted consequences of a treaty’s partner’s violation of essential provisions of a treaty.”\(^7^6\) Since the EU is currently confronted with internationally unlawful Israeli policies that violate human rights and other elements of Community law, it can respond by initiating sanctions in order to fulfill its own human rights-related requirements and not as a purely punitive measure against Israel. On this point, the EMHRN explains, 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.\(^7^7\)


\(^{7^5}\) EMHRN Report, pg. 17.

\(^{7^6}\) Ibid, pg. 18.

\(^{7^7}\) Ibid.
Under the Agreement the EU is legally bound to ensure that both sides respect human rights and democratic principles and that such principles guide their internal and international policy. The Agreement has essentially created obligations in Community law that are binding on EU institutions which are, along with Member states, supposed to apply Community law as they expect the European Courts would do so. In case of deficient execution, the Agreement has generally laid out a method of dispute resolution, which includes dialogue, cooperation, technical assistance and a compulsory settlement mechanism if a consensual agreement is unreachable. Article 79, known as the “non-execution clause” allows for “appropriate measures” that would “least disturb the functioning of the Agreement,” but more importantly it allows for the full suspension of the Agreement in order to protect the EU’s own obligations and interests from harm. If no solution is reached, Article 82 allows for the termination of the Agreement. Moreover, if a competent EU institution determines that a partner’s misapplication of the Agreement is preventing the Community, its institutions, or Member States from performing their own obligations under Community law and/or international law, the Agreement must be suspended. Apart from the Association Agreement, the right to suspend agreements in the case of material breaches is a customary principle of international law codified by the law of treaties and therefore within reach of the EU. Israel’s violations of the “rules of origin” and “human rights” clause is clearly preventing the EU from abiding by its own obligations

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78 Article 70, Association Agreement.
79 Ibid, Article 75.
80 Article 79 states, “The Parties shall take any general or specific measures required to fulfil their obligations under the Agreement. They shall see to it that the objectives set out in the Agreement are attained.”
81 Ibid, Article 82.
82 This rule applies when measures short of suspension would fail to resolve the problem and when suspension would serve to do so. The scope of the suspension must be sufficient to put an end to the violations of Community law resulting from the association partner’s malpractice under the Agreement. See EMHRN Report, pg. 22.
to respect IHL and general human rights law thereby making suspension an appropriate route of legal action.

Several MEPs have recognised the urgency of the situation and called for the Agreement’s outright suspension as illustrated by a resolution adopted in 2002 which called on the Council and the Commission “to demand that the Israeli government, “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.” The resolution further called “on the Commission and Council, in this framework, to suspend the EU-Israel Association Agreement.” On another occasion in 2004, the European Parliament called Israeli military action against Palestinians “acts of terror” and called once again for the suspension of the Agreement. Such demands are also being voiced on a national level as illustrated by two Early Day Motions passed by the UK House of Commons in 2004. One called on the British government “to use all means at its disposal, including the introduction of sanctions against Israel” to persuade it “to comply with the International Court of Justice and the UN Resolution.” The other Motion called for the suspension of the Agreement “until [Israel]

83 The Council of Ministers refused to implement this decision, with Britain, Netherlands and Germany as the only states opposing suspension. See: European Parliament Resolution Text (P5_TAPROV(2002)0173) 10 April 2002. Available online: www.europarl.eu.int/meetdocs/delegations/plco/20020612/07EN.pdf
Israel’s unlawful implementation of the Agreement and the EU’s failure to act to counter such behaviour highlights the possibility that Community law is being implemented in a deficient manner by the responsible Community institutions. If responsibility for deficient implementation can be determined, any EU institution or Member State with standing can call on the responsible party to terminate its violations. If this call is not heeded, an action against the responsible institution can be brought before the European Court of Justice. Other persons, EU nationals and others directly affected by the general failure to act may have standing to bring forth an action in Community courts. See EMHRN, pg. 23.
84 Sharon Sadeh, “EU: IDF actions that harm civilians akin to ‘acts of terror’” Haaretz, 1 April 2004.
85 See text of Early Day Motion, 1288: //edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=24876&SESSION=682
86 See text of Early Day Motion, 162: //edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=162&SESSION=873
It should nevertheless be noted that the British government continues to sign discreet agreements with Israel in violation of international law. See for example: Ali Abunimah, “Britain's double game,” The Electronic Intifada, 14 April 2005. Available online: //electronicintifada.net/v2/article3757.shtml
lifts the movement restrictions which it has placed on Palestinian trade.”87 Israel’s system of
closure, curfews, and other “movement restrictions” have of course not been lifted, but
rather have been further entrenched by the apartheid wall. When viewed against the
conditions of international law, suspension would not be considered a sanction in the
negative sense of the term,88 but rather it would signify the implementation of a customary
norm of international law, namely, the non-compliance of one Party negates the obligation
of compliance of the other Party.89

Economic Leverage

As mentioned earlier, the EU has officially expressed its unwillingness to take such
measures claiming a desire to increase leverage with Israel. Such an argument however,
overlooks the fact that through suspension, the EU would essentially be using its economic
clout to gain such leverage. As the International Development Committee of the House of
Commons argues, “The EU should not shy away from using economic pressure to gain
political leverage with Israel.”90 As Israel’s principal trading partner, the EU’s trump card is
its economic clout and Israel is clearly sensitive to the opportunities associated with such
coopration instruments which act as EU’s principal political instruments in the first place.

During the first Intifada for example, the suspension of scientific and inter-university

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87 The EU and the PLO signed an Euro-Mediterranean interim Association Agreement on trade and cooperation in 1997. However, Israel has officially and in practice opposed its implementation. Former Israeli Prime Minister Benjamin Netanyahu proposed to recognise the Agreement if the EU extended preferential treatment to settlement products. All trade between the OPTs and third countries is subject to Israeli control and passes through Israeli customs.
88 While sanctions are viewed negatively due to their devastating effects on Iraq, jurists argue that they were no longer legitimate following Iraq’s withdrawal from Kuwait and its acceptance of Security Council resolutions. See: Hans Von Speck “America’s war America’s peace,” Presentation given at “A hearing on the project for the new American century” at the Brussels Tribunal, 14-17 April 2004. See: www.brusselstribunal.org
cooperation played a key part in the re-opening of the Palestinian universities that had been shut down for months by the Israeli army.\footnote{See: Isabelle Avran, “How Europe could put pressure on Israel,” \textit{Le Monde Diplomatique}, July 1998. Available online: //mondediplo.com/1998/07/18israel} Given these realities, one must question the reasoning behind the EU’s striking unwillingness to undertake such measures. A likely explanation is the fact that the EU is itself reaping extraordinary benefits from its illicit relationship with Israel. On this point the European Commission stated in no uncertain terms,

\begin{quote}
The trade balance with Israeli is very, very heavily in our favour. So when you say, 'What is the benefit of impact on Israel of these arrangements,' at the moment the European Union is doing quite well out of them both in terms of industrial trade and agricultural trade...So I am not sure what would be the result of disrupting these or interrupting these. It may actually harm the European Union more than it harms Israel.\footnote{International Development Committee, pg. 65.}
\end{quote}

Indeed, recent initiatives such as the Olmert Arrangement and European Neighbourhood Policy adopted by the EU to "bring Israel closer" indicate that financial rewards could be acting to derail the body from abiding by humane legal principles.

\section*{Olmert Arrangement and European Neighbourhood Policy}

While calls for sanctions or suspension have persisted, the EU has not responded in kind and has rather formulated a “technical arrangement” commonly known as Olmert Arrangement. The Arrangement’s main tenets stipulate that EU customs authorities should rely on Israeli declarations on the origin of products and cease to ask Israel for verification. Furthermore, it clearly proposes to alter the meaning of the Association Agreement in international law to allow Israel to continue to apply it to the OPTs and does not even claim to “end the settlement-related import fraud perpetrated against the European Community.
as a result of Israel’s ongoing malpractice."93 In actuality, the explicit purpose behind the Arrangement was to make way for the EU’s “European Neighbourhood Policy,” (ENP) a framework aimed at increasing EU “cooperation” with Eastern Europe and Mediterranean countries.94 While Israel was one of the first countries chosen to implement the first step of the ENP, an economic and political “Action Plan,” such a Plan could only move forward once the controversy regarding “rules of origin” was resolved. A series of bilateral negotiations has thus led to a situation today where the EU must agree to amend the “rules of origin” clause of the Agreement before Israel can participate in the Pan-Euro-Mediterranean preferential trading system. The EU can in no way agree to such an amendment without legalising Israel’s malpractice under the Agreement. However, in spite of this blatant disregard for the applicable legal principles, the Commission has agreed with Israel to recommend that the arrangement be endorsed by the EU in the EU-Israel Association bodies. The Commission has also agreed to argue that the Arrangement satisfies the EU’s conditions for bringing Israel into the regional trade system.

Given the Commission’s stance on the issue, the EU General Affairs and External Relations Council approved the EU-Israel Action Plan as part of the ENP in December 2004, placing Israel one step below full membership in the EU.95 According to the Plan, “the EU and Israel are now closer together than ever before and, as near neighbours, this will reinforce their political and economic interdependence.” The Plan continues,

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94 The EU’s ENP offers the prospect of free access to goods, services, people, and capital to countries surrounding the EU in exchange for economic and political reform drawn up in each individual state. In addition to Israel, action plans have been drawn up between the EU and Moldova, Ukraine, Morocco, Tunisia, Jordan and the Palestinian Authority.
95 Ilil Shahar, “85% of Israelis wish to join "anti-Semitic" EU,” Maariv, 10 March 2004. Available online: //maarivintl.com/index.cfm?fuseaction=article&articleID=4372

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Enlargement offers the opportunity for the EU and Israel to develop an increasingly close relationship, going beyond co-operation, to involve a significant measure of economic integration and a deepening of political co-operation.96

In the face of Israel's criminal human rights record, the Plan claims the “EU and Israel share the common values of democracy, respect for human rights and the rule of law and basic freedoms”97 and aims to build ties in new areas and encourage and support Israel's objectives for further integration into European economic and social structures.

Furthermore, the Plan ironically purports to help fulfil provisions in the Association Agreement, the very agreement that is already being implemented in contravention of Community and international law. With regard to the besieged Palestinian population, the Plan only speaks of “reforms, transparency, accountability and democratic governance”98 and conveniently fails to mention the apartheid wall, torture, or other Israeli violations of human rights law and IHL. While the EU is obligated to ensure that its cooperation with Israel is conditioned on concrete and effective steps to end all discriminatory state practice and rectify its effects, in an utter display of disregard for international law, the EU has failed to make Israeli compliance with international law a precondition for expanding bilateral relations in such an extravagant manner.

Repercussions and “Dirty Hands”

If the EU formally pursues such a route it will be faced with a series of grave repercussions. The unsettling possibility exists that the EU is in fact acquiescing to Israel's insistence on applying and implementing a Community agreement in a manner that

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96 See proposed EU-Israel Action Plan, online: //europa.eu.int/comm/world/enp/pdf/action_plans/Proposed_Action_Plan_EU-Israel.pdf
97 Ibid.
98 Ibid.
contravenes international law. Such a decision may be unprecedented and if the
Community agrees to follow through with the “Olmert Arrangement” and by extension the
Action Plan, it will be directly accommodating the illegal policies and national legislation
used by Israel to justify its settlement, annexation, and apartheid practices. The explicit
purpose behind such a shocking display of rogue behaviour would be to remove a
persistent inconvenience to the EU and enable Israel’s participation in the new regional
trade area. Instead of attempting to ensure that its relations are conducted on a legal basis,
the EU is apparently upgrading its relationship with Israel with no strings attached. By doing
so, in the words of political analyst Arjan el Fassed, “the EU officially has become part of
the problem and formally endorsed Israel’s state practices vis-a-vis an oppressed
population.”99 In order to remain on the right side of the law, the EU can neither formally
accept the Arrangement nor the ensuing Plan as long as Israel continues to violate
previous bilateral agreements and the applicable international law. At the very least, by
acting as an exception to its own rules, the EU is signalling to the Palestinians and Israelis
that it considers the rules that govern the international system unimportant.100 Furthermore,
an official acceptance of Israel in the ENP in present-day conditions “would place the
Member States alongside Israel in violating the Fourth Geneva Convention of 1949.”101

99 Arjan El Fassed, “In bed with Israel: EU’s close relationship with Israel supports abuse,” The Electronic Intifada, 11
March 2005. Available online: //electronicintifada.net/v2/article3600.shtml ; Also see: Arjan El Fassed, “EU launches
new initiative as deportation of Palestinians is extended,” The Electronic Intifada, 3 November 2004. Available online:
//electronicintifada.net/v2/article3225.shtml
100 On this point, Karma Nabulsi reminds us that “‘good governance’” means applying principles that you are happy to
apply to other conflicts. “Citing UN security resolutions on the admissibility of the acquisition of territory by force
everywhere but occupied Palestine is not good governance. Encouraging Iraqi exiles and refugees to participate in
elections while treating Palestinian refugees as pariahs is not applying democratic principles that the international
community seems to want to teach the Palestinians.” See: Karma Nabulsi, “Britain and Europe are funding Israel’s
A persistent EU failure may further act to transform the current unlawful implementation of the Association Agreement into a consolidated practice. This may lead to the eventual loss of legal ground for claiming the correct implementation of the EU’s customs law or human rights law with any third country let alone Israel. An ongoing disregard on the part of the EU and Member States to take action against Israeli violations of IHL may also indicate that “they have accepted becoming material beneficiaries of Israel’s settlement policy,” involving them directly in Israel’s unlawful behaviour. Thus, as it stands, the EU and its Member States cannot claim to have “clean hands” as they are not complying with the duty to refrain from acts that knowingly facilitate violations of human rights and IHL by a third party. They are similarly guilty of violating their “duty of care” by failing to take any precautionary measures when it is clear that their action and/or inaction is facilitating, aggravating, or simply increasing the likelihood of serious violations of human rights.

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103 Ibid.
104 EMHRN Report, pg. 13.
Chapter 3

Humanitarian Assistance and Donor Aid

The EU’s misapplication of the Association Agreement is just one example of how one international body could be considered complicit in Israeli violations of international law. The arms trade is another area in which the EU is similarly culpable for facilitating Israel’s illegal behaviour as several Member States continue to funnel arms to Israel without complying with the criteria of the EU Code of Conduct on Arms Exports. While for logical reasons arms sales help Israel sustain the occupation, a less obvious and less researched area that could be impacting the situation similarly is that of donor aid. EU member states and others have thus far chosen to pour huge amounts of aid into Palestinian communities, rather than take more controversial steps to bring an end to Israeli violations of international law. This humanitarian approach arguably arises from "a liberal impulse among rich countries which seek to contribute to development and the alleviation of suffering," but in the words of Jeff Halper, it is also "an impulse which stops short of endorsing the political changes required to end the conflict." Flashy monetary pledges arguably serve to conceal the EU’s failure to act on other matters such as trade for example. Aid has always played a prominent role in Palestine/Israel and became of central importance following the signing of the Oslo agreement in 1993 when international donors

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105 Israel’s military budget in 2002 was 9% of its GDP totalling $9.8 billion, which is 3 times higher than the US and 4 times higher than the world average. It is the 10th biggest arms exporter in the world with military exports exceeding $2.49 billion in 2000. See: “Arming the occupation: Israel and the arms trade,” Campaign Against Arms Trade (CAAT), October 2002. Available online: [www.caat.org.uk/information/publications/countries/israel-1002.pdf](http://www.caat.org.uk/information/publications/countries/israel-1002.pdf)

106 Israel’s arms imports come mainly from the US. In 2001 alone for example, US arms sales were worth $2.95 billion. Arms are also increasingly being imported from Germany, France, and the UK, among others. See: Harald Molgaard, “Arms exports and collaborations: The UK and Israel: Developments since CAAT’s ‘Arming the Occupation’ Report,” CAAT, June 2005. Available online for download: [www.caat.org.uk/information/publications/countries/israel-0605.pdf](http://www.caat.org.uk/information/publications/countries/israel-0605.pdf); Also see: Oxfam’s Campaign against the Arms Trade: [www.oxfam.org/eng/programs_camp_arms.htm](http://www.oxfam.org/eng/programs_camp_arms.htm)

107 Jeff Halper, “‘Victims of war are not like victims of earthquake:’ The conflict between humanitarianism and political work,” in Michael Keating, Anne Le More, and Robert Lowe (eds), Aid, Diplomacy, and Facts on the Ground, London: Royal Institute of International Affairs, 2005, pg 189. Hereinafter, Halper.
embarked on an unprecedented aid programme.\textsuperscript{108} For the most part development aid is financed by foreign governments in the form of Overseas Development Assistance through multilateral agencies, such as the UN, or their own bilateral agencies such as DFID.\textsuperscript{109} In turn, NGO’s like Christian Aid, receive funding from both.\textsuperscript{110} The development industry has flourished over recent years and the OPTs are currently exceptionally aid dependent receiving one billion dollars a year or an average of 315 dollars per capita. Despite such massive amounts of aid, several social indicators in the OPTs today are comparable to parts of sub-Saharan Africa\textsuperscript{111} with two out of five Palestinians living below the poverty line and sixteen percent living in absolute poverty.\textsuperscript{112} The World Bank predicts that poverty levels will climb to 56 percent in 2006 and 72 percent in Gaza.\textsuperscript{113} According to the World Food Programme (WFP), over a million Palestinians are food-insecure\textsuperscript{114} and food insecurity/vulnerability in some areas of Gaza is reaching 90 percent. Despite growing

\textsuperscript{108} At that point aid was directed at 3 main goals: to support the implementation of the agreement and to sustain the “peace process”; to contribute to Palestinian socio-economic development; to build Palestinian institutions. See: Anne le More, “The international politics of aid in the occupied Palestinian territory,” \textit{Humanitarian Exchange/ Humanitarian Practice Network at Overseas Development Institute}, No. 28, November 2004. Available online for download: www.odi.org.uk/Africa_Portal/pdf/humanitarianexchange028.pdf; Hereinafter, Le More, \textit{Humanitarian Exchange Report}.


\textsuperscript{110} Research for this section was primarily done on aid from the EU and Member States, since they are the greatest contributors to the OPTs and the EU is the biggest donor to the PNA. An argument centred on ODA from the US would require a different approach. Unlike most other donors, USAID has imposed conditionalities on aid, for example in 2001, “the local USAID head, Larry Garber, announced that US aid to the Palestinians would stop if the PNA declared Palestinian independence, and made further aid conditional on positive political developments.” See: Sari Hanafi, “Palestinian NGOs and the second Intifada,” in \textit{Humanitarian Exchange Report}.

Palestinian NGOs called for a complete boycott of USAID in protest of the “American official support for Israeli crimes.” The call to boycott was published in Palestinian and Arab newspapers on several occasions in throughout 2002 and 2003. For general info, see: www.usaid.gov/wbg


\textsuperscript{114} According to WFP definitions, “Food insecurity exists when people lack secure access to sufficient amounts of safe and nutritious food for normal growth and development and an active and healthy life.” On WFP work in the OPTs see: www.wfp.org/country_brief/indexcountry.asp?country=275

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levels of Palestinian malnutrition, the territories do not suffer from food shortages and rather it is the Israeli occupation that is directly responsible for the dismal conditions facing Palestinians today. Donors are not faced with a natural disaster situation; they are dealing with a belligerent occupier that is causing a catastrophic situation. Aid workers are increasingly recognising that humanitarian activities are blurring these political sources of conflict and suffering. In the words of former commissioner-general of UNRWA Peter Hansen, “There can be no humanitarian solutions to the crisis, there can only be political solutions.” Indeed, in light of the ICJ Opinion, donors are seriously questioning to what extent the international community is financing the Israeli occupation and the destruction of Palestinian livelihood.

**Donor Debate**

The Advisory Opinion along with the worsening situation on the ground has made it increasingly difficult for donors to obscure the reality of the occupation and Israel’s obligations under IHL. During the peace industry boom when aid was directed mostly for development purposes, “donors preferred to downplay rather than antagonise Israel.” However, the worsening humanitarian crisis, the intensification of Israeli attacks against Palestinian civilians, the reoccupation of most Palestinian territory not to mention the wall, have all forced IHL back onto the international agenda. The main dilemma facing donors relates to the obligations of both Israel and the donors themselves: Israel bears the primary

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116 Christian Aid, pg. 51.
responsibility\textsuperscript{118} to provide assistance to those under its occupation\textsuperscript{119} and donors have an obligation to ensure that these laws are complied with. Many now agree that donor assistance to the OPTs “plays into and reinforces the Israeli occupation of Palestine,” and “relieves Israel of its obligations as the occupier.”\textsuperscript{120} Such assistance “rebuilds whatever Israel destroys and enables the continuation of such actions” and simply “maintains levels of poverty” resulting from a strict closure regime by providing food and other essentials.\textsuperscript{121} Another one of the challenges facing donors questions how aid can be dispensed in conformity with international law. The ICJ ruling instructs third parties “not to render aid or assistance”\textsuperscript{122} that may maintain the situation created by the wall. Donors are therefore examining what level of assistance should be extended to Palestinians trapped in the so-called ‘seam-zone’ between the wall and the ‘green line,’ for example.\textsuperscript{123} Others ask

\textsuperscript{118} In addition to obligations under the Fourth Geneva Convention, Israel also has a broad obligation to ensure the welfare of the population in the territories under Article 43 of the Hague Regulations.

\textsuperscript{119} Israel would be obliged to export foodstuffs to Palestine, provide electricity, water, fuel, communications infrastructure and so on. As a result, Israel would be “out of pocket by as much as $2 billion annually, not counting the cost of the international aid burden which Israel would have to shoulder-unless it chose to allow Palestinians to starve while the world watches.” See: Yossi Alpher, “Israel’s aid responsibilities towards the Palestinian population,” in \textit{Aid, Diplomacy, and the Facts on the Ground}, pg. 156.

\textsuperscript{120} Humanitarian agencies are allowed to offer services and operation in cooperation with Israel, but they are prohibited from providing assistance in lieu of the occupying power or pre-empting Israel’s responsibilities, according to Article 60 of the Fourth Geneva Convention.

\textsuperscript{121} Mary B. Anderson, “‘Do no harm:’ The impact of international assistance to the occupied Palestinian territory,” in \textit{Aid, Diplomacy, and the Facts on the Ground}, pg. 144. Hereinafter, Anderson.

\textsuperscript{122} As of May 2004, donors had spent an estimated $23 million on projects designed to moderate the negative effects of the wall on surrounding Palestinian communities. Such projects include the repair of water infrastructures, land reclamation and rehabilitation projects, employment generation schemes, the establishment of mobile health clinics and the construction of shelters for children waiting for the wall’s gates to be opened to go to school. See: Palestinian National Authority, \textit{The Annexation and Expansion Wall: Impacts and Mitigation Measures}, Ramallah, 31 May 2004, pg. 2. Available on Ministry of Planning site: www.mop.gov.ps/

\textsuperscript{123} Donors are concerned to ensure that their projects do not influence any demographic changes near the wall since halting funds for projects inside the “Seam-Zone” or other “closed areas” may accelerate the movement of Palestinians from their homes within these areas. On the other hand, aid channelled to areas east of the wall or outside “closed areas” could also accelerate such population shifts. Unofficially, donors have voiced their reluctance to fund infrastructure in these areas because of the uncertainty of their long-term viability. See: David Shearer and Anuschka Meyer, “The dilemma of aid under occupation,” in \textit{Aid, Diplomacy, and the Facts on the Ground}, pg. 172. Hereinafter, Shearer; Life in “closed areas” is practically impossible as Palestinians are required to get permits from the Israeli authorities to stay in their homes and these permits have to be renewed on a regular basis. Needless to say, these permits are very rarely issued and babies born in these areas are not granted such permits. Movement in and out of such areas for all purposes, including for medical treatment, is heavily restricted;
whether the funding of new roads\textsuperscript{124} in the OPTs actually \textit{reinforces} the existence of illegal settlements or whether donors should rebuild\textsuperscript{125} Palestinian homes and towns illegally demolished by Israel.\textsuperscript{126} The overall conundrum for donors is whether to prolong current aid levels in the face of further economic decline and mounting humanitarian need\textsuperscript{127} or to adopt a more “robust, even confrontational aid policy towards Israel in an effort to encourage it to assume its obligations.”\textsuperscript{128}

\textbf{Withdrawal of Aid}

The International Committee of the Red Cross (ICRC) could be viewed as having adopted a robust, legally principled stand when it took the “painful decision” to terminate two major relief programmes to the Palestinians at the end of 2003 on grounds that its programme “was not designed to substitute for the responsibility of the occupying power

\textsuperscript{124} Israel has requested funding for roads that would “assist the contiguity between Palestinian areas.” Such requests fail to point out that such funding is directed towards solidifying a segregated road network complete with bypass highways and tunnels for Jews only. Expanding the road network further consolidates the settlement system and the occupation. See: \textit{B’Tselem}, “Forbidden roads-the discriminatory West Bank roads regime,” August 2004, pg. 16. Available for download online: \url{www.btselem.org/English/Publications/Summaries/200408_Forbidden_Roads.asp}

\textsuperscript{125} Israeli journalist Amira Hass reported for example that Israel’s devastation of Palestinian infrastructure during its “Defensive Shield” operation in March-April 2003 cost approximately $350 million, which equals the amount invested in that infrastructure by donors in the entire preceding year.

\textsuperscript{126} The most extensive destruction has occurred in the southern Gaza Strip town of Rafah where as of June 2004, more than 15,000 people, nearly 9% of Rafah’s total population of 167,000, had lost their homes in the previous four years. David Shearer, head of OCHA in the OPTs, asks, “If Israel were presented with the $15 million bill for Rafah’s reconstruction, as international law stipulates, would it prompt a rethinking of military strategy and encourage other methods of surveillance that cause less harm to civilians and property.” See: Shearer, pg. 175. Also see: OCHA and UNRWA, \textit{Rafah Humanitarian Needs Assessment: Submission to the Local Aid Coordination Committee}, 4 June 2004, pg. 3. See: \url{www.ochaopt.org}

\textsuperscript{127} Sharmila Devi devotes a large section of her article to the plight of the internally displaced persons in Rafah. She points out that the dismantling of their homes and the destruction of their livelihoods was part of the “military strategy of expulsion.” See: Devi, “Aid donors pay the price for security clampdowns by Israel,” \textit{Financial Times}, 6 August 20. Shearer, pg. 169.

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which is Israel” and “it refused to take over the obligations of the Occupying Power” to take care of civilians living under occupation. The ICRC stressed that instead of being a sudden and acute emergency, the humanitarian needs of the Palestinians were related to the Israeli occupation and closure policy and “the gravity of the situation demanded that the ICRC shift its emphasis from humanitarian assistance provider to custodian of IHL.”

According to the ICRC, this custodian role was and is still fulfilled by systematically documenting the “destruction of infrastructure,” the “humanitarian effects of closures, checkpoints, and other polices aimed at restricting freedom of movement for Palestinians,” and by “reminding the Israeli and the international community of their obligations under IHL.” While the ICRC’s decision was not followed by other donors and much of its food assistance programme was covered by the WFP, whether the ICRC precedent should be followed is an open and complex question that deserves further consideration.

The withdrawal of aid would be an ultimate source of political pressure and would “launch one of the greatest non-violent acts of resistance in history and throw an otherwise unsustainable occupation back on to the occupying power.” Israel would be faced with almost four million impoverished Palestinians living in the ruins of a destroyed economic and physical infrastructure. Faced with these conditions of its own creation, Israel would be unable to maintain its occupation and a dramatic change, if not collapse, of the occupation apparatus would be likely. Whether this call to action is initiated by the PA or aid

131 Ibid.
132 Ibid.
133 Halper, pg. 191.
agencies themselves, for it to be truly effective and for the PA not to become (or arguably continue to be) an instrument of its own oppression, the PA should also step down.\textsuperscript{134}

It is nonetheless doubtful that the current PA would take any steps that would compromise their power or position and donors are additionally hesitant to adopt such a decision since "it is unlikely that Israel would step in to supply adequate relief."\textsuperscript{135} Plus, it is considered by many to be morally problematic to try to force a change in Israeli behaviour by refusing to meet pressing Palestinian humanitarian needs.\textsuperscript{136} Such a move, while perhaps legally appropriate, would contest the \textit{raison d’etre} of such agencies under the Red Cross Red Crescent Code of Conduct. Some Palestinians also offer reasons for not favouring the withdrawal of aid including; personal costs to those dependent on support, "loss of solidarity," and loss of international witnesses in the OPTs.\textsuperscript{137} On another level, already alarming poverty levels would be 40 percent higher without donor funding.\textsuperscript{138} Indeed, such a dramatic change is potentially very dangerous, as Sarah Roy warns, "if donors withdraw their assistance, there will be a humanitarian disaster in Gaza."\textsuperscript{139}

Considering the grave realities on the ground, the withdrawal of assistance demands careful consideration without losing sight of Israel’s legal responsibilities as the occupying power. Apart from the question of aid withdrawal, the straightforward legal arguments underpinning the ICRC’s decision highlight a series of other issues of donor concern.

Agencies are questioning whether the deep-seated involvement of donors is actually weakening the ability of local Palestinian organisations to resist oppression. Both aid

\begin{footnotesize}
\begin{enumerate}
\item See: Rex Brynen, “Donor said to Palestine: Attitudes, incentives, patronage, peace,” in \textit{Aid, Diplomacy, and the Facts on the Ground}, pg. 133.
\item Anderson, pg. 147.
\end{enumerate}
\end{footnotesize}
workers and aid recipients are arguably finding themselves in a state where “catastrophe” and its aftermath have become “routine.” Humanitarian assistance, according to Halper, “plays a perversely enabling function in relieving the oppressor of responsibility for its actions by providing a kind of safety net for the local population.” By providing this “safety net,” humanitarian agencies could be complicit in a key Israeli strategy that aims to impoverish the Palestinian population to break its resistance to policies of “quiet transfer” and “ghettoization,” while avoiding a humanitarian crisis that might provoke outside intervention. Needless to say, complicity should not be equated with concurrence with Israel’s illegal behaviour since humanitarian workers are generally appalled by the conditions in the territories. However, as Halper explains,

The attempt to inject funds and resources into a political conflict, in which the stronger party employs tactics of de-development and deliberate impoverishment, results only in contributing to its perpetuation.

On another level, some development funds are seen as a tool of de-politicisation or as de-legitimising the Palestinian resistance. A survey carried out in August 2002 found that

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140 Words and labels related to the “occupation” also can be seen as sanitising it and reinforcing its “legitimacy.” The idea of “permits” for example conveys the message that Palestinians are temporary residents or in transit, rather than the ‘indigenous’ people of the area. The use of the term “incursion” to describe dangerous Israeli military assaults into occupied civilian areas is also misleading and “reinforces the ‘business as usual’ feelings on which Israeli policy depends.” See: Anderson, pg 145-7.
141 On this point, Meron Benvenisti states, “Israel isn’t even required to display minimal politeness and gratitude to the donor states for their generosity in providing the economic safety net. Indeed, the greatest contributor - the European Union as a body and European states individually - are treated with contempt and condescension: pay up and shut up, or we’ll accuse you of anti-Semitism.” See: Meron Benvenisti, “International community supports a deluxe occupation,” Ha’aretz, 11 September 2003.
142 Halper, pg. 189-190.
143 Ibid, pg. 190.
144 UNRWA is generally seen in a positive light, see: Nader Said, “Palestinian perceptions of international assistance,” in Aid, Diplomacy, and the Facts on the Ground.
145 For example, after an Israeli military assault on Palestinian civilian areas in 2002 which left thousands without food or medical supplies, the media aired images of emergency convoys and workers assembling relief packages. In situations like these, Palestine becomes a “humanitarian issue” rather than a political struggle of an occupied people.
146 Methods of de-politicisation include: solely funding projects and organisations that are non-political in nature; restricting elements of projects that could be viewed as being political; and pressuring Palestinian organisations to publicly distance themselves from criticism of the Israeli occupation and public support of Palestinian resistance. See:
55 percent of Palestinians perceived international funding as reinforcing the occupation and 62 percent “felt that donor countries were using funding to get further concessions from the Palestinians concerning their national rights.” Tensions are further highlighted in the aftermath of Israeli military assaults when foreigners are often the only aid workers allowed into destroyed areas. By merely carrying out their mandate, relief workers are, albeit unwillingly, helping Israel marginalise the Palestinian Authority and other Palestinian service providers. Another such instance occurred when Palestinian organisations issued a general call for non-compliance with Israel’s new permit system designed to further dissect and control the OPTs. Foreign NGOs and agencies went ahead and applied for these special permits indirectly indicating an acceptance of Israel’s apartheid policies. These examples illustrate the vast array of urgent issues facing international humanitarian agencies with regard to their internal policy and the international legal dimension of the conflict and while donors arguably need to remain involved in the territories, the precise character of such involvement needs to be redefined.


148 Select donors also regularly call for the reform of the Palestinian Authority, this “unintentionally reinforces assertions by the Israelis that the newly formed and still embryonic Palestinian governmental and public administration structures are a failure” and that Palestinians are “not ready to be peace partners.” On the other hand, decisions (that are sometimes formalised), not to engage with anyone who is in any way connected to Hamas reinforces societal divisions and the monolithic perception that Hamas is purely a “terrorist” group. This ignores the fact that Hamas meets many of the humanitarian and other needs of a significant portion of Palestinians. See: Anderson pg. 146.

149 Foreign donors also offered local NGOs little support at the World Conference Against Racism when Palestinian NGOs reached a consensus to term Israel an “apartheid state.” Foreign agencies failed to give their approval not necessarily because they thought this was an inaccurate description, but because such a stand would require the adoption of a new approach similar to the one they adopted during the struggle against apartheid South Africa.

150 In the meantime, the EU and other states 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. Indeed, “Israel’s eagerness for aid to continue is not matched at the operational level by the willingness to assist with aid delivery,” Shearer, pg. 168.

Moreover, there is evidence that Israel gains economically from aid flows. According to UNCTAD, approximately 40% of all assistance to the OPTs finds its way back to Israel in the form of goods and services. See: United Nations
Donor Action

The policies of individual governments or bodies such as the EU often determine the boundaries of donor activity thus leaving donors with little recourse to independent criticism.\(^{151}\) Hence, donor debate has thus far been largely sterile and without policy repercussions. For example, statements issued under the umbrella of the Association for International Development Agencies (AIDA) may call on the Israeli government to increase humanitarian access to the OPTs, but fall short of strong advocacy work to end Israeli occupation. In spite of such limitations, the situation on the ground is forcing donors to go beyond their traditional reactive role in favour of a more politically active one. Plus, as aid levels mount, donors will need to account to their public over why their taxes are being used to fund an occupation for which they have minimal responsibility. While humanitarian assistance can neither bring an end to a root cause of the problem, the occupation,\(^{152}\) nor provide the needed *political* solution, it can as Mary Anderson explains, “change the political space in which political actors respond.”\(^{153}\) In recognition of the man-made nature of the humanitarian crisis in the OPTs, agencies are therefore examining if and how to engage in advocacy work. The International Development Committee of the House of Commons were surprised during a recent visit to the West Bank when “unusually...no one asked for money!” The group reported that “Neither the PA, nor the NGO's, nor the UN

\(^{151}\) Additionally, agencies often do not want to threaten their charity or non-profit status and in the face of increasing “anti-terror” legislation in Western states, donors are having to further restrict any statements/project funding which could threaten their legal status or government funding.

\(^{152}\) Removing “access controls” imposed by the Israelis would have increased at minimum real GDP by 21%, whereas a doubling of development assistance-without easing closure-would only reduce the number of people living in poverty by 7% by the end of 2004. See: “Twenty Seven Months – Intifada, Closures and Palestinian Economic Crisis, An Assessment,” *World Bank*, May 2003.

\(^{153}\) Anderson, pg. 153.

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Agencies saw their problems as rooted in a shortage of funding. But they all asked for advocacy and political pressure to end the occupation.\textsuperscript{154}

Indeed, select donors are expanding their mandate and engaging in activities such as: placing a humanitarian emphasis on legal protection and legal assistance, researching and collecting detailed data on the economic costs of occupation\textsuperscript{155} to both Israelis and Palestinians.\textsuperscript{156} On a local level, it is important that Palestinian NGOs demand that their donors take a public stand on basic principles or refuse their funding.\textsuperscript{157} Expressing an immediate concern Roy argues that “donor activism should focus on helping Palestinians remain on their land and in their homes and to resist any policy that would forcibly dispossess them.”\textsuperscript{158} Given the current situation on the ground, agencies should make such advocacy a central part of their mandate and focus on real issues such as the refugees, the end to Israeli occupation and apartheid policies, and not only on “safe issues” designated by their back-donors. While tensions between advocacy and neutrality do exist, as the International Development Committee explains,

Given that there is a such a widespread recognition of the need for political solutions, and that the basic rights of Palestinians are not addressed in any political negotiation, and given the destruction of Palestinian political and civic institutions, it is difficult to see how development organisations can avoid being involved in advocacy.\textsuperscript{159}

Advocacy should be accompanied with active lobbying to donor’s respective governments to pressure Israel through sanctions, boycotts, or diplomacy to end the occupation and

\textsuperscript{154} International Development Committee, pg. 63.
\textsuperscript{156} Mary Anderson believes that such data could constitute the basis for a large public relations and education campaign in Israel, that could increase the level of Israeli objection to the occupation. See: Anderson, pg. 147-9.
\textsuperscript{157} Palestinian NGOs should realise that they have power within the donor-NGO ‘partnership’, because without the implementing organizations, there is no development system. See: ‘Yasmine Awad’ and ‘Robert E. Foxsohn, “Breaking the Complicity: ‘Developing Palestine means ending the occupation,” manifest, 11 August 2002.
\textsuperscript{158} Roy, pg. 208.
\textsuperscript{159} International Development Committee, pg. 64.

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conform with the relevant international legal principles. Even though the G8 summit promised even more financial assistance, Western states can no longer "mask direct political assistance to Israel by offering economic assistance to the Palestinians."\textsuperscript{160} As a Palestinian legal advisor stated, "it will be a real tragedy if the G-8 thinks the occupation is going to end just by throwing money at it."\textsuperscript{161} Certainly, such "charity" sustains the Israeli occupation and further subjugates the Palestinians while delaying the pursuit of other effective strategies that are more likely to push Israel towards compliance with international law. The following section will very briefly overview the nature of a few of such strategies that ultimately aim to bring not only Israel, but the international community as well, in line with the applicable legal principles affirmed by the ICJ.

UN Action

After acknowledging the primary objective of the UN to maintain "peace and security" and to promote the peaceful resolution of disputes, the ICJ emphasised the "urgent necessity" for the UN to "redouble its efforts to bring the Israeli-Palestinian conflict...to a speedy conclusion."\textsuperscript{162} The Court had a clear message for its fellow UN organs as Pieter H.F. Bekker explains, "it rebuked the Security Council for having repeatedly failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a veto of one of its permanent members."\textsuperscript{163} In view of the judgment, the UNGA stepped in and voted overwhelmingly to demand that Israel heed the

\textsuperscript{160} Karma Nabulsi, “Britain and Europe are funding Israel’s occupation and expansion,” \textit{The Guardian}, 1 March 2005.
\textsuperscript{162} ICJ Wall, Paragraph 160/161.
\textsuperscript{163} Bekker was Senior Counsel to Palestine during the ICJ proceedings. See: Pieter H.F. Bekker, “The United Nations and international law,” \textit{International Conference on Middle East Policies}, 6 November 2004.
Opinion and its international obligations.\footnote{During UNGA talks on the draft, the Israeli representative “thanked God that the fate of Israel and the Jewish people was not decided by the Assembly. See: “UN Assembly votes overwhelmingly to demand Israel comply with ICJ ruling,” \textit{UN News}, 21 July 2004. The resolution also called for the Secretary General to establish a register of damage caused by the wall to all persons concerned. See: “UN registry of damage to Palestinians from Israeli barrier moves step closer,” \textit{UN News}, 11 January 2005. Also see: “UN Committee on Palestine considers concrete action by international community,” \textit{UN DPI}, 11 May 2005.} Indeed, although the Opinion did not elaborate on the precise nature of the necessary action, it represented the beginning of a legal struggle by providing a framework for developing new political and legal strategies of resistance.\footnote{Andrew N. Rubin, “One year on: We are no longer able to see the sun set,” \textit{The Electronic Intifada}, 9 July 2005. Available online: //electronicintifada.net/v2/article3985.shtml}

As a first step, the UNGA could return to the ICJ and ask the Court to determine the legal consequences of a Security Council veto that prevents it from exercising its duties,\footnote{Azem Bishara, “The Court has spoken: What next?” \textit{The Electronic Intifada}, 1 July 2004. Available online: //electronicintifada.net/v2/article2893.shtml ; Gregory Khalil, “Just say no to vetoes,” \textit{New York Times}, 19 July 2004.} thus enabling a legal consideration of the US veto, which has long prevented the Council from addressing the Palestinian issue. On the other hand, the UNGA “Uniting for Peace Resolution” of 1950 is perhaps a more efficient and appropriate step to counter repeated US vetoes and the Security Council’s failure to maintain “peace and security.” By means of this well-known\footnote{See text of “Uniting for Peace Resolution” (377): \url{www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf} \textcolor{red}{This resolution has been discussed for decades in Palestinian political circles. See for example, Mary Barrett, “PLO Looks at the Uniting for Peace Plan in UN,” \textit{Arab American News}, Vol. VI, No. 269, 30 June-6 July, 1990.} and tested procedure (by none other than the US) the UNGA can demand the withdrawal of Israel from the OPTs and call for a UN Peacekeeping Force to be deployed in the territories.\footnote{Francis A. Boyle, \textit{Palestine, Palestinians, and International Law}, Atlanta: Clarity Press, 2003, pgs. 19, 147, 158. \textit{Hereinafter}, Boyle.} According to the terms of the resolution, the UNGA can adopt comprehensive economic, diplomatic, and travel sanctions against Israel, a measure taken repeatedly against the former criminal apartheid regime in South Africa.

The UNGA could also move for the \textit{de facto} suspension of Israel throughout the entire UN system based on the fact that Israel has expressly repudiated both Resolutions.
181 and 194, the very resolutions that recognised Israel and admitted it into the UN in the first place. Israel could also be suspended for failing to abide by the ICJ judgment. As Richard Cummings explains, "failure by a United Nations member or entity with observer status to adhere to the advisory opinion on any matter of law could specifically give rise to a suspension by the General Assembly of its voting rights," as experienced by South Africa after it violated an ICJ Advisory Opinion. Since the US would undoubtedly use its veto power to prevent the formal expulsion of its ally, the UNGA is able and obligated to exercise its UN Charter powers under Chapter IV to de facto suspend Israel from all UN bodies, just like it did to the criminal regimes in South Africa and the former Yugoslavia. In the words of Francis A. Boyle, “The criminal apartheid regime in Israel has become the new pariah of international law and must be treated as such by the entire world.”

From another angle and in view of US attempts to sabotage the International Criminal Court, the UNGA can establish an separate International Criminal Tribunal for Palestine (ICTP) within which Israeli war criminals can be prosecuted. These individuals are both civilian and military and include former and present political leaders of Israel. Under Article 22 of the UN Charter, the UNGA has powers to set up “subsidiary organs” such as an ICTP which would mirror the structure of the International Criminal Tribunal for the Former Yugoslavia by applying the rules of international criminal law applicable to an

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172 A case was lodged in Belgium by 23 survivors of the 1982 massacres in Sabra and Shatila charging Ariel Sharon and other Israeli government ministers with war crimes, crimes against humanity, and genocide related to the massacres that crushed these 2 refugee camps in Lebanon. It was raised in Belgium due to a Universal Jurisdiction Law that incorporated the Geneva Conventions into Belgian criminal law. However, this legislation was curtailed by Belgium following immense US pressure to repeal the law. For more information, see: www.indictsharon.net ; Also see, John Borneman, “Universal jurisdiction: Reflections on the 'Case of Ariel Sharon,'” The Daily Star, 27 December 2004.
“international armed conflict,” the correct legal categorisation for Israeli military aggression against the Palestinians. A solid case could also charge Israel in front of the ICJ with the violation of Article 2 and other clauses of the 1948 Genocide Convention. Palestinian claims date back to the Nakbe or dispossession of 1948 and onwards until the present day and any of the 132 contracting parties to the Convention have standing to sue Israel to stop what Boyle calls “its ongoing and longstanding campaign of genocide against the Palestinians.” These strategies represent legitimate state-level actions that while effective must be accompanied, or perhaps preceded, by action on a civil society level. The divestment/disinvestment campaign accompanied with the grassroots boycott movement for example, are key strategies that aided in the dismantling of South Africa’s apartheid regime and are now attracting increasing global support for the Palestinian cause.

**Civil Society Action**

Universities, churches, labour unions, and others are joining a globally orchestrated movement to boycott Israel and divest/disinvest from it. Alongside

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173 This is in contrast to the International Criminal Tribunal for Rwanda (ICTR), which deals with an “internal armed conflict,” See: Boyle pg. 158.
176 Boyle, pg 160.
177 See for example, Columbia University’s Divestment Campaign, www.columbiadivest.org, which the author was personally involved in initiating. Or for a full list of University Divestment Campaigns, see: www.israel-divest.org
178 The United Church of Christ, the Presbyterian Church USA, the World Council of Churches, the United Methodist Church, and the Anglican Church, have all passed resolutions condemning Israel and calling for some level of divestment. The Episcopal Church revoked its decision to divest due to pressure from Jewish-American groups. See: Tom Regan, “Mideast divestment movement picks up steam,” Christian Science Monitor, 7 July 2005. “Church group hints at Mideast divesting,” The New York Times, 23 February 2005.
179 See for example, Labour for Palestine Campaign based in the US; www.laborforpalestine.org
181 In simple terms, “divestment” calls for the sell-off of all investments in corporate entities that do business with Israel, whereas “disinvestment” calls for the elimination of any investments in Israel.

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international activists, Palestinian civil society representing “three integral parts of the people of Palestine,” Palestinian refugees, Palestinians under occupation, and Palestinian-Israelis, have called for boycott, divestment, and sanctions against Israel until it meets its obligation to recognise the Palestinian right to self-determination.\footnote{This appeal calls more specifically for Israel to comply with the precepts of international law by: 1. Ending its occupation and colonisation of all Arab lands and dismantling the Wall; 2. Recognising the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and 3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194. See: Joint Advocacy Initiative, “One year on: Palestinian civil society calls for boycott, divestment, and sanctions,” 9 July 2005.} As South African Archbishop Desmond Tutu recognised, “moral and financial pressure is again being mustered one person at a time” against Israeli oppression.\footnote{Desmond Tutu, “Build moral pressure to end the Israeli occupation of Palestinian lands,” International Herald Tribune, 25 October 2002; See also, Desmond Tutu, “Apartheid in the Holy Land,” The Guardian, April 29, 2002.; Desmond Tutu, “Of occupation and apartheid do I Divest?” CounterPunch, October 17, 2002.} Over 40 universities in the US alone are demanding a review of all university investments and disinvestment from Israel\footnote{Ian Urbina, “The analogy to apartheid,” Middle East Report 223, Summer 2002. Available online: www.merip.org/mer/mer223/223_urbina.html, Hereinafter, Urbina.} and academic boycotts in the UK continue to gain steam despite the Britain’s Association of University Teachers recent decision to reverse its boycott of Israeli universities.\footnote{Omar Barghouti and Lisa Taraki, “Academic freedom in context,” Al-Ahram Weekly, 16-22 June 2005. Available online: http://weekly.ahram.org.eg/2005/747/op13.htm Urbina.} Elsewhere in Europe, the General Workers Union in Denmark cancelled a huge order of computer hardware from an Israeli firm, Radix Technologies, and called on all its members to boycott Israeli products and has remained steadfast in its position.\footnote{Ibid.} Coop Norge, Norway’s second largest store chain, announced a boycott of all products from Israel. This decision was buttressed by Norway’s Transport Workers' Union which had previously announced that its members would block any Israeli products that came through their hands.\footnote{Ibid.}
Entire cities are themselves aiming to legislate against Israeli policies. In 2002, the city council in Berkeley, California considered a proposal drafted by the locally based Peace and Justice Commission calling for a municipal boycott of all financial ties to Israel. Among other demands, the proposal called for UN peacekeeping troops be sent to the region and called on Congress to hold hearings on the region’s human rights violations. The measure was eventually voted down following political pressure, but activity in this direction is on the rise.¹⁸⁸ Last year, a former tank gunner in the Israeli army and vocal supporter of divestment stated to a Massachusetts audience,

We are asking the city of Somerville, as well as other cities and civic institutions, to divest from companies involved in selling arms, bulldozers and military technologies that are used by the Israeli army to commit war crimes against Palestinians.

He called on those committed to human rights to “demand that their tax-dollars are not invested in companies that sell equipment and ammunition that fuel Israel's consistent and appalling violations of international law and human rights.” Representing a growing number of Israelis, he expressed his belief that “economic pressure is the most effective way to end the brutal occupation of the West Bank and Gaza, and bring peace and security to Palestinians and Israelis.”¹⁸⁹ Israeli-Jews and other Jews have created other vocal groups such as “Not in my Name” or “Jews against the Occupation,”¹⁹⁰ which represent a very important part of grassroots activity against Israeli crimes.¹⁹¹ Another significant development is the refusenik movement encompassing those Israelis who refuse to serve


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in the army.\textsuperscript{192} This movement resembles the South African anti-conscription drive in the late 1980s, an effort that represented a slice of the huge grassroots effort consisting of university and government divestment efforts, consumer boycotts, arms embargoes and eventual economic sanctions, under which the racist regime ultimately crumbled. The situation in Palestine/Israel demands a similar response as Israel has created, "an apartheid regime" in the OPTs "worse than the one that existed in South Africa," in the words of John Dugard, a member of South Africa's post-apartheid Truth and Reconciliation Commission. While global conditions have changed,\textsuperscript{193} boycotting is much more difficult,\textsuperscript{194} and certain differences do exist between the two situations, the South African precedent provides some sort of model for those struggling against Israeli apartheid. Such calls to action are of course huge topics within themselves, but for the purpose of this paper, they represent alternate routes that the international community, both states and civil society alike, can and should take to end the longest-standing occupation and apartheid system on earth today.


\textsuperscript{193} Urbina.

\textsuperscript{194} Ibid.
Reflections

The EU and the donor community are, albeit with arguably different intentions, supporting a deluxe occupation: Israeli entities in the OPTs have a free hand to trade and benefit from cooperation instruments under the Association Agreement, and Israel is allowed to further entrench a military occupation and apartheid system paid for by the donor community. In the words former deputy mayor of Jerusalem Meron Benvenisti, Israel has “created an international precedent – an occupation fully financed by the international community.” Israel is furthermore not held accountable: the EU is sweetening its bilateral agreements regardless of Israeli compliance and the donor community continues to funnel aid to the OPTs relieving Israel of its legally prescribed responsibilities under IHL. Having visited the territories in late August 2005, an official European Delegation stated “an end to the Israeli-Palestinian conflict depends on a more determined international intervention to achieve accountability from Israel and enforce its compliance with International Law.”

Indeed, the question of Palestine, like many post-colonial situations, was created by the international community and hence the world must rise to its moral responsibility to resolve it. As summed up accurately by the International Development Committee,

The fact is that Palestinians in Gaza and the West Bank have no state, neither de jure, nor de facto; no citizenship; no rights; no remedies, and no one from the international community taking the responsibility to see to ensure that an occupied people in these circumstances are treated as humanely as possible.

Herein lies the importance of the ICJ opinion for the Palestinians: it provides legal recourse to a people who possess neither meaningful sovereignty nor self-determination as a state,

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197 International Development Committee, pg. 63.
and are therefore unable litigate their damages to a body that has historically been out of reach. While arguably brimming with shortcomings,\textsuperscript{198} international law provides the Palestinians with the only path that can secure their rights especially since political negotiations have only served to strip Palestinians of their substantive rights,\textsuperscript{199} including their right to self-determination. On this point, Catriona Drew highlights, “an unacknowledged trend \textit{within} contemporary practice, which (selectively) favours pragmatic negotiation over formal legal entitlement – the all-important \textit{peace process} over self-determination as process.” Certainly, the so-called peace process has been “invoked to \textit{trump} rather than translate the legal framework,”\textsuperscript{200} and thus it remains imperative that Palestinians remain steadfast in their call for the implementation of international human rights law and IHL. The ICJ opinion is of further significance because it affirms that respect for human rights and humanitarian law \textit{does not depend} upon a peace settlement and that a negotiated solution should be achieved on the basis of international law.

From a wider perspective, international law finds itself in another defining moment in its existence of perpetual crisis. The so-called “war on terror” has created a climate of impunity which rejects the mantra that international law should guide the actions of states. Legal principles are considered outdated and are being bypassed for the sake of combating “terrorism.”\textsuperscript{201} Those who have high stakes in the relevance of international law should

\textsuperscript{198} It should be noted that while this paper is approached from a formal legal perspective, the author recognises that international law historically and presently can very convincingly be critiqued from several angles. See: Anthony Anghie, \textit{Imperialism, Sovereignty and the Making of International Law}, Cambridge University Press, 2005 S. James Anaya, \textit{Indigenous Peoples in International Law}. New York, Oxford: Oxford University Press, 1996.


recognise that it must now renew itself and reassert its relevance.\textsuperscript{202} By failing to sanction Israel, the international community is not only complicit in Israeli crimes but it is also sustaining a situation of lawlessness and impunity. The epitome that is the question of Palestine illustrates the choice we face between a world governed by legal principles and a world where power and political as well as economic convenience reign supreme. As Etienne Balibar notes in a display of keen insight, the Palestinian cause is a "universal" one because "it is a test for the recognition of right, and the implementation of international law."\textsuperscript{203} As a universal cause, the Palestinian question demands universal action since as this paper has illustrated, "qui tacet consentire videtur,"\textsuperscript{204} or he who keeps silent is assumed to consent. Indeed, the dynamic way in which political support for the Palestinians is rapidly increasing across the globe indicates that the dangers of complicity and inaction are being recognised. In the words of the late Edward Said,

\begin{quote}
Remember the solidarity here and everywhere in Latin America, Africa, Europe, Asia and Australia, and remember also that there is a cause to which many people have committed themselves, difficulties and terrible obstacles notwithstanding. Why? Because it is a just cause, a noble ideal, a moral quest for equality and human rights.\textsuperscript{205}
\end{quote}

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\textsuperscript{202} See: Anne Orford, “The destiny of international law,” 17 \textit{Leiden Journal of International Law} 2004, pg. 441-476.\textsuperscript{203}
Etienne Balibar, “A complex urgent universal political cause,” Address before the conference of Faculty for Israeli-Palestinian Peace (FFIPP), Universite Libre de Bruxelles, July 3-4, 2004. \hfill \texttt{//ffipp.org/wiki/ffipp_international/etienne_balibar} \textsuperscript{204}
See: Barbara Whittle, “Truth and reconciliation commission: \textit{Qui tacet consentire videtur},” 372 \textit{De Rebus} 1999 Available online: \texttt{www.derebus.org.za} \textsuperscript{205}
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