



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

ACTIVE BUT ACQUIESCENT: THE EU'S RESPONSE TO THE ISRAELI MILITARY OFFENSIVE IN THE GAZA STRIP





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Brussels – May 2009

EURO - MEDITERRANEAN HUMAN RIGHTS NETWORK

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BIBLIOGRAPHIC INFORMATION

Title: Active but Acquiescent: The EU's Response to the Israeli Military Offensive in the Gaza Strip

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Corporate author: Euro-Mediterranean Human Rights Network (EMHRN)

Publisher: Euro-Mediterranean Human Rights Network (EMHRN)

Date of publication: May 2009 - Pages: 92

ISBN 87-91224-38-1

Original language: English

Proofreading and editing: Stanus, Nathalie; Flø Jørgensen, Marit; Schade-Poulsen, Marc.

Layout design and cover design: Abderrazik, Hamza

Printing: Total Design Belgium

Index terms: Human Rights / International Law / International Humanitarian Law

Geographical terms: European Union / Gaza / Occupied Palestinian Territories / Middle East

This document has been produced with the financial assistance of DANIDA and SIDA.

The contents of this document are the sole responsibility of the Euro-Mediterranean Human Rights Network and can under no circumstances be regarded as reflecting the official position of the financial donors.

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I. INTRODUCTION

In view of the Israeli military offensive in the Gaza Strip between 27 December 2008 and 18 January 2009, that took place following the collapse of the six-month ceasefire and which caused an unprecedented level of death and destruction, the Euro-Mediterranean Human Rights Network (EMHRN) has set out to examine the policies of the European Union (EU) towards the conflict. In view of the focus on the EU's response as a main human rights player on the international scene, this report is mainly concerned with the role and reaction of the EU and its member states rather than of other local or international players in the conflict. For the same reason, because of the EU's relations with only one actor in the conflict, including binding human rights obligations in its bilateral relations – Israel – and its lack of contact with the other – Hamas – most of the analysis is centred on Israel's conduct and on the EU's reaction to it, although the report briefly discusses Hamas' violations and analyses the EU's response to these as well.

While focusing on the EU's reactions in the run-up to, the evolution and aftermath of "Operation Cast Lead", this report begins by setting the wider political, legal and policy context in which the EU's reactions are constructed and pursued. It outlines the EU's declared political aims in the Israeli-Palestinian conflict, the human rights and international humanitarian law obligations and commitments of the EU and its member states, as well as the policy instruments the Union has at its disposal. The report then analyses the manner in which the EU has deployed its policies, particularly since 2006, when Hamas won the Palestinian Legislative Council (PLC) elections, arguing that the Union, *nolens volens*, was part of a wider international context within which the escalation took place. The report then briefly reviews developments during the offensive itself, presenting an overview of the main violations of international humanitarian law. The report then turns to the EU's reaction during and in the aftermath of the military offensive, suggesting that as relative calm settles, the EU, collectively, finds itself at a crossroads. The Union, driven by domestic and transatlantic interests and allegiances, risks falling back on the same set of failed policies riddled with new ambiguities. However, a growing European unease with developments in the region opens a window of opportunity for the EU to review carefully its relationship with Israel and the Palestinians and to discuss ways of reducing the gaps between human rights and international humanitarian law commitments and policy vis-à-vis the Israeli-Palestinian conflict.

2. SETTING THE CONTEXT: EU OBJECTIVES, LEGAL OBLIGATIONS AND POLICY INSTRUMENTS IN THE ISRAELI-PALESTINIAN CONFLICT

2.1 EU POLICY OBJECTIVES TOWARDS ISRAEL, THE OPT AND THE CONFLICT

The EU's declared objectives in Israel and the Occupied Palestinian Territory¹ (OPT) are based on two pillars, which have consolidated over the decades into a clear view of the conflict and its resolution. The first pillar consists in securing Israeli and Palestinian rights to self-determination. The EU historically recognized Israel's right to statehood, living in peace with its neighbours within secure and internationally-recognized boundaries. The European position towards the Palestinians was articulated progressively over the decades. Beginning with open-ended support for Palestinian self-determination in the 1980 Venice Declaration,² by the end of the Oslo process the European Council advanced its support for a Palestinian state, arguing that 'the EU is convinced that the creation of a democratic, viable and peaceful sovereign Palestinian state...would be the best guarantee of Israel's security'.³ With the eruption of the second intifada in 2000, the EU further articulated its vision for peace, namely the creation of two states living in peace within internationally-recognized borders. The state of Palestine would be established in the West Bank, East Jerusalem and the Gaza Strip along the 1967 borders (with minor and mutually agreed adjustments if necessary), and would be viable, independent,

sovereign and democratic.⁴ Despite the ever-diminishing prospects of such a state, the EU has remained steadfast in its commitment. At the height of Israel's military assault on the Gaza Strip in December 2008 and January 2009, the EU affirmed its support for a viable and democratic Palestine living side-by-side with Israel in peace and security,⁵ and has reiterated this position since then.⁶

¹ The OPT is composed of the Gaza Strip and the West Bank, including East-Jerusalem.

² Declaration by the European Council on the Situation in the Middle East, Venice, 12-13 June 1980.

³ Conclusions of the European Council in Berlin, 24-25 March 1999.

⁴ European Council in Laeken on the 14-15 December 2001 – Declaration on the Situation in the Middle East; The European Council, Presidency Conclusions, Seville, 25 June 2002.

⁵ Statement of the EU on the Situation in the Middle East, Paris 30 December 2008.

⁶ 'The EU in the Middle East Peace Process', MEMO/09/88, 27 February 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/88&format=HTML&aged=0&language=EN&guiLanguage=en>

The second pillar is the importance of complying with international human rights and humanitarian law. Most EU declarations on the conflict since the 1970s have condemned Palestinian acts of "terrorism", pointing to the relevant violations of international law; while also condemning Israeli settlements, the construction of which contravenes the Fourth Geneva Convention.⁷ During the Oslo years, the Union kept relatively silent, particularly about the accelerated pace of settlement construction in the OPT, for fear of "disturbing the peace process". However, with the outbreak of the second intifada, the EU intensified its calls for a halt to and reversal of settlement construction, and denounced a whole array of human rights and international humanitarian law (IHL) violations, ranging from Palestinian suicide bombings to Israeli incursions, extra-judicial killings, forms of collective punishment and construction of the Wall/Barrier in the West Bank.⁸ Finally, since Israel's unilateral disengagement from the Gaza Strip in 2005 and the political separation between the Hamas-controlled Gaza Strip and the Palestinian Authority (PA)/Fateh-controlled West Bank in 2007, condemnations of Israel's military incursions and closure of Gaza and of Hamas' indiscriminate launching of rockets into bordering Israeli towns have featured prominently in EU declarations.⁹

Hence, after 2000, EU declarations clearly stipulated both its vision of the Middle East and the means necessary to achieve it. The aim was that of two states on the basis of the 1967 borders. The means were negotiations and respect for human rights, democracy and international law. More than a vision, the attainment of these goals has been viewed as an integral element of the EU's security interests and strategy.¹⁰

⁷ Statement of the Nine Foreign Ministers on the Situation in the Middle East, Brussels, 6 November 1973; Statement of the Nine Foreign Ministers on the Egyptian-Israeli Peace Treaty, Paris, 26 March 1979; Declaration by the European Council on the Situation in the Middle East, Venice, 12-3 June 1980; Declaration of the European Council on the Middle East, Madrid, 26-27 June 1989; Declaration of the European Council on the Middle East, Dublin, 25-26 June 1990. In the context of these statements, the EU has also condemned as violations of the Fourth Geneva Convention all the associated Israeli infrastructure in the OPT (e.g., Israeli-only roads, checkpoints and associated expropriation of Palestinian land, etc.). Beyond the EU's positions on settlements violating the Fourth Geneva Convention, it should be noted that the associated infrastructure of settlements, including draconian administrative and physical obstacles to Palestinian freedom of movement, including but not limited to Israeli only roads and the Wall/Barrier, has led to the appropriation of Palestinian land as well as the transfer of parts of the Palestinian population, in violation of a much broader range of norms of international humanitarian and human rights law.

⁸ Declaration of the Presidency on behalf of the EU, Israeli settlement activities, 4 April 2001; European Council in Copenhagen on the 12-13 December 2002; Council of Ministers, Conclusions on the Middle East, 29 September 2003; European Council in Seville on the 25 June 2002; European Council in Copenhagen on the 12-13 December, Declaration on the Middle East; Council of Ministers, Conclusions on the Middle East, 21 July 2003; Council of Ministers, Conclusions on the Middle East, 29 September 2003; European Council in Brussels on the 16-17 October 2003, Presidency Conclusions, The ICJ Advisory Opinion, July 2004.

⁹ EU Presidency Statement on further escalation of violence in Gaza and Southern Israel, 2 March 2008.

¹⁰ Council of Ministers, 'A Secure Europe in a Better World: European Security Strategy', Brussels, 12 December 2003. This position was reaffirmed in 2008 in the Council of Ministers, Report on the implementation of the European Security Strategy, Brussels, December 2008.

2.2 EU AND MEMBER STATES' LEGAL OBLIGATIONS UNDER IHL AND IHRL

EU policies in the Israeli-Palestinian conflict, including the Union's reaction to the conflict in the Gaza Strip, are governed by a complex legal framework consisting of two main sets of norms: principles and norms pertaining to public international law, international human rights law (IHRL) and IHL; and specific EU commitments and instruments that can be of a binding or non-binding nature. Reviewing EU policies from a legal standpoint entails an examination of both sets of norms in the light of the EU's commitments as well as of the member states' obligations.

When identifying the obligations of the EU and its member states under IHRL and IHL, it is paramount to bear in mind the limited purpose of this study, i.e. focusing on EU and member states' obligations within the context of EU external relations.¹¹ This focus has important legal implications. While the EU's obligations mainly stem from specific commitments and instruments and mainly relate to human rights law, those of the member states derive primarily from IHL and relevant rules concerning state responsibility.

2.2.1 Member states' obligations under IHL and state responsibility rules

While being part of the EU, the member states remain bound by their own international obligations under international human rights and humanitarian law, be these conventional or of a customary nature. This is particularly significant with regard to policy fields in which the member states have not transferred competences to the Union. When considering member states' obligations in the context of EU external relations, two types of obligations are relevant and play specific roles. Taken together, they constitute a comprehensive framework and serve as the basis on which the EU and its members must deploy their policy instruments.

First, unlike human rights law, IHL sets out a pivotal obligation contained in common Article 1 of the 1949 Geneva Conventions,¹² the customary nature of which was recognized by the International Court of Justice in its 1984 ruling on the Nicaragua Case.¹³ It lays down the obligation for states, in all circumstances, to respect and ensure respect for IHL. Such an obligation has far-reaching consequences particularly in the case of EU member states in their relations with a third state engaged in an armed conflict. Not only must states respect this body of norms, but they must take all possible steps to ensure that IHL is respected by all parties, and in particular by parties to the conflict. Furthermore, such an obligation is imposed in all circumstances, which means that states which are members of an organization such as the EU cannot hide behind the latter to avoid their own responsibilities.

¹¹ This report does not aim at discussing the legal personality of the EU or assessing the actions or omissions of the EU and its member states in general, nor does it address the complex legal issues relating to the EC's competences in the field of external relations. For further details on these legal issues see Raas Holdgaard (2008) External Relations Law of the European Community Legal Reasoning and Legal Discourses, Leiden, Kluwer Law International.

¹² This obligation was reiterated in Article 1, para. 4 of 1977 Additional Protocol I.

¹³ See 'Military and paramilitary activities in and against Nicaragua', Nicaragua v. United States of America, Merits, Judgment, ICJ Reports, 1986, paragraph 220.

In 2005, the UK Presidency of the EU expressed the view that 'Article 1 of the Fourth Geneva Convention does not constitute an obligation in international law to ensure that other High Contracting Parties also respect the Convention (...) The obligation to respect the law must remain with the parties to the conflict'.¹⁴ Such a restrictive interpretation of the scope of the obligation was rejected by the International Court of Justice (ICJ) in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, when it stated that every High Contracting Party to the Conventions, regardless of whether they are parties to a conflict, is bound by this obligation.¹⁵ This reading is well-founded in the practice of states and international organizations, as well as in doctrinal opinions.¹⁶ Hence states must take an active part in ensuring compliance with the rules of IHL by all parties concerned, as well as react against violations of that law. While there is no indication of concrete measures to be taken to give effect to such obligations,¹⁷ the EU's institutional and policy frameworks offer important tools for member states to ensure their compliance.

Second, the collective legal interest of ensuring compliance with fundamental norms has implications¹⁸ under general international law on state responsibility. Article 41 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts¹⁹ sets out particular consequences of a serious breach of an obligation under the peremptory norms of general international law: 1) states shall cooperate to bring to an end through lawful means any serious (gross or systematic) breach of a peremptory norm of general international law; and 2) no state shall recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining that situation.²⁰

14 'UK Policy on the Occupied Palestinian Territories', Letter to Hickman and Rose by Nick Banner, UK Foreign and Commonwealth Office, 20 September 2005.

15 International Court of Justice (2004) 'Legal consequences of the construction of a wall in the occupied Palestinian territory', General List No.131, 9 July, para. 158.

16 Laurence Boisson de Chazournes and Luigi Condorelli (1984) 'Quelques remarques à propos de l'obligation des Etats de "respecter et de faire respecter" le droit international humanitaire "en toutes circonstances"', in C. Swinarski (ed.) *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix Rouge en l'honneur de Jean Pictet*, Dordrecht, Martinus Nijhoff, pp. 17-35; and from the same authors 'Common Article 1 to the Geneva Conventions Revisited: Protecting Collective Interests', *International Review of the Red Cross*, March 2000, No. 837, pp. 67-87. In Resolution S/RES/681 (1990) of 20 December 1990, the Security Council 'gravely concerned at the dangerous deterioration of the situation of all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and at the violence and rising tension in Israel ...', called upon the High Contracting Parties to the said Convention to ensure respect by Israel, the Occupying Power, for its obligations under the Convention in accordance with article 1 thereof'.

17 Umesh Palwankar (1994) 'Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law', *International Review of the Red Cross*, No. 298, February, pp. 9-25.

18 As underlined by the International Court of Justice in the Barcelona Traction Case 'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes'. See 'Barcelona Traction, Light and Power Company, Limited, Judgement', *International Court of Justice, Reports*, 1970, para. 33.

19 General Assembly, Resolution 56/83, 12 December 2001.

20 In the 2004 Advisory Opinion, following its reference to Common Article 1, the ICJ stated that: '(G)iven the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the Wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction', para. 159.

The latter obligation not to render aid or assistance also concerns a broader question under the law on state responsibility. Article 16 of the International Law Commission Articles on State Responsibility envisages one of the cases of responsibility of a state in connection with the act of another state: 'a State which aids or assists another State in the commission of an internationally wrongful act by the latter is responsible for doing so' under certain conditions.²¹ This interpretation raises the very complex issue of complicity under international law, more neutrally called "aid or assistance". It is worth noting that the Rapporteur of the International Law Commission dealing with the topic of the responsibility of international organizations proposed a similar draft article.²² As stressed by some authors, 'the rules on complicity in international law are not sufficiently developed to allow for clear-cut determinations'.²³

2.2.2 EU commitments under IHL and IHRL

Specific EU human rights commitments in the context of EU external relations²⁴ are based on the general obligation contained in Article 6 para. 2 of the Treaty on European Union (TEU), which states that the Union 'shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the member states, as general principles of Community law'. Accordingly, actions carried out or agreements concluded by the EU with a third country must respect human rights. Formulating the EU's human rights commitments vis-à-vis third countries in a more programmatic manner, Articles 177 para. 2 and 181 para. 1 of the Treaty establishing the European Community (TEC) lay down the principle that Community policies in the areas of development cooperation and economic, financial and technical cooperation 'shall contribute to the objective of respecting human rights and fundamental freedoms'. In the same vein, Article 11 of the TEU holds that one of the EU's Common Foreign and Security Policy (CFSP) objectives is to 'develop and consolidate respect for human rights and fundamental freedoms'. Although these commitments are set out as objectives to be pursued, they also clearly define the legal framework in which EU policies are to be carried out, and retain the character of legal obligations of a binding nature.

21 According to Article 16, two conditions are envisaged: '(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State'. ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-10 August 2001) UN Doc A/56/10.

22 Draft article 12 reads as follows: 'Aid or assistance in the commission of an internationally wrongful act: An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that organization'. See ILC 'Report of the International Law Commission on the Work of its 57th session', 2 May to 3 June and 11 July to 5 August 2005, UN Doc. A/60/10.

23 Georg Nolte and Helmut Philippaust (2009) 'Equivocal Helpers – Complicit States, Mixed Messages and International Law', *International and Comparative Law Quarterly*, Vol. 58, January, p. 1. On the question of whether and how the EU "aids or assists" illegal Israeli actions or actors in the OPT see EMHRN (2007) 'Third Annual Review on Human Rights in EU-Israel Relations, Accommodating to the 'special' case of Israel', June; and EMHRN (2005) 'A Human Rights Review on the EU and Israel, Mainstreaming or Selectively Extinguishing Human Rights?', December, <http://www.emhrn.net/423>

24 For an overview of this question see Barbara Brandtner and Allan Rosas (1998) 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice', *European Journal of International Law*, Vol. 9, pp.468-490.

Furthermore, they go beyond a mere obligation not to infringe human rights and entail a certain obligation as to result that implies positive action on the part of the EU in the sphere of human rights.²⁵

Accordingly, the EU has implemented human rights conditionality in its relations with third countries. Conditionality can be exerted *ex ante* and *ex post*. In the case of *ex ante* conditionality, the EU may unilaterally offer benefits, including EU membership, trade preferences or participation in Community programmes or EU agencies, upon condition of a third country's prior respect for human rights and democratic principles. In the case of *ex post* conditionality, the EU may offer a benefit upon condition that human rights and democratic principles are respected, thus reserving the right to unilaterally withdraw such benefits in the event of the third country's breach of such norms. Hence, since the late 1970, the EU has inserted a human rights clause in all trade and cooperation agreements with third countries, including with Israel and the Palestine Liberation Organisation (PLO).²⁶ This clause stipulates that human rights are an essential element in the relations between the parties to the agreement. On the basis of this clause, the benefits stemming from EU agreements may be lawfully withdrawn through partial or total suspension of the agreement.

In addition, the EU may resort to negative conditionality, i.e., autonomous restrictive measures (or sanctions) in the framework of the CFSP in order 'to uphold respect for human rights, democracy, the rule of law and good governance'.²⁷ Such measures may include diplomatic sanctions; suspension of cooperation with a third country; trade sanctions (general or specific trade sanctions, arms embargoes); financial sanctions (freezing of funds or economic resources, prohibition of financial transactions, restrictions on export credits or investment); flight bans; and restrictions on admission. However, the adoption of these sanctions also depends on a political process, as recalled by the 'Guidelines on implementation and evaluation of restrictive measures'.²⁸ This margin of appreciation in manners of reacting to unlawful acts requires political will on the part of the EU and its member states in order to ensure that the common fundamental principles at the heart of their commitments are applied consistently.

25 This interpretation is confirmed by the new wording inserted in Article 3 as revised by the Lisbon Treaty, which provides that '(I)n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.' Emphases added.

26 This provision became official EU policy in 1995 with the Commission's 'Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries', COM (95) 216 and 'Communication on the European Union and the External Dimension of Human Rights Policy: from Rome to Maastricht and Beyond', COM (95) 567. For further details see Lorand Bartels (2005) *Human Rights Conditionality in the EU's International Agreements*, Oxford, Oxford University Press.

27 Council of Ministers 'Basic principles on the use of restrictive measures' (sanctions), doc. 10198/1/04, 14 July 2004, para. 3.

28 Council of Ministers 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy', doc 15114/05, 2 December 2005, para. 1.

With regard to IHL, the EU Guidelines²⁹ on promoting compliance with international humanitarian law (2005/C 327/04) set out the operational tools for the EU and its institutions to induce compliance. They refer to the use of restrictive measures and sanctions as a potentially effective means to ensure compliance with IHL. They also identify as a means of action the use of the 1998 EU Code of Conduct on Arms Export, Criterion 2 of which states that an importing country's compliance with IHL should be considered before licenses to export arms to that country are granted. In December 2008, the EU Code of Conduct has become legally binding through a 'Council Common Position Defining Common Rules Governing the Control of Exports of Military Technology and Equipment'³⁰. This legally binding common position has eight criteria governing the transfer of arms by member states, which include the prohibition of arms transfers to states engaged in serious violations of human rights and to states where arms exports risk prolonging armed conflicts.

In addition, the Community applies conditionality to specific arrangements beyond third country agreements. For instance, the new Framework Partnership Agreement with Humanitarian Organizations, which governs relations between the European Commission's Humanitarian Aid Office (ECHO) and its partners and whose purpose is to define roles and responsibilities in the implementation of EU-financed humanitarian operations, states that for actions to be eligible for Community funding they must respect IHL.³¹

There have been efforts by the EU to increase consistency and coherence between these commitments and their application in practice, ensuring for example that the formulation of all Community policies avoids negative human rights effects and maximizes the positive impact.³² Such efforts have sought to better organize the EU "tool-box" for the promotion of human rights, including *démarches*, guidelines, dialogues, development cooperation, etc.³³ As noted in the 2008 EU Annual Report on Human Rights: 'the EU has made additional efforts to strengthen the coherence and transparency of its human rights policy. It is important to make this policy more effective and to have human rights fully taken into account in all relevant policies and actions, within and outside the EU, in order to ensure the EU's credibility vis-à-vis third countries, including by integrating clauses on human rights and core labour standards systematically in European Community negotiations and EU agreements with third countries.

29 In addition to the Guidelines on IHL, the EU's Guidelines on human rights cover the death penalty (adopted 1998 - updated on 2008), human rights dialogues (2001 - updated on 2009), torture and other cruel, inhuman or degrading treatment or punishment (2001 - updated on 2008), children and armed conflict (2003 - updated on 2008) and human rights defenders (2004 - updated on 2008), Violence against women and girls and combating all forms of discrimination against them (2008).

30 Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 8 December 2008, <http://register.consilium.europa.eu/pdf/en/08/st15/st15972-re01.en08.pdf>

31 Commission 'Framework Partnership Agreement with Humanitarian Organizations', 27 November 2007, Art. 5.1.

32 Communication from the Commission to the Council and the European Parliament 'The European Union's Role in Promoting Human Rights and Democratisation In Third Countries', COM(2001) 252 final, 8 May 2001, p.5 and p.27. See also Communication from the Commission to the Council and the European Parliament 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners' COM(2003) 294 final, Brussels 21 May 2003.

33 Council of the European Union 'EU Annual Report on Human Rights', 13522/1/06, 12 October 2006, p.53.

The EU human rights guidelines and other norms will be further elaborated and operationalized through the development of practical implementation tools'.³⁴

2.3 EU POLICY INSTRUMENTS AND LEGAL OBLIGATIONS VIS-À-VIS ISRAEL AND THE PA

In order to contribute to the fulfilment of the two state solution alongside respect for human rights and IHL, as well as to ensure compliance with the above-mentioned legal principles and obligations, the EU has deployed its policy instruments in Israel and the OPT under three main headings: diplomacy, contractual relations and capacity-building. Each policy heading is governed by different decision-making rules, and each has built into it different mechanisms for influencing the conflict and promoting the EU's objectives and legal commitments. In principle, the three policy headings are complementary, thus leading to mutually reinforcing results.

2.3.1 Diplomacy: multilateral and unilateral initiatives

The first policy heading is diplomacy, which is conducted in the context of the EU's CFSP. Decision-making procedures require unanimity amongst the member states and the method of influence is that of socialization. Hence, having determined a unanimous common position, the EU acts, not through pressure and coercion, but through awareness-raising, arguing, persuading and shaming the third country in question, thus inducing it to rearticulate its interests and beliefs, and consequently its actions in the conflict.

The Union's diplomatic role in the Middle East includes multilateral and unilateral initiatives. Following the 1991 Madrid conference, EU multilateral diplomatic involvement took the form of chairing the Regional Economic Development Working Group and co-chairing several other working groups. In 1995 and in the context of Oslo, the EU launched the Euro-Mediterranean Partnership (EMP), a multilateral forum intended to foster structural peace through functional cooperation in the Mediterranean. In July 2008, the EMP was incorporated in the French-inspired Union for the Mediterranean (UfM), in which Israel, the PA and the Arab Mediterranean countries, amongst others, are included. Like the EMP, the UfM is meant to promote mutual interest cooperation between the two shores of the Mediterranean in specific soft policy domains. With the end of the Oslo process, the Union has also acquired a more structured role in multilateral mediation, most notably with its participation in the Quartet alongside the US, Russia and the United Nations (UN). In the context of the Quartet, the EU has promoted several diplomatic initiatives such as the Roadmap for Peace,³⁵ originally conceived under the 2002 Danish EU Presidency, and the 2002-5 push for PA reform undertaken by the Quartet's Task Force on Palestinian Reform, chaired by the Commission. The EU has also staffed and financed Quartet initiatives such as the Quartet Envoy for Disengagement in 2005-6 and the Office of the Quartet Representative since 2007.

³⁴ Council of the European Union 'EU Annual Report on Human Rights', 14146/2/08 REV 2, 27 November 2008, p.202.

³⁵ For a detailed account of EU's role in drafting the roadmap see Wybe Douma (2006) 'Israel and the Palestinian Authority' in S. Blockmans and A. Lazowski (ed.) *The European Union and its Neighbours A legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, The Hague, Asser Press, pp.437-439.

Moving to unilateral frameworks of action, we find the EU's declaratory diplomacy and the roles of CFSP High Representative Javier Solana and the EU Special Representative for the Middle East Peace Process (MEPP). "Declaratory diplomacy" entails the issuing of public statements and démarches both during meetings of the Council of Ministers and the European Council and in response to specific facts and events. They take the form of Council of Ministers or European Council conclusions or statements by the EU Presidency, the Troika (the CFSP High Representative, External Relations Commissioner and Presidency) or the CFSP High Representative. The purpose of these declarations is both that of signalling the Union's collective position and praising/shaming particular acts and actors. Declarations and démarches have been pinpointed as forms of action for the implementation of the EU's Guidelines on human rights and IHL. Hence, for example, in a March 2009 declaration by the Czech EU Presidency, the EU reminded Israel of its obligations under the Roadmap and international law, and stated that the demolition of houses in East Jerusalem threatens the viability of a comprehensive, just and lasting settlement in conformity with international law.³⁶

As for the roles of the CFSP High Representative and the Special Representative for the MEPP, whereas High Representative Solana acts in response to and in the context of particular diplomatic initiatives (e.g. the Roadmap, ceasefire talks, disengagement), the Special Representative (currently Marc Otte, previously Miguel Moratinos) is tasked with establishing contact with all parties, offering good offices and promoting compliance with agreements, human rights and international law. EU diplomacy normally takes the lead only on specific crisis management initiatives (e.g. the Israeli siege of the Church of the Nativity in 2002), rather than the overall mediation of the conflict, which remains firmly in the hands of the US.

2.3.2 Contractual relations: Association and the European Neighbourhood Policy

The second policy heading at the EU's disposal regards its bilateral contractual ties with Israel and the PLO/PA. Here, decision-making is mixed – qualified majority and unanimity voting – reflecting the mixed nature of the agreements the EU has concluded with the parties. The Union's contractual ties have been progressively upgraded since the 1960s. Israel's Association Agreement which entered into force in 2000 is extensive and covers political dialogue, free trade in industrial and select agricultural products, freedom of establishment, free movement of capital, the harmonization of regulatory frameworks as well as social and cultural cooperation.³⁷ Israel has more recently also signed additional agreements on procurement, agriculture, scientific and technical cooperation, aviation and the European Global Navigation Satellite System (Galileo). While far less developed than in the case of Israel, the PLO signed an Interim Association Agreement with the EU in 1997, providing for the partial liberalization of trade. However, as opposed to EU-Israel relations, the implementation of the EU-PLO agreement has been grossly ineffective due to Israel's non-recognition of, and thus non-cooperation in, the functioning of the agreement. Finally, both Israel and the PA have been included in the

³⁶ Declaration by the Presidency on behalf of the European Union on possible house demolitions in East Jerusalem, Brussels, 12 March 2009.

³⁷ The association agreement between Israel and the EU is the main legal instrument of the relationship between the EU/EC and Israel. For further details on this agreement see Douma (2006) *op. cit.*, pp. 440-450.

European Neighbourhood Policy (ENP), with Action Plans having been published for both in 2004.³⁸ Implementation of the EU-Israel Action Plan has accelerated over the years, and the Plan is set to expire and scheduled to be replaced in 2009, whereas the EU-PA Action Plan remains largely a dead letter.

In the context of these contractual relations, the EU can rely on socialization, conditionality and passive enforcement to pursue its objectives and induce compliance with human rights and IHL. Socialization is the EU's preferred channel of influence. Particularly relevant in the case of EU-Israel relations,³⁹ the Association Agreement includes several institutionalized forums for dialogue: the Association Council, the Association Committee, the Sub-Committee on Political Dialogue, and, within it, the informal working group on Human Rights.⁴⁰ Political dialogue has also been pinpointed by the EU Guidelines as a principal method for ensuring respect for IHRL and IHL, notably the EU Guidelines on promoting compliance with international humanitarian law.⁴¹

The EU can also engage in ex post conditionality and passive enforcement with both Israel and the PLO/PA by withdrawing the benefits provided in the context of contractual relations through partial or total suspension of the agreements in the event of a material breach thereof. In the case of EU-Israel relations, this includes Article 83 and Protocol 5 of the Association Agreement, which define the territory lawfully covered by the agreement, i.e., the State of Israel within the 1967 borders and thus not Israeli settlements illegally constructed in the OPT. Ex post conditionality could also be applied through the "essential elements" and "non-execution" articles. Article 2 of the EU-Israel Association Agreement states that relations between the parties as well as all the provisions of the agreement shall be based on the respect for human rights and democratic principles. These principles guide their domestic and international policies and constitute an essential element of the agreement. The Interim Association Agreement between the EU and PLO contains the same provision articulated further through an explicit reference to the human rights enshrined in the Universal Declaration on Human Rights, which is not spelled out in the EU-Israel Association Agreement.⁴² Article 79 and Article 70 of these two agreements respectively in turn entitle the parties to take appropriate measures if one considers that the other has failed to fulfil an obligation under the agreement. However, human rights provisions embedded in contractual agreements have had limited impact in the southern Mediterranean, and the Commission and Council have consistently refused to invoke "non-execution" clauses to deal with human rights non-compliance in the EMP countries.

³⁸ EU-Israel Action Plan, 9 December 2004; EU-PA Action Plan, 9 December 2004.

³⁹ The EU has also established an Association Council with the Palestinians. However, in view of the malfunctioning of the EU-PLO agreement, in practice these institutionalized forums for dialogue are unutilized.

⁴⁰ As opposed to other ENP countries, there is no human rights sub-committee in EU-Israel relations, but rather an informal human rights working group within the context of the political dialogue sub-committee. The first meeting of the EU-PLO human rights subcommittee instead took place in December 2008.

⁴¹ See 'European Union Guidelines on promoting compliance with international humanitarian law', para 16 (a).

⁴² Art. 2 of the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part. The article reads as follows: 'Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the universal declaration on human rights, which guides their internal and international policy and constitutes an essential element of this Agreement'.

Finally, the EU could exert ex ante conditionality through the ENP by delivering benefits foreseen in the action plans only if the parties fulfil the priorities specified in those plans. The ENP Action Plans for Israel and the PA are implemented and monitored under the framework of the Association Agreement and the Interim Agreement respectively, and are intended to facilitate the fulfilment of the provisions of these agreements.⁴³ In the case of the EU-PA Action Plan, clear steps were spelt out in the areas of democracy, human rights, the judiciary, fiscal transparency, the security sector and the administration. In the case of Israel, the Action Plan instead mentions only vaguely and in the context of political dialogue 'facilitating efforts to resolve the Middle East conflict, strengthening the fight against terrorism and arms proliferation, promoting the respect for human rights, improving the dialogue between cultures and religions, cooperating in the fight against anti-Semitism, racism and xenophobia'. When it comes to international law, the Action Plan limits itself to stating that the EU and Israel would 'work together to promote (...) the respect of human rights and international humanitarian law', thus seriously curbing the prospects of ex ante conditionality being exerted in the context of the ENP.⁴⁴

2.3.3 Capacity building: aid and the ESDP missions

The last policy heading is that of assistance to the Palestinians. We include under this heading both financial aid, primarily disbursed by the Commission under the Community pillar and majority voting, as well as European Security and Defence Policy (ESDP) missions deployed under the CFSP pillar and agreed to by the member states by unanimity. Assistance can influence the Palestinians through capacity-building and conditionality. To the extent that the persistence and deterioration of the conflict is viewed as being due to inadequate (Palestinian) capabilities, assistance can financially and technically support the build-up of such capacities. Alternatively, the EU can engage in aid conditionality, including both negative conditionality, such as the suspension of aid to the Hamas government, as well as positive conditionality, such as the reform-related EU conditionalities used particularly in the 2002-5 period.

EU aid to the Palestinians has been disbursed to support "state"-building (or "state"-survival) and economic development (or economic subsistence), although since the mid-1990s and particularly after 2000 it has increasingly taken the form of humanitarian assistance and payments to cover the PA's recurrent expenditure.⁴⁵ Since 2000, average EU annual transfers to the Palestinians have risen exponentially, reaching almost €1bn in 2008 if member state contributions are included. In the context of the ESDP, the EU has been involved in border monitoring and capacity-building in the security sector. Since 2005 (although practically since 2007), the EU Police Mission in the Palestinian Territories (EUPOL-COPPS) has provided civil police training and equipment and has engaged in the reconstruction of Palestinian security and judicial facilities (i.e. prisons, courts and police stations). In the context of the November 2005 US-brokered Agreement on Movement and Access (AMA) and up until June 2007, the EU also engaged in border monitoring at the Rafah crossing (the crossing point for the movement of people between the Gaza Strip and Egypt) through its border monitoring mission EUBAM. While

⁴³ See EU Council Conclusions on the ENP, 14 December 2004.

⁴⁴ EU-Israel Action Plan, p. 4.

⁴⁵ Le More, Anne (2008) *International Assistance to the Palestinians after Oslo: Political Guilt; Wasted Money*, London, Routledge.

not having executive power over who could cross through Rafah,⁴⁶ EUBAM was mandated to operationally monitor, verify and evaluate PA performance in border management, as well as to build PA border and customs capacity through training, equipment and technical assistance. However, Israel, beyond retaining an indirect presence and control through its liaison office at Kerem Shalom,⁴⁷ could also determine at will when and whether to let EUBAM function in practice by allowing or stopping EU monitors stationed in Israel from reaching Rafah. Israel thus reserved the right to withdraw its consent to the border arrangement and to order the shutting of the crossing point and EUBAM had no power to ensure Israel's respect for the terms of the AMA. The AMA, and EUBAM operating within it, did not ensure free access between the Strip and Egypt.⁴⁸

⁴⁶ Egypt and the PA had ultimate decision-making power over the Rafah crossing. Israel, through its presence in the liaison office at Kerem Shalom (a few kilometres away from Rafah) monitored through video cameras the crossing and could veto entry up to six hours, after which the decision rested with the PA.

⁴⁷ Kerem Shalom is also a major crossing point for the movement of goods from Egypt into the Gaza Strip.

⁴⁸ Between the signature of the AMA in November 2005 and June 2006 the average daily number of crossings of people through Rafah was approximately 1,300. Between June 2006 and June 2007 the number of average daily crossings fell to just over 400. See Gisha and Physicians for Human Rights (2009) 'Rafah Crossing: Who Holds the Keys', summary, March 2009.

3. THE DEPLOYMENT OF EU POLICY INSTRUMENTS PRIOR TO THE OFFENSIVE IN THE GAZA STRIP

With this policy context in mind, let us briefly review developments in the three years leading to "Operation Cast Lead" and delve into the deployment of EU policy instruments in this period. Were EU policy instruments used in conformity with EU objectives and commitments, and in such a way as to prevent the escalation, or did they fuel it further? What does this suggest regarding the EU's reaction during the military operation itself? Were EU policies part of a coherent yet failed strategy, or did the EU lack a strategy to deal with the Gaza Strip as is frequently suggested by observers and officials alike?⁴⁹

3.1 POLICIES BETWEEN THE PA ELECTIONS AND THE COLLAPSE OF THE NATIONAL UNITY GOVERNMENT

In view of Hamas' victory in the January 2006 Palestinian Legislative Council elections⁵⁰ and its subsequent entry into the PA, the EU, alongside its Quartet partners, immediately imposed conditionality on the new government. In view of the inclusion of Hamas on the EU's list of terrorist organizations since 2003, some form of conditionality was inevitable. Yet the Quartet

went beyond calling on the new government to renounce terrorism and insisted on three "principles" (an end to violence, recognition of Israel and acceptance of previous agreements), which soon evolved into strict conditions for the recognition of the government.⁵¹ The latter two conditions in particular were disputable. Hamas was called upon to recognize Israel, despite the fact that only states (or at most the PLO as the legal representative of the Palestinians, of which Hamas is not part, and which has recognized Israel) recognize other states and that the borders by which Israel would be recognized were left undefined. Regarding the acceptance of previous agreements, ironically it was the Sharon government which in 2001 first asserted that it would only "respect" rather than "accept" previous agreements.⁵²

EU diplomacy in the context of the Quartet failed to induce compliance by Hamas. Hamas refused to fully endorse the three conditions, and in response the EU, taking the lead from the US,⁵³ exerted strong negative conditionality on the PA by boycotting the government and withholding assistance. In addition, the international community froze international bank transactions in the OPT following the US Congress' Palestinian Anti-Terrorism Act,⁵⁴ and Israel halted the transfer of PA tax revenues, arrested dozens of Hamas ministers and parliamentarians.

⁴⁹ In an interview with an EU official, March 2009, the claim was made that the EU lacked a strategy towards Gaza in the period leading up to the offensive. Yet, as discussed below, the EU, in fact, appeared to have a strategy, which however failed to deliver its intended results.

⁵⁰ The international community, including the EU, had accepted Hamas' participation in the PLC elections. The conduct of the elections was monitored by EU observers and viewed by them as being free and fair.

⁵¹ On the evolution of this policy see Alvaro de Soto (2007) 'End of Mission Report', May 2007, reprinted in *The Guardian*, 14 June, pp.17-19. <http://www.guardian.co.uk/frontpage/story/0,,2101676,00.html>

⁵² Akiva Eldar (2007) 'The Syrian secret Sharon did not reveal to Olmert', *Haaretz*, 20 March, <http://www.haaretz.com/hasen/spages/839634.html>

⁵³ On the US's lead in defining the Quartet's policy see De Soto (2007) op. cit.

⁵⁴ 'Palestinian Anti-Terrorism Act of 2006', <http://www.govtrack.us/congress/bill.xpd?bill=h109-4681>

and restricted their movement within the OPT. The EU repeatedly called on Israel to fulfil its legal obligations with respect to the delivery of tax revenues, the easing of restrictions on movement and the implementation of the AMA.⁵⁵ Yet words were not followed by deeds. On the contrary, EUBAM, which required Israeli cooperation at Kerem Shalom, in practice, acquiesced in the frequent closure of Rafah. The closure of the Rafah crossing increased dramatically after 10 June 2006 - two weeks prior to the capture of Israeli Corporal Gilad Shalit in an attack on a military base near Gaza on 25 June 2006 - when Israel halted its cooperation at Kerem Shalom.⁵⁶ With EU monitors unable to reach Rafah, the crossing was closed 85% of the time between June 2006 and June 2007. EU cajoling or unilateral Egyptian actions only led to its occasional opening for humanitarian and religious pilgrimage purposes up until June 2007, when the crossing was permanently shut.⁵⁷ The closure of the Rafah crossing has had serious implications for the access of Palestinians to healthcare, academic opportunities and employment abroad, for the separation of families, for commerce and business, and in terms of fuelling a general sense of entrapment amongst the civilian population of the Gaza Strip.⁵⁸ EUBAM could not have opened the Rafah crossing alone and thus cannot be held primarily responsible for its closure. Yet according to Gisha, by remaining part of the AMA arrangement despite the frequent closure of Rafah up until June 2007 (and its permanent closure thereafter), the EU and its member states have acquiesced in the collective punishment caused by the closure.⁵⁹

The unprecedented policies of boycott, sanctioning and closure instituted against an occupied population pushed the OPT to the humanitarian and economic brink, setting off alarm bells from UN agencies, the World Bank and international Non-Governmental Organisations (NGOs).⁶⁰ In response, at the EU's insistence, the Quartet agreed on a Temporary International Mechanism (TIM), through which funds would be channelled to the OPT while by-passing the Hamas-led PA government.⁶¹ Beginning in August 2006, the TIM provided social allowances to civil servants and pensioners, direct financial and material support to the health, education, water and social sectors, as well as funds to pay fuel bills. The TIM, alongside growing humanitarian needs, led to a surge in EU aid to the OPT. Commission and member state aid rose from €500 million in 2005 to almost €700 million in 2006 and €1 billion in late 2007.⁶² While the boycott paralysed the PA, thus further worsening the economic and humanitarian situation in the OPT, the TIM and the surge in aid that came with it pulled Palestine one step back from a humanitarian catastrophe.

55 EU General Affairs and External Relations Council (2007) Conclusions on Middle East Peace Process, 23 April, Luxembourg, 2796th Meeting, paragraph 6.

56 It is interesting to note here that while Israel's non-cooperation at Kerem Shalom is often linked to the Shalit case, it dates back two weeks prior to the capture and is rather linked to Israel's dissatisfaction with its limited control over the functioning of the AMA. Interview with EU official, March 2009.

57 Gisha and Physicians for Human Rights (2009) Rafah: Who holds the keys?, March 2009, Summary.

58 Interview with Gisha, Tel Aviv, March 2009. The consequences of closure were aggravated by the fact that in the same period Israel destroyed Gaza's power plant, made wide use of sonic booms, increased its use of artillery, destroyed property, and imposed other forms of collective punishment on the civilian population in the territory.

59 Gisha and Physicians for Human Rights (2009) op.cit.

60 See for example the Office of the Special Envoy for Disengagement (2006), Periodic Report, April; United Nations (2006), Assessment of the Future Humanitarian Risks in the occupied Palestinian territory, 11 April; or Oxfam (2007) 'Poverty in Palestine: the human cost of the financial boycott', Briefing Note, April, http://www.oxfam.org/en/files/bn070413_palestinian_aid_boycott.pdf/download

61 The EU, which contributes significantly higher levels of assistance to the PA than the US, had a much higher stake in an eventual collapse of the Palestinian Authority.

62 European Neighbourhood Policy - The Occupied Palestinian Territory, MEMO/08/213, Brussels, 3 April 2008, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/213&format=HTML&aged=0&language=EN&guiLanguage=en>

The rising levels of assistance through the TIM, beyond leading to a paralysed PA and a deepening humanitarian crisis, also entailed the de-development of the governance structures of the would-be Palestinian state. Hence, far from leading to capacity-building, the TIM paradoxically led to the contrary.⁶³ The TIM contributed to reversing the few steps forward made in PA governance in 2002-5, which were promoted at the time especially by the EU. The by-passing of official institutions with the exception of the Presidency led to a re-centralization of power in the hands of Mahmoud Abbas and generated an increasingly unaccountable and opaque management of available PA funds, despite progress made on both counts in the three previous years. The effects of political and economic de-development were starkest in the Gaza Strip, where Israel's increasing closures post-disengagement alongside the absence of a functioning PA, pushed the Gaza Strip into chaos and lawlessness, with the emergence of mafia-style gangs and al-Qaeda-like cells, which flourished from 2006 up until the Hamas take-over in June 2007.⁶⁴

One of the most significant effects of EU policies in 2006-7, alongside those of the US and Israel as well as internal dynamics within the Palestinian political scene, was to contribute to the polarization between Fateh and Hamas. Immediately following the Palestinian elections, Hamas proposed a coalition government to Fateh, which the latter rejected. A year later, in view of rising factional violence particularly in the Gaza Strip and the paralysis of the PA, the EU repeatedly called for national unity.⁶⁵ When the two factions were reconciled in the Saudi-brokered National Unity Government (NUG) in February-March 2007, for a brief moment Europeans showed cautious optimism and appeared willing to reconsider their approach to the PA. In fact, while the Quartet's conditions were not fully respected, through the Mecca agreement the NUG and Hamas within it had made significant steps towards them, in particular by agreeing to "respect" (rather than accept) previous agreements⁶⁶ and publicly acknowledging the existence of the State of Israel and committing to the two-state solution on several occasions.⁶⁷ The EU's reaction was pivotal in determining the future of Palestinian reconciliation in so far as the NUG could have survived only if it was allowed to function, which in turn required a resumption of aid to it, alongside Israel's lifting of movement restrictions, release of imprisoned lawmakers and other prisoners and resumption of PA tax revenue transfers. EUPOL-COPPS could also have assisted the overhaul of PA security forces, where the Fateh-Hamas divide played out most starkly.

63 When announcing the non-renewal of his mandate, the Quartet Envoy for Disengagement James Wolfensohn pleaded against a Quartet policy which would in practice reverse the steps forward made in PA governance and de-responsibilize both the Hamas administration and Israel as far as its IHL obligations were concerned. As noted by an EU official, the Quartet's conditionality and the ensuing TIM did precisely the opposite of what was called for by the Quartet Envoy. Interview with EU official, March 2009.

64 See International Crisis Group (2007) 'After Mecca: Engaging Hamas', February 2007; and International Crisis Group (2008) 'After Gaza', August 2008, <http://www.crisisgroup.org/home/index.cfm?id=1271&l=1>

65 Council conclusions on the Middle East, 17 October 2006; Council conclusions on the Middle East, 13 November 2006; Council conclusions on Middle East, 22 January 2007.

66 Text of Mecca Accord for Palestinian coalition government, Haaretz, 8 February 2007.

67 Conol Urquhard (2007) 'Hamas official accepts Israel but stops short of recognition', The Guardian, 11 January 2007; Orly Halpern (2007) 'Experts Question wisdom of boycotting Hamas', Forward, 9 February,

Yet when the US (and Israel) made clear that the Mecca agreement fell short of meeting the Quartet's principles,⁶⁸ the EU muted its initial support for the NUG. The boycott and sanctioning policies of the EU, like those of Israel and the US, remained unchanged. On top of this, the US financed, armed and trained security forces loyal to Fateh.⁶⁹ All was set for a new round of confrontation in May-June 2007, which culminated with Hamas' "victory" in the Gaza Strip and Abbas' dissolution of the NUG and nomination of a non-Hamas caretaker government in the West Bank under the premiership of Salam Fayyad. The EU, alone, did not cause the collapse of national unity and the political separation between the West Bank and the Gaza Strip that ensued, which was determined, inter alia, by internal Palestinian political dynamics, Israel, the US and other actors in the region. Yet by supporting Israeli and American policies and imposing negative conditionality towards Hamas and the NUG, it was actively part of the international approach which led to these results.

3.2 POLICIES BETWEEN THE COLLAPSE OF THE NUG AND "OPERATION CAST LEAD"

Far from reversing its approach, the EU (alongside Israel and the US) persisted in negative conditionality towards Hamas between June 2007 and December 2008. The implicit objective remained that of "defeating" Hamas through a double-track strategy of punishment of Hamas, and consequently of the population of the Gaza Strip, and rewards to the PA/Fateh government, and thus to the population of the West Bank. Yet an unwavering unwillingness to exert any form of pressure on Israel regarding its own human rights and IHL obligations as an occupying power sowed the seeds of the strategy's demise.

3.2.1 "West Bank First"

The EU, alongside the US and Israel, immediately stated its will to work with the caretaker government in the West Bank, a willingness which soon crystallized into what became known as the "West Bank first" strategy. The logic underpinning this strategy was that of rendering the West Bank a prosperous place, signalling to the Palestinians the dividends that could be reaped through moderation and cooperation with the international community and Israel. Through positive conditionality and capacity-building, Palestinian support for "moderates" was expected to increase. The EU's "West Bank first" strategy contained three elements. All three failed to deliver.

First and on the economic front, the EU immediately resumed financial transfers to the PA. At the December 2007 Paris donor conference, the EU and its member states reconfirmed their role as the most generous funder of the PA, signalling their support for the caretaker government. They pledged \$3.4 billion out of a total of \$7.7 billion in budget support, development aid and humanitarian assistance. Of these funds the EU pledged €440 million. These funds were to be

⁶⁸ Donald Macintyre (2007) 'Israel at loggerheads with allies on boycott of Palestinian coalition', *The Independent*, 18 March.

⁶⁹ Adam Entous and H. Tamimi (2007) 'Palestinian Abbas forces amassing arms' Reuters, 28 January; Alastair Crooke (2007) 'Our second biggest mistake in the Middle East', *London Review of Books*, 5 July; 'Abbas faces showdown as outlawed Hamas force increases', *Sunday Herald*, 7 January 2007.

channelled to support Fayyad's Palestinian Reform and Development Plan (PRDP) for 2008-10. By February 2008, the Commission replaced the TIM with a new financial instrument – PEGASE – entirely devoted to supporting the PA caretaker government and fully aligned with the priorities of the PRDP. Of the €440 million pledged, €325 million would be channelled through PEGASE. The Commission also presented itself as a model donor by frontloading its payments to the PA, and three months after the donor conference it had already disbursed €300 million. By November 2008 the EU had committed €486 million, thus exceeding its pledges made in Paris.⁷⁰ Despite this, living standards in the West Bank did not improve. The conditions that had been identified by the World Bank for the success of the PRDP were international aid, Palestinian reform and the lifting of Israeli movement restrictions: 'aid and reform without access are unlikely to revive the Palestinian economy' argued the Bank.⁷¹ Yet whereas donor assistance met and surpassed initial expectations and the caretaker government made some steps forward in reform, Israel's movement restrictions increased,⁷² non-compliance with the AMA persisted and settlement construction accelerated.⁷³ The French Presidency warned of Israel's 'worrying indifference to repeated calls from the international community'.⁷⁴ Yet little action followed. The economic situation in the West Bank thus failed to improve in 2008,⁷⁵ and of the €486 million spent by the Commission, a mere €53m could be devoted to development, while most of the funds were spent on meeting recurrent expenditure (i.e. principally salary payments to PA employees).⁷⁶

Second and on the security front, the EU activated EUPOL-COPPS in the West Bank. The purpose of the mission was that of training and equipping the PA civil police in order to improve living standards in the West Bank by increasing security.⁷⁷ EUPOL-COPPS trained and equipped approximately 600 police officers and helped improve law and order in West Bank, particularly in towns such as Jenin and Nablus. In May 2008 the mission was expanded into a broader rule of law mission covering the penal and judicial systems.⁷⁸ Whereas EUPOL-COPPS contributed to improved law and order in the West Bank, it failed, or rather could not succeed, in inspiring an overhaul of the security sector, which remained fundamentally stalled by the Fateh-Hamas

⁷⁰ EC assistance to the Palestinians in 2008, http://ec.europa.eu/external_relations/occupied_palestinian_territory/ec_assistance/ec_aid_to_pa_2008_en.pdf

⁷¹ World Bank (2008) 'Palestinian Economic Prospects: Aid, Access and Reform' 22 September, p.11.

⁷² In the West Bank, the number of obstacles increased in 2008 from 563 in January to 630 in September, in addition to flying checkpoints, gender and age restrictions, curfews and the Wall/Barrier. Upon insistence of Quartet Special Envoy Tony Blair, Israel shifted or opened some checkpoints in 2008. Yet addressing individual checkpoints made no difference to the overall movement restrictions in the West Bank. On this see *The Middle East Quartet: A Progress Report*, 25 September, co-signed by several NGOs, including EMHRN, <http://www.emhrn.net/usr/00000026/00000027/00000028/00002590.pdf>

⁷³ In 2008, there was a 60% increase in new structures built in settlements and an eight-fold increase in construction tenders compared to the previous year. *Peace Now Report, Summary of Construction in the West Bank 2008*, http://www.peacenow.org.il/data/SIP_STORAGE/files/5/3935.pdf According to estimates from the Central Bureau of Statistics', in 2008, the settler population (excluding East Jerusalem) grew at a much faster rate than the general population: 4.7 percent compared to 1.6 percent respectively. Source B'tselem: <http://www.btselem.org/english/Settlements/Statistics.asp>

⁷⁴ EU Presidency statement on construction of new housing units in Maskiot on the West Bank, [www.delisr.ec.europa.eu/english/whatsnew.asp?id=1023](http://ec.europa.eu/english/whatsnew.asp?id=1023)

⁷⁵ World Bank (2008) 'Palestinian Economic Prospects: Aid, Access and Reform', 22 September.

⁷⁶ EC assistance to the Palestinians in 2008 (last updated January 2009), http://ec.europa.eu/external_relations/occupied_palestinian_territory/ec_assistance/ec_aid_to_pa_2008_en.pdf

⁷⁷ US efforts instead have concentrated on training and equipping the PA national security forces and the presidential guard.

⁷⁸ The EU's police mission for the Palestinian territories: <http://www.consilium.europa.eu/uedocs/cmsUpload/EUPOL%20COPPS%20booklet.pdf>

divide, and more pointedly by the PA-Hamas divide.⁷⁹ In turn, despite improved security in the West Bank, security forces remained politicized, lacking democratic accountability. They engaged in human rights abuses, arbitrary arrests and detentions, particularly against hundreds of Hamas members and supporters in the West Bank (much like Hamas has done with its Fateh opponents in the Gaza Strip). Furthermore, the efforts of the Palestinian civilian police were stalled by the frequent Israeli military incursions in the same cities in which PA forces were deployed. The EU attempted to remedy this by sponsoring human rights training programmes among police forces. But these micro interventions were a drop of water in an ocean.

Third and on the diplomatic front, the member states, the Commission, the Council and the High Representative pledged their support for the Annapolis process launched by the US in November 2007. In the run-up to the Annapolis conference, the EU tabled an 'Action Strategy for the Middle East Peace Process', committing to support bilateral efforts between the parties, the mediating role of the US, and the efforts of the Quartet and of the Arab League to advance the Arab Peace Initiative.⁸⁰ The purpose of the EU's diplomatic support for the Annapolis process was to demonstrate to the Palestinians that the dividends that could be reaped from moderation were not only economic but also political. The Annapolis process in practice ground to a halt by late 2008 without any progress in terms of convergence on final status issues. The EU as an actor had been excluded from the negotiation and mediation process,⁸¹ and its repeated declarations fell on deaf ears over the course of the year.

In 2008 the EU persisted in a vitiated strategy conceptualized during the Oslo years. It bankrolled the PA despite its growing undemocratic practices, and supported the diplomatic process while in practice acquiescing in Israel's policies of colonization. The expectation was that this would be sufficient to provide security to Israel while improving the lot of the Palestinians so as to secure their moderation and compliance.⁸² Yet as Richard Norton put it, all the Palestinians have seen is an 'entrenched occupation and a weak, corrupt government that is, at best, an ineffectual parody of democracy'.⁸³ All the EU's aid, technical assistance and diplomatic support could not compensate for, and paradoxically supported, the deteriorating situation on the ground. The "West Bank first" strategy failed with respect to its objective of positively altering Palestinian incentives in favour of "moderation", also because alongside it there was a second policy element, the asphyxiation of the Gaza Strip, to which we now turn.

79 Muriel Asseburg and Amr Hamzawy (2009) 'European Conflict Management in the Middle East: Toward a More Effective Approach', Carnegie Papers, Beirut. According to one Middle East analyst, as opposed to the years of Arafat's rule, there appears to be a growing distinction between Fateh and the PA and in particular the PA security services. The irreconcilability with Hamas has increasingly characterized more segments whose primary loyalty lies with the PA/security services than with Fateh. 'The EU and the Middle East Task Force', EUISS, 30 March 2009, Paris.

80 EU High Representative Javier Solana and EU Commissioner for External Relations Benita Ferrero-Waldner, 'Statebuilding For Peace In The Middle East: An EU Action Strategy', Joint Paper, November 2007.

81 Interview with EU member state diplomat, March 2009.

82 Le More, A. (2008) *International Assistance to the Palestinians. Political Guilt, Wasted Money*, London, Routledge.

83 Augustus Richard Norton (2009) 'The Gaza war: Antecedents and Consequences', Real Institute Elcano, ARI 2/1/09-3/2/09.

3.2.2 Tightening the grip on the Gaza Strip

The EU's double-track strategy consisted of rewarding the PA-led West Bank and on the other hand in punishing the Hamas-controlled Gaza Strip. Hence, since June 2007 the EU has persisted in its boycott of the Hamas government in Gaza by refusing contact with it and refraining from channelling aid through it. In addition, approved EU projects in the Gaza Strip (e.g. on the sewage system and the airport) remained dormant. The only EU aid channelled to the Gaza Strip in 2008 took the form of cash payments to 28,500 civil employees (including both PA civil servants who did not go to work under the Hamas administration as well as teachers and health workers) and to 24,000 Gaza residents under the Palestinian Vulnerable Families programme and payments to cover private sector arrears and to pay for fuel bills to operate Gaza's power plant, as well as humanitarian assistance under ECHO and the United Nations Relief and Works Agency (UNRWA), amounting to a total of approximately €220 million.⁸⁴ The fact that most EU money to the Gaza Strip in 2008 took the form of cash payments meant that, while having to be continuously negotiated with Israel, most assistance reached the Gaza Strip in 2008 despite the closure.⁸⁵ Yet as Israel's siege of the Strip tightened, even this EU aid to the Gaza Strip, in practice, ground to a halt by the end of the year.⁸⁶

In September 2007 Israel classified the Gaza Strip as "hostile territory"⁸⁷, severely restricting the access of humanitarian goods and fuel, while effectively banning the movement of commercial goods and people in and out of the territory. The declared aim was that of exerting pressure on Hamas, essentially creating a direct link between the pursuit of political goals and the collective punishment of the civilian population.⁸⁸ Israel's closure of the Gaza Strip persisted despite the Egyptian-brokered ceasefire agreement (tahdiya) between Israel and Hamas of 17 June 2008. The tahdiya agreement foresaw a halt to all military action, a relaxation of the siege, the opening of crossings and the launch of negotiations over Gilad Shalit's release. At Hamas' end, the ceasefire worked relatively well until November 2008, with a steady decrease in rocket attacks, seemingly mostly launched in defiance of Hamas.⁸⁹ Yet Israel's closure of the Strip persisted with no relaxation on the ban on trade, which led to a 50% unemployment rate and to

84 Benita Ferrero-Waldner Commissioner for External Relations and ENP (2009) 'European Union Pledges Support for reconstruction of Gaza', International Conference in support of the Palestinian economy for the reconstruction of Gaza, Sharm-el-Sheikh, 2 March 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/81>

85 Interview with UN official, and member state diplomat, March 2009.

86 Interview with EU official and UN official, March 2009.

87 The designation of a territory as "hostile" has no basis in IHL.

88 In doing so Israel has violated both its obligations as the occupying power under IHL (to allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel) and under IHRL (the right to life, health, movement, water and decent living). Interview with Gisha, Tel Aviv, March 2009.

89 In the 6 months of the agreement, 329 rockets were fired (mostly in June and July 2008), compared to an average of 380 rockets per month in the six months preceding the lull. Between 19 June and 4 November 2008 20 rockets and 18 mortar shells were launched (of which 8 fell inside the Strip). No Israeli casualties were reported during this period. See Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center, *The Six Months of the Lull Arrangement*, December 2008: www.terrorism-info.org.il/malam_multimedia/English/end_n/pdf/hamas_e017.pdf. However, as pointed out by one observer, the few rockets launched added to the public pressure in Israel to put an end to all rocket attacks. Comments by Israeli NGO to the authors, March 2009.

the shut-down of 95% of Gaza's industry due to lack of raw materials and export opportunities.⁹⁰ Israel also continued to hamper humanitarian access, including basic food and medical products. The Gaza Strip requires a daily average of 400-500 truckloads of humanitarian assistance to meet basic needs according to the International Committee of the Red Cross (ICRC) and the UN. In May 2008, i.e. a month before the ceasefire agreement, an average of 475 trucks were allowed into the Strip daily, compared to 564 in December 2005. Immediately after the ceasefire deal, Israel partially opened access points; yet in July 2008, Israeli Foreign Minister Tzipi Livni declared that all crossings would remain shut until the release of Gilad Shalit.⁹¹ Between 19 June 2008 and 5 November 2008 the average number of daily truckloads dropped to 120.⁹²

On 4-5 November 2008 the situation precipitated when Israel carried out an incursion, allegedly in order to destroy a tunnel under construction, which killed six Hamas militants. Hamas resumed rocket attacks, including launching longer range missiles which reached Ashkelon and Netivot creating additional Israeli public pressure on the government to take action. By 5 November Gaza's borders were almost entirely sealed as Israel allowed a mere 6 truckloads per day to enter the Strip. In a situation in which over 80% of the 1.5 million people are dependent on food aid,⁹³ the effect was devastating. In addition, the only power plant in the Gaza Strip was shut down in November due to the lack of fuel entering the Gaza Strip, leaving 250,000 Gazans without electricity and with running water once every 5-7 days. The siege was also extended to building materials and cash, forcing banks to close by early December 2008 and to a suspension of all cash-for-work programmes. EU assistance through cash programmes and fuel payments thus also ground to a halt.

The EU objected to Israel's closure policy, recognizing it as an illegal act of collective punishment.⁹⁴ Commissioner Benita Ferrero-Waldner stated: 'I am profoundly concerned about the consequences for the Gazan population of the complete closure of all Gaza crossings for deliveries of fuel and basic humanitarian assistance. I call on Israel to reopen the crossings for humanitarian and commercial flows, in particular food and medicine. Facilitation of fuel deliveries for the Gaza power plant should be resumed immediately. International law requires the provision of access to essential services such as electricity and clean water to the civilian population'.⁹⁵ Yet beyond words, little was done to induce Israel to lift its closure. On the contrary, the EU acquiesced in several Israeli decisions.⁹⁶ On fuel supplies, when in late 2007 Israel reduced the amount of fuel allowed to enter the Gaza Strip well below Gaza's minimum needs, the

⁹⁰ The Gaza Strip: A Humanitarian Implosion, March 2008, http://www.oxfam.org.uk/resources/policy/conflict_disasters/downloads/gaza_implosion.pdf; The Middle East Quartet: A Progress Report, 25 September 2008, <http://www.emhrn.net/usr/00000026/00000027/00000028/00002590.pdf>

⁹¹ Barak Ravid 'Shin Bet chief: Hezbollah deal may spur abductions', Ha'aretz, 27 July 2008, <http://haaretz.com/hasen/spages/1005851.html>

⁹² Sara Roy (2009) 'If Gaza Falls...', London Review of Books, 1 January.

⁹³ Gaza's humanitarian crisis', BBC News, 6 March 2008, http://news.bbc.co.uk/2/hi/middle_east/7191359.stm

⁹⁴ On the EU's definition of Israel's siege as collective punishment see 'EU Presidency Statement on further escalation of violence in Gaza and Southern Israel', 2 March 2008, <http://domino.un.org/UNISPAL.NSF/f45643a78fcbca719852560f6005987ad/25d22cbc70ead218852574010056004b!OpenDocument>

⁹⁵ Commissioner Ferrero-Waldner's speech 14 November 2008.

⁹⁶ The following examples draw from an interview with Gisha, Tel Aviv, March 2009.

Commission scaled down its own payments of fuel bills to the PA, which in turn purchases fuel from the Israeli company Dor Alon.⁹⁷ By permitting and operating under Israeli restrictions on fuel purchases and on the repair and maintenance of power plant turbines and the electricity network, the EU has implicitly recognized these restrictions as lawful. As far as EUBAM is concerned, the EU did not take further initiatives to ensure the implementation of the AMA after the complete closure of Rafah post-June 2007. On the contrary, the EU's own isolation of the Gaza Strip through its refusal of contact with and assistance to its authorities signalled through its deeds the EU's acquiescence in Israel's strategy of curbing Hamas through the collective punishment of the population. This strategy, while punishing the civilian population, tarnishing the Palestinians' view of democracy, and rendering them particularly vulnerable to the military offensive that ensued, had little effect in terms of disempowering Hamas, which remained firmly in control of the Gaza Strip.⁹⁸

3.2.3 Deepening bilateral relations with Israel

EU policies towards the OPT thus acted as a "light" version of the strategy espoused by Israel (as well as the US) in the same period. Hence, it is not surprising that little pressure was exerted by the EU on Israel to alter the latter's policies on the ground. In fact the 2006-8 period saw a deepening of EU-Israeli ties, irrespective of Israel's increasingly serious violations of IHRL and IHL.

In the autumn of 2008, there were some developments regarding the misapplication of the EU-Israel association agreement, whereby EU benefits are illegally granted to Israeli settlements in the OPT such as trade preferences granted to settlement products under the Association Agreement or funding channelled to settlement entities under the Community's Research Framework Programmes. Specifically, suspected issues of fraud to the "technical arrangement" regulating the rules of origin problem were publicly exposed in the autumn of 2008 by the UK, which proposed in the Council a discussion of ways to tighten the arrangement. Yet rather than proposing to move away from the technical arrangement, to place the burden of proving the precise origin of products on Israel rather than on European customs authorities, and to seek a

⁹⁷ Israel proposed drastic cuts in the fuel and electricity supplies to Gaza in September 2007 at the same time that it declared Gaza to be a «hostile territory». Adalah and Gisha, on behalf of 10 Palestinian and Israeli human rights organizations, challenged these cuts before the Israeli Supreme Court, which subsequently rejected the petition. In this case, the court accepted the state's arguments that Israel is not in effective control of Gaza, and approved the state's "minimum humanitarian standard", a standard that has no basis in law, while alleviating Israel of any responsibility for the deteriorating humanitarian situation in Gaza. See High Court of Justice (HCJ) 9132/07, Jaber Al-Basyouni Ahmed v. The Prime Minister (decision delivered 30 January 2008).

⁹⁸ Telephone interview, Palestinian Centre for Human Rights (PCHR) and Al Mezan Center for Human Rights, Gaza, March 2009.

legal solution to the problem (i.e. arbitration or unilateral suspension of the agreement)⁹⁹, the focus has shifted to the question of labelling in order to allow consumers to make an “informed choice” between Palestinian products and products produced in Israeli settlements.¹⁰⁰ Regardless of its symbolic relevance, labelling distracts from the core of the problem:¹⁰¹ the fact that Israel interprets its agreement with the EU in a manner that contravenes international and Community law.¹⁰² The awareness of refraining from assisting illegal Israeli actions in the OPT however may be slowly spreading. The British Embassy in Tel Aviv for example has stopped negotiations to lease a building belonging to Africa-Israel in view of the company’s role in West Bank settlement construction.¹⁰³ Yet to date, such moves remain few and far between, and the EU has neither sought legal solutions to avoid rendering aid or assistance to internationally unlawful acts in the OPT, nor adopted safeguard measures to avoid extending existing misapplications of EU-Israel agreements to other policy domains.¹⁰⁴

By contrast, the general gist underpinning EU-Israel relations is that of a deepening relationship, regardless of Israel’s conduct in the conflict. The EU-Israel Association Council, held on 8 June 2008, declared its intention to upgrade EU-Israel relations. The upgrade would entail strengthened political dialogue and Israel’s participation in EU programmes and agencies, integration into the single market, alignment with CFSP declarations and démarches on an ad hoc basis, and participation in ESDP missions, as well as efforts by the EU to normalize Israel’s role in UN bodies. Following the meeting, the Commission was mandated to explore the technical and economic aspects and the member states the political aspects. Consequently and at the political level, on 8-9 December, at the height of Israel’s collective punishment of the civilians in the Gaza Strip and its accelerated colonization of the West Bank through settlements and bypass roads, the Council declared its intention to deepen relations with Israel and to define the modalities of doing so by April 2009 in order to propose to the Association Council in May

99 By the end of 2004, the EU and Israel agreed on a “technical arrangement” according to which Israel would name the locality of production on the origin certificates of its products, placing the onus on member state customs to detect settlement products exported to the EU under the association agreement and deny preferences to them. However, both the Commission and the Council agreed that the technical arrangement does not represent a solution to exports of products coming from settlements but only a way to manage the problem. The technical arrangement allows Israel to continue applying the Association Agreement to the Occupied Territory and issue proofs of origin accordingly. Israel does not need to acknowledge in any official documents that products coming from the settlements are not products from Israel. Under the technical arrangement, EC custom officers void unilaterally Israeli certificates of origins; however legally this is something they could do only if an arbitration procedure had been launched and would have ruled in favour of the EU’s interpretation of the association agreement, i.e. if the Commission and the member states had sought a legal solution to this issue. Conversation with APRODEV, April 2009.

100 UK Foreign and Commonwealth Office (2008) ‘Non-Paper on Settlements’ November, http://www.fjffp.org/background6_eu/UK_Non-paper-0811.pdf. See also Barak Ravid (2008) ‘Livni to Miliband: U.K. plan to label West Bank goods is “exaggerated”’, Haaretz, 16 November, <http://www.haaretz.com/hasen/spages/1037780.html>.

101 Labelling may also prove counterproductive in so far as European consumers may not be able to distinguish Israeli settlement products from Palestinian products produced in the OPT.

102 The consequences of the EU’s failure to seek a legal solution to the problem may emerge in light of the forthcoming European Court of Justice’s judgment in the Brita case, whereby a German company having been refused preferential treatment for imported settlement products has challenged European customs officials for the denied preferences. See European Court of Justice, Case C-386/08: Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany) lodged on 1 September 2008 — Brita GmbH v Hauptzollamt Hamburg-Hafen.

103 Barak Ravid (2009) ‘UK Boycotting Lev Leviev over West Bank construction’, Haaretz, 4 March 2009, http://www.haaretz.co.il/hasen/pages/ShArtStEng.jhtml?itemNo=1068545&contrassID=1&subContrassID=1&title=%27U.K.%20boycotting%20Lev%20Leviev%20over%20West%20Bank%20construction%20%27&dyn_server=172.20.5.5

104 See EMHRN (2007) op. cit. and EMHRN (2005) op. cit.

2009 a new instrument replacing the existing Action Plan. The Council also set out guidelines for strengthened political dialogue.¹⁰⁵ These included meetings at head of state (i.e. summits), foreign minister and sectoral ministerial levels, as well as ad hoc Israeli participation in the Political and Security Committee, hearings of Israeli experts by Council working parties and committees, strengthened inter-parliamentary dialogue, and informal exchanges on strategic as well as human rights and anti-Semitism issues. In December 2008, the EU and Israel also concluded a civil aviation agreement removing nationality restrictions in bilateral air service agreements and launched talks on a new agreement leading to the establishment of a Common Aviation Area.¹⁰⁶

Reviewing the content of these proposals, some steps towards entrenching human rights and IHL in EU-Israel relations were made, as required, inter alia, by the EU Guidelines. As far as human rights dialogue is concerned, the Council proposed to replace the EU-Israel informal working group on human rights by a subcommittee, as in the case of other ENP partners. The Council also committed the Union to strengthening bilateral relations with Israel upon an understanding of the parties’ “shared values” of democracy, human rights, the rule of law and IHL, and their “common interests and objectives” regarding the two-state solution. Yet the very fact that an upgrade of EU-Israel relations was conceived and agreed upon at the very time when Israel was increasingly violating these “shared values” and “common interests” made the EU’s words at best ring hollow.¹⁰⁷

In addition, EU member states have continued to bolster Israel’s military capacity through arms exports. In 2007, 18 member states authorized a total of 1018 licences to Israel worth over €199million, with France topping the list at €126 million, followed by Germany (€28 million) and Romania (€17 million).¹⁰⁸ Although licence authorizations do not amount to actual export figures, they signal member states’ intention to equip the Israeli army. Across the EU, in 2007 a mere 28 licence authorizations to Israel were denied on the basis of Criterion 2 of the EU Code of Conduct on Arms Exports, and of the 27 member states only nine claim not to export arms to Israel.

105 General Affairs and External Relations Council (GAERC) (2008) ‘Strengthening of the EU’s bilateral relations with its Mediterranean partners’, Annex: Guidelines for strengthening the political dialogue structures with Israel, draft conclusions, 5 December, Brussels.

106 EU and Israel sign civil aviation agreement, Brussels, 9 December, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1915&format=HTML&aged=0&language=EN&guiLanguage=en>

107 GAERC, Press Release, 2915th meeting, Brussels, 8-9 December 2008, 15-16. PA Prime Minister Salam Fayyad sent a letter in May 2008 complaining about the proposed upgrade in EU-Israel relations in view of Israel’s conduct. Israel retaliated by withholding tax and duty payments to the PA. Yet the French Presidency, having secured Israel’s participation in its project – the Union for the Mediterranean – decided to proceed with the upgrade.

108 Amnesty International (2009) Fuelling conflict: Foreign arms supplies to Israel-Gaza, January, <http://www.amnesty.org/en/library/asset/MDE15/012/2009/en/3301b5c0-189b-4ba2-9bca-68e116fd590f/mde150122009en.pdf>

4. ISRAEL'S OFFENSIVE IN THE GAZA STRIP: INTERNATIONAL HUMANITARIAN LAW AND FACTS ON THE GROUND

Assessing the violations of international law committed during the offensive in the Gaza Strip warrants a report in itself. Given its focus, this study does not aim at providing definitive conclusions either on the applicable international legal framework, such as the applicability of the law of occupation, or on the legality of launching the offensive by Israel and the violations of international human rights and humanitarian law that occurred during the conflict. However, based on the existing documents and reports from EMHRN members, other NGOs, the ICRC and the United Nations, we seek to present an overview of the main violations substantiated by various sources in order to analyse the EU's response. Such analysis is complicated by the fact that the EU and its members states have refrained from expressing their views on the violations of international law, and when they have done so, as detailed in the sections below, they have given only limited or different legal interpretations depending on the belligerent concerned.

4.1 PRELIMINARY REMARKS

When considering the relevant norms of international law, it is first crucial to recall the complete separation between the law regulating the legality of the use of force (Jus ad Bellum) and the law governing the conduct of warfare during an armed conflict (Jus in Bello or IHL). Consequently, whether or not Israel violated the former set of norms is not relevant and has no implication regarding its obligations under international humanitarian law.¹⁰⁹

Rules of international humanitarian law applicable to the armed conflict between Israel and Hamas and other Palestinian armed groups include, inter alia, customary rules on the conduct of hostilities and on the treatment of persons deprived of their liberty. Given that Israel retains "effective control" over the Gaza Strip despite its 2005 disengagement, such as control over Gaza's airspace, sea space, and land borders, as well as its electricity, water, sewage, and

¹⁰⁹ Al-Haq (2009) 'Brief: Legal Aspects of Israel's Attacks on the Gaza Strip during "Operation Cast Lead"', 7 January, p.6. See also PHRO 'Statement on Gaza and IHL', <http://www.palhumanrights.org/news-press/The%20Humanitarian%20Crisis%20in%20Gaza-ENG.pdf>. With regard to the legal assessment of the Israeli offensive under the UN Charter regulating the use of force, it is worth noting Richard Falk's position in his latest report to the Human Rights Council. Setting aside the question of whether the occupying power can claim the right to self defence against the occupied population, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 holds that the requirements for the Israeli claim under international law of self-defence were not met. See 'Human Rights Situation in Palestine And Other Occupied Arab Territories', Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, Human Rights Council – Tenth Session, 17 March 2009, A/HRC/10/20, paras. 11 and ff.

telecommunications networks and population registry, applicable IHL also comprises parts of the Fourth Geneva Convention on the law of occupation.¹¹⁰ While it goes beyond the scope of this study to discuss the interaction between IHL and IHRL, it is now well-established that human rights continue to apply in time of war.¹¹¹ This section will mainly focus on IHL issues.

Under IHL, the repeated justification by Israel that civilian buildings were targeted because Hamas and other Palestinian armed groups were firing from such buildings, placing civilians at risk, calls for a clarification. International humanitarian law is not based on reciprocity, and violations by one party to the conflict do not waive or lessen in any manner the obligations of the other party.¹¹²

The protection of civilians and civilian objects from attacks and dangers arising from military operations during armed conflict is one of the most fundamental objectives of IHL. First, the principle of distinction, enshrined in conventional and customary international humanitarian law, dictates that the parties to a conflict must at all times distinguish between civilians and combatants, as well as between civilian objects and military objectives, and direct their operations only against combatants and military objectives.¹¹³ Second, the principle of proportionality prohibits attacks on legitimate military objectives which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹¹⁴ Third, the parties to a conflict must take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.¹¹⁵ This obligation is twofold as it concerns obligations regarding precautions in attack¹¹⁶

and obligations with respect to precautions against the effects of attack.¹¹⁷

The exact number of civilians among the dead and injured is difficult to establish. Despite the differences in figures, credible estimates indicate that over one-quarter of the casualties were women and children. The latest figures provided by the Palestinian Centre for Human Rights (PCHR) following a careful and detailed investigation are as follows:¹¹⁸ '(O)ver the course of the 22 day Israeli assault on the Gaza Strip, a total of 1,417 Palestinians were killed. Of these, 236 were combatants. The vast majority of the dead, however, were civilians and non-combatants: protected persons according to the principles of IHL. PCHR investigations confirm that, in total, 926 civilians lost their lives, including 313 children and 116 women. 255 police officers were also killed'.¹¹⁹ The recent figures provided by the Israeli army reach the opposite conclusion, in sharp contrast to most other sources in this regard.¹²⁰ According to Magen David Adom (the national society of the International Red Cross Movement in Israel), as a result of rocket and mortar fire, three Israeli civilians were killed and 182 were injured.¹²¹ The overwhelming proportion of civilians among the casualties and the level of destruction as a result of "Operation Cast Lead" are shocking. Upon his return from a visit to the Gaza Strip, the UN Under-Secretary General for Humanitarian Affairs John Holmes, stated: '(T)he destruction I saw was devastating – both in human and material terms. The magnitude of loss of life and injury to the civilian population is bound to have a lasting impact on the mental and physical wellbeing of the Palestinians in Gaza. All aspects of life and livelihood have been affected.'¹²² While these accounts do not per se constitute sufficient elements to conclude that violations of IHL occurred, they are disturbing indicators that raise important questions with regard to respect for the principles of distinction, proportionality and precaution.

110 'Human Rights Situation in Palestine and other Occupied Arab Territories', Combined Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Representative of the Secretary-General for Children and Armed Conflict, the Special Rapporteur on violence against women, its causes and consequences, the Representative of the Secretary-General on the human rights of internally displaced persons, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Special Rapporteur on the right to food, the Special Rapporteur on extrajudicial, arbitrary or summary executions, the Special Rapporteur on the right to education, and the Independent Expert on the question of human rights and extreme poverty, A/HRC/10/22, 10 March 2009, para 18.

111 See ICJ 'Advisory Opinion on the Legality of the Use of Nuclear Weapons', ICJ Reports 1996, para. 25; Human Rights Committee, General Comment No 29, UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 3. In this context see 'Human Rights Situation in Palestine and Other Occupied Arab Territories', Combined Report, 2009, op. cit., paras. 19-23.

112 B'Tselem (2009) 'Guidelines for Israel's Investigation into Operation Cast Lead: 27 December 2008 – 18 January 2009', February 2009, p.1. More generally B'Tselem stated: 'In statements released during the operation, the IDF Spokesperson claimed regarding most of these buildings that they had been attacked because Hamas was using them to store weapons, manufacture weapons, or plan attacks on Israeli soldiers or civilians. The military provided only minimal evidence to support these claims, and B'Tselem is unable to examine their accuracy. However, at least in one instance, B'Tselem found that such information was erroneous. The IDF Spokesperson's Office posted a video on its website which it claimed showed Palestinians loading Grad missiles onto a truck. At the end of the video, a missile is fired at the truck by a helicopter, killing eight Palestinians. B'Tselem's investigation revealed that the Palestinians seen in the video were loading oxygen canisters and other equipment they had taken from a metal workshop that had been bombed, their aim being to prevent the canisters and equipment from being looted', p.4.

113 See for example, Jean-Marie Henckaerts and Louise Doswald-Beck (2005) International Committee of the Red Cross (ICRC) Customary International Humanitarian Law, Cambridge, Cambridge University Press, Rule 7, p. 25.

114 Ibid., Rule 14, p. 46.

115 Ibid., Rule 15, p. 51.

116 Ibid., pp. 51-67.

117 Ibid., pp. 68-76.

118 PCHR Press release 'Confirmed figures reveal the true extent of the destruction inflicted upon the Gaza Strip', 12 March 2009, <http://www.pchrgaza.org/files/PressR/English/2008/36-2009.html>.

119 Al Mezan published on 7 March 2009 a list of Palestinians killed by the Israeli Occupation Forces during their military "Operation Cast Lead" against the Gaza Strip, from 27 December 2008 to 18 January 2009. The list included the names of 1342 people killed, including: 109 women (8% of the total rate of deaths); 318 children (24%); 127 elderly people (9%); 235 fighters – including 27 persons who were assassinated while unarmed and uninvolved in fighting activities (therefore the rate of those fighters, excluding those unarmed is 16%) – and 210 (16%) policemen and security apparatus members who were killed while performing their regular duties and were uninvolved in any combat activities. See <http://www.mezan.ps/en/details.php?id=8552&ddname=gaza%20destruction&id2>. B'Tselem indicated that during the three weeks of the operation, over 1,300 Palestinians were killed and over 5,320 were wounded. See B'Tselem (2009) op. cit, p. 1. Un Office for the Coordination of Humanitarian Affairs (OCHA) quoted figures from Palestinian Ministry of Health (MoH) in Gaza issued on 8 February 2009: killing of 1,440 people and the injury of another 5,380 with no distinction made in these figures between combatants and civilians. See OCHA 'The Humanitarian Monitor – OPT, January 2009', No. 33, p.1.

120 'According to the data gathered by the Research Department of the Israel Defense Intelligence, there were 1166 names of Palestinians killed during Operation Cast Lead. 709 of them are identified as Hamas terror operatives, amongst them several from various other terror organizations. Furthermore, it has been found that 295 uninvolved Palestinians were killed during the operation, 89 of them under the age of 16, and 49 of them women. In addition, there are 162 names of men that have not yet been attributed to any organization'. IDF, Majority of Palestinians Killed in Operation Cast Lead: Terror Operatives, 26 March 2009, available at: <http://dover.idf.il/IDF/English/News/today/09/03/2602.htm> It should be noted, however, that the expression 'Hamas terror operatives' does not refer to any recognized categories of persons.

121 See OCHA 'The Humanitarian Monitor – OPT', January 2009, No 33, p.3.

122 Ibid., No 33, p.1.

In addition to the absence of proper shelter or warning systems within the Gaza Strip, the fact that the Gaza Strip is one of the most densely populated areas in the world, and that civilians could not escape because the borders were sealed,¹²³ dramatically increased the vulnerability of civilians on the ground.¹²⁴ B'Tselem, an Israeli human rights organization, pointed out that 'unlike other places in the world, in which long lines of refugees are seen carrying their few remaining possessions, Gaza civilians remained trapped within a small area'.¹²⁵ As stressed by Human Rights Watch (HRW), while international humanitarian law does not prohibit fighting in urban areas, the presence of many civilians places greater obligations on warring parties to take steps to minimize harm to civilians.¹²⁶

4.2 VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED BY ISRAEL

During the 22 days of the Israeli "Operation Cast Lead" in the Gaza Strip, many reports and statements pointed out serious violations of IHL committed by Israel. The statements made on 13 February 2009 by Israeli soldiers and reported by Haaretz,¹²⁷ according to which the Israeli army killed Palestinian civilians under permissive rules of engagement¹²⁸ and intentionally destroyed their property, can be added to the many documents substantiating various types of violations. As stated by B'Tselem, 'many Palestinian accounts have reflected a similar picture to that revealed (by Haaretz) triggering suspicions that today's revelations represent only the tip of the iceberg, and that they are the result of norms of conduct that have taken hold throughout the army'.¹²⁹ PCHR stressed that 'many of the cases (...) documented constitute grave breaches of the Geneva Conventions, and war crimes'.¹³⁰ According to PCHR, some acts may also amount to a crime against humanity.¹³¹

123 See UN Radio 'Situation of Gaza population terrifying: Holmes', 14 January 2009, <http://www.unmultimedia.org/radio/english/detail/67448.html>

124 See OCHA 'The Humanitarian Monitor - OPT', January 2009, No 33, p. 1. Quoting the United Nations High Commissioner for Refugees, Richard Falk stated that Gaza was 'the only conflict in the world in which people are not even allowed to flee'. See Human Rights Situation in Palestine and Other Occupied Arab Territories', Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, Human Rights Council - Tenth Session, 17 March 2009, A/HRC/10/20, para. 10.

125 B'Tselem (2009) op. cit., p.8.

126 Human Rights Watch (2008) 'Q & A on Hostilities between Israel and Hamas', 31 December, <http://www.hrw.org/en/news/2008/12/31/q-hostilities-between-israel-and-hamas> See also Al-Haq (2009) op. cit. p.4.

127 'IDF in Gaza: Killing civilians, vandalism, and lax rules of engagement', Haaretz, 19 March 2009, <http://www.haaretz.com/hasen/spages/1072040.html>; and Amos Harel (2009) 'Shooting and Crying', Haaretz, 31 March, <http://www.haaretz.co.il/hasen/spages/1072475.html>

128 Israel's offensive was portrayed from the outset as a "war" rather than a military operation thus following entirely different rules of engagement than those normally provided to the Israeli army in military operations in the OPT. Interview with representative of Breaking the Silence, Jerusalem, March 2009.

129 B'Tselem 'Israeli Human Rights Organizations Call on the Attorney General: "Stop whitewashing suspected crimes in Gaza"' Press Release, 19 March 2009, http://www.btselem.org/English/Press_Releases/20090319.asp

130 PCHR Press release 'Confirmed figures reveal the true extent of the destruction inflicted upon the Gaza Strip', 12 March 2009, <http://www.pchrgaza.org/files/PressR/English/2008/36-2009.html> See also PHRO 'Statement on Gaza and IHL', <http://www.palhumanrights.org/news-press/The%20Humanitarian%20Crisis%20in%20Gaza-ENG.pdf>

131 PCHR Press release 'Confirmed figures reveal the true extent of the destruction inflicted upon the Gaza Strip', op. cit.

Testimonies of civilians who were not participating in hostilities being shot at¹³² or buildings in which Israeli soldiers told civilians to take shelter being targeted raise very serious concerns with regard to the protection of civilians under international humanitarian law. As noted by Al-Haq: '(A)ttacks on civilians not taking direct part in hostilities that result in deaths constitute wilful killing and a war crime'.¹³³

In the course of the Gaza conflict, Israel was explicit regarding what and who it considered as a legitimate military target: '(W)e are hitting not only terrorists and launchers, but also the whole Hamas government and all its wings (...) After this operation there will not be one Hamas building left standing in Gaza, and we plan to change the rules of the game'.¹³⁴ As stressed by Adalah - The Legal Center for Arab Minority Rights in Israel, 'statements in the media by senior government officials and other official spokesmen indicate that the government of Israel decided, as a matter of policy, to attack government offices and public civilian facilities in Gaza, explaining that all institutions under the control and/or administration of the Hamas movement constituted legitimate targets for military attack. Consequently, the central police building was bombed on 27 December 2008, during the evening of 31 December 2008, the parliament building and the ministries of education and transportation in Gaza were also bombed'.¹³⁵ The Israeli position, as a matter of policy, regarding systematically targeting any building related to Hamas as a legitimate target, without demonstrating in each case that it was a legitimate military objective, clearly contradicts the definition of a military object set out by IHL.¹³⁶ Accordingly, only those objects may be lawfully targeted which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹³⁷ As for the targeting by Israel of Hamas policemen based on the same rationale that they are all legitimate military targets, it is unlawful under IHL. As stressed by Al-Haq 'international humanitarian law holds that members of the Civil Police who are engaged in regular police duties such as ordinary internal law enforcement or traffic regulation, are civilians'.¹³⁸ Under IHL they would therefore lose their protection only in the case they directly participate in hostilities and for the time of this participation.¹³⁹ Unsurprisingly, as stressed by the UN Special Rapporteur on summary executions, the principal dispute concerns the proportion of the Palestinian men killed who can be classified as civilians or combatants, the difference in

132 B'Tselem (2009) op. cit., p.8.

133 Al-Haq Brief (2009) p.3.

134 Brigadier General Dan Harel, quoted in Tova Dadon, 'Deputy chief of staff: Worst still ahead' Y-net News, 29 December 2008, <http://www.ynet.co.il/english/articles/0,7340,L-3646462,00.html>

135 Adalah (2009) 'Re: Refrain from attacking civilian government institutions and civilians in Gaza', 4 January, <http://www.adalah.org/eng//israeli%20attack%20on%20gaza.php#bill>, and a position paper written by Adalah Attorney Fatmeh El-'Ajou on the question of whether the Israeli military attacks on the civilian police and the government buildings and institutions of Hamas in Gaza constitute war crimes under international criminal law, Adalah's Newsletter, Volume 57, February 2009 available at: <http://www.adalah.org/newsletter/eng/feb09/feb09.html?navi=%2Fnewsletter%2Feng%2Ffeb09%2Ffeb09.html>

See also, Al-Haq Brief (2009) op. cit. pp.1 ff.

136 B'Tselem referred to 'media interviews of representatives of the IDF's international law department, whose names were not made public, indicate there was a serious difference of opinion on the legality of striking these targets'. B'Tselem (2009) op. cit. p.12. See Yotam Feldman and Uri Blau (2009), 'How IDF legal experts legitimized strikes involving Gaza civilians', Haaretz, 31 January 2009, <http://www.haaretz.com/hasen/spages/1057648.html>

137 Jean-Marie Henckaerts and Louise Doswald-Beck (2005), op. cit., Rule 8, p. 29.

138 Al-Haq Brief (2009) op. cit., p. 3. See also Human Rights Watch (2008) op. cit.

139 Jean-Marie Henckaerts and Louise Doswald-Beck (2005), op. cit., Rule 6, p. 19.

part relating to the status of those members of the civilian police force in Gaza who were not taking direct part in hostilities and who Israel apparently intentionally targeted.¹⁴⁰

Likewise, regarding the assertion that Hamas' political leaders were systematically viewed as legitimate targets, it should be noted that for a civilian to be a valid target of attack, he/she has to participate directly in hostilities and can only be targeted during participation in hostilities. Acting on the premise that any political leader can be targeted is unlawful under IHL.¹⁴¹ Even when such a leader is directly participating in hostilities, the attacker must ensure that the attack will not cause incidental loss of civilian life, injury to civilians or damage to civilian objects, and the attack cannot be conducted when expected civilian loss resulting from it would be excessive in relation to the anticipated military advantage. The targeting of Hamas officials while they were in their homes with their families in densely populated areas raises serious issues under the principles of proportionality and distinction.¹⁴²

The targeting of, or disproportionate use of force around, civilian buildings, including schools administered by UNRWA, that resulted in the death of, or injury to, civilians because Israeli soldiers allegedly came under fire from these buildings may constitute a serious violation of IHL on the conduct of hostilities. However, as highlighted by HRW, the attacking party is not relieved of its obligation to take into account the risk to civilians, on the grounds that it believes that the defending party is responsible for having located legitimate military targets within or near populated areas.¹⁴³ The presence of a Hamas commander or military facility in a populated area thus would not justify attacking the area without regard to the threat to the civilian population. The 6 January attack just outside a UN school housing displaced persons in Jabaliya refugee camp, which killed 40 Palestinians, illustrates the need for a wide-ranging independent criminal investigation. It also raises the issue of the type of weapons used and, most importantly, the way they were used.¹⁴⁴

The use of certain types of weapons by the Israeli army raises some serious concerns. IHL prohibits as indiscriminate attacks, those that employ a method or means of combat which cannot be directed at a specific military objective; or which employ a method or means of combat the effects of which cannot be limited as required by IHL.¹⁴⁵ In this regard, according to HRW, the use of weapons and heavy artillery in densely populated areas by Israel, such as the 155 mm high-explosive artillery shells that have an injuring effect over a radius of as much as 300 meters through blast and fragmentation violates this prohibition of indiscriminate

¹⁴⁰ Human Rights Situation in Palestine and other Occupied Arab Territories, Combined Report, op. cit., Human Rights Council, A/HRC/10/22, 10 March 2009, para. 91.

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Al-Haq Brief (2009) op. cit. p.3.

¹⁴² B'Tselem (2009) op. cit., pp.7-8.

¹⁴³ Human Rights Watch (2008), op. cit.

¹⁴⁴ Human Rights Watch (2009) 'Israel: Stop Shelling Crowded Gaza City' 16 January 2009, <http://www.hrw.org/en/news/2009/01/16/israel-stop-shelling-crowded-gaza-city>

¹⁴⁵ Jean-Marie Henckaerts and Louise Doswald-Beck (2005), op. cit., Rule 12, p. 40.

attacks.¹⁴⁶ Mortar shells were also used.¹⁴⁷ Moreover, using very powerful explosive weapons, as well as aerial bombardment, to hit individual combatants in buildings or Hamas leaders at home proved to be inappropriate and caused extensive civilian casualties.

The use of white phosphorus as an incendiary weapon, although first denied by the Israeli army, is now evidenced by various sources. While not prohibited per se under IHL, its use in densely populated areas of the Gaza Strip may violate IHL rules prohibiting indiscriminate attacks and those requiring the attacker to take precautions to avoid or at least minimize civilian casualties.¹⁴⁸ According to HRW, 'Israel's repeated firing of white phosphorus shells over densely populated areas of Gaza during its recent military campaign was indiscriminate and is evidence of war crimes'.¹⁴⁹ Its use in Gaza, including by the technique of air-bursting white phosphorus projectiles, which spreads the burning wafers over a wide area, caused civilians horrific skin burns, and set structures and buildings on fire. The UN Board of Inquiry – established by the UN Secretary-General tasked to review and investigate incidents in which UN personnel, premises and operations were affected during the Gaza conflict – found that projectiles containing white phosphorus were used by the Israeli army in the case of the UNRWA Field Office compound on 15 January 2009 and in the UNRWA Beit Lahia School on 17 January 2009.¹⁵⁰

Regarding the hitting of UN buildings, UN officials had previously communicated to Israeli commanders the exact locations of such facilities. Despite this, the UN Secretary-General referred to 'several incidents of outrageous attacks against UN facilities', calling 'on all combatants to respect the sanctity of United Nations' premises'.¹⁵¹ The High Commissioner for Human Rights deplored Israel's unacceptable strikes against clearly-marked UN facilities where civilians were taking shelter. She also stressed that Israel defied the UN request for protection.¹⁵² The UN Board of Inquiry concluded that 'the Government of Israel is responsible for the deaths and injuries that occurred within the United Nations premises and the physical damage that was done to United Nations premises and property in (these) incidents (...) UNRWA Asma school, UNRWA Jabalia school, UNRWA Bureij Health Centre, the UNRWA convoy, the UNRWA Field Office compound, the UNRWA Beit Lahia school and the UNSCO compound'.¹⁵³ The Board pointed out 'a breach

¹⁴⁶ Human Rights Watch (2009) 'Israel: Stop Shelling Crowded Gaza City' op. cit.

¹⁴⁷ B'Tselem noted that 'the standard deviation of artillery fire is dozens of meters and the range at which persons can be expected to be killed or wounded by it also reaches dozens of meters, depending on field conditions. Taking this and the densely populated area into account, use of artillery fire significantly increases the chance of civilian casualties. Indeed, civilians in the Gaza Strip have been killed by artillery fire in the past, and in November 2006, the military ceased using artillery fire, partly for this reason. The army also used mortar shells during the operation'. Quoting Lt. Col. Shuki Ribek, commander of Battalion 51 who said: 'I don't recall when we ever fired mortar shells in Gaza before', B'Tselem goes on by stressing that 'the reason is, primarily, that mortar fire is even less accurate than artillery fire'. B'Tselem (2009) op. cit., p. 5.

¹⁴⁸ B'Tselem (2009) op. cit., p.6.

¹⁴⁹ Human Rights Watch (2009) 'Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza', 25 March, <http://www.hrw.org/node/81760>

¹⁵⁰ 'Secretary-General Summary of the Report of the United Nations Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009', 4 May 2009, pp.18-19, <http://image.guardian.co.uk/sys-files/Guardian/documents/2009/05/05/4MayGIttrtoSCBrd.pdf>

¹⁵¹ UN Secretary-General's statement to the Security Council on the Situation in the Middle East (Delivered by B. Lynn Pascoe, Under-Secretary-General for Political Affairs), New York, 21 January 2009, <http://www.un.org/apps/sg/sgstats.asp?nid=3667>

¹⁵² Statement of Ms Navanethem Pillay, United Nations High Commissioner for Human Rights to the Ninth Special Session of the Human Rights Council on The Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression of the occupied Gaza Strip, 9 January 2009, <http://www2.ohchr.org/english/press/newsFrameset-2.htm>

¹⁵³ 'Secretary-General Summary of the Report of the United Nations Board of Inquiry', op. cit., p.20, para.93.

of the inviolability of United Nations premises and a failure to accord the property and assets of the Organization immunity from any form of interference'. It also noted that 'such inviolability and immunity cannot be overridden by demands of military expediency'.¹⁵⁴ Regarding the claims by the Israeli army that it came under fire from UN buildings, the Board specifically recommended, after having reviewed evidence in this regard, that 'the United Nations should seek formal acknowledgement by the Government of Israel that its public statements alleging that Palestinians fired from within the Jabalia school on 6 January and from within the UNRWA Field Office compound on 15 January were untrue and are regretted'.¹⁵⁵ It also recommended, inter alia, that the UN 'should take appropriate action to seek accountability and pursue claims to secure reparation or reimbursement'.¹⁵⁶

There were also reported cases of directly targeting hospitals and places of worship as well as cases of firing on or preventing ambulances and emergency medical care from reaching persons in need.¹⁵⁷ IHL generally prohibits the attack of civilian objects such as hospitals, ambulances and worship places. Civilian objects can only be the lawful object of attack, if and for such time as they are used for military purposes, and only if their destruction makes an effective contribution to military action and offers a definite military advantage as defined above. However, even when combatants are using such buildings as a location to fire on the Israeli army (or on civilian areas), or when places are used to store weapons, this does not relieve Israel from its obligation to respect IHL. IHL also lays down obligations to collect, care for and evacuate the wounded and to protect health workers, hospitals, medical units and ambulances. Referring to reports that Israeli shells struck the al-Quds hospital in the Tel al-Hawa neighbourhood, setting it on fire, the President of the ICRC stated that it was 'unacceptable that wounded people receiving treatment in hospitals are put at risk'.¹⁵⁸ According to the Gaza-based Al Mezan Centre for Human Rights, '23 emergency service personnel were killed, 17 of whom were on duty at the time, and 50 emergency service personnel were injured during the offensive. In addition, 39 ambulances, emergency vehicles, field hospitals and civil defense vehicles were damaged or destroyed. A number of health premises, ambulance and emergency centers and civil defense premises were damaged or destroyed'.¹⁵⁹ The ICRC issued a statement in a particularly denouncing tone, which is very rare for this institution given its principles and methods of work. Reporting a grave incident in the Zaytun neighbourhood of Gaza City it stated: 'the Israeli military must have been aware of the situation but did not assist the wounded. Neither did they make it possible for us or the Palestine Red Crescent to assist the wounded.' It concluded that 'in this instance the Israeli military failed to meet its obligation under international humanitarian law to care for and evacuate the wounded' and that it 'considered

¹⁵⁴Ibid., p.8, para.38.

¹⁵⁵Ibid., Recommendation 1, p.24, para.110.

¹⁵⁶Ibid., Recommendation 1, p.24, para.110.

¹⁵⁷ The Israeli Supreme Court rejected a petition brought by Adalah on behalf of Palestinian and Israeli human rights organizations during the offensive in Gaza which challenged the Israeli military attacks that targeted ambulances and medical teams engaged in carrying out their duties in assisting the wounded, and the delays imposed by Israel on the evacuation the injured to hospitals in Gaza for medical treatment. See HCJ 201/09, Physicians for Human Rights-Israel, et al. v. The Prime Minister, et al. (decision delivered 19 January 2009).

¹⁵⁸ ICRC (2009) Press Release 'Gaza: wounded at risk as Al-Quds Hospital is hit', 15 January, www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-israel-news-150109?opendocument

¹⁵⁹ Al Mezan Center for Human Rights Report (2008) 'The Targeting of Medical Centers, Ambulance Teams and Civil Defense Teams during the Israeli Offensive "Operation Cast Lead" against the Gaza Strip', 18 March, <http://www.mezan.ps/en/details.php?id=8570&ddname=gaza%20destruction>

the delay in allowing rescue services access unacceptable'.¹⁶⁰

IHL obliges those who plan or carry out an attack to take all feasible precautions during military operations to avoid harming civilians, or at least to minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. Such obligations require greater attention when carrying out an attack in densely populated areas. As reported by B'Tselem the Israeli military authority 'claimed that it fulfilled this obligation by dropping flyers from the air or by placing phone calls to notify civilians in advance of the intention to bomb the area where they were located'.¹⁶¹ However, B'Tselem stresses two main concerns with regard to those warnings given in advance by the Israeli army to civilians before launching an attack. First, the effectiveness of such warnings was unclear, given that borders were closed and civilians had nowhere to seek shelter.¹⁶² Second, some warnings called upon civilians to move to city centres while the Israeli army launched attacks against Gaza city centre.¹⁶³ More specifically, given that attacks were often launched simultaneously on several areas, often civilians, having been told to seek refuge in a particular area, found no safe haven given that the area they had escaped to had in the meantime also come under fire. Finally and most importantly, such warnings, even when appropriately given, do not relieve Israel of its obligation to take precautionary measures under IHL.

According to testimonies given to B'Tselem and Al Mezan Center for Human Rights, the Israeli military used Palestinians as human shields during the operation.¹⁶⁴ The use of civilians as human shields is absolutely prohibited both under international humanitarian law¹⁶⁵ and under Israeli military orders.¹⁶⁶ B'Tselem also stressed that in 2005 'the Israeli Supreme Court ruled that any form of use of civilians as human shields is absolutely forbidden'.¹⁶⁷

Furthermore, according to the Public Committee Against Torture in Israel (PCATI), Palestinians arrested during the fighting in the Gaza Strip were held in appalling conditions and subjected to humiliation and inhuman treatment from the time of their arrest until their transfer to the custody of the Israel Prison Service.¹⁶⁸

¹⁶⁰ ICRC (2009) Press Release 'Gaza: ICRC demands urgent access to wounded as Israeli army fails to assist wounded Palestinians', 8 January, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-news-080109?opendocument> See also B'Tselem (2009) op. cit., pp. 13 ff.

¹⁶¹ B'Tselem (2009), op. cit. p. 8.

¹⁶² B'Tselem (2009) op. cit., p.9.

¹⁶³ Human Rights Watch (2009) 'Israel: Stop Shelling Crowded Gaza City' op. cit.

¹⁶⁴ B'Tselem (2009), op.cit., p. 11 and Al Mezan Center for Human Rights (2009) 'Hiding Behind Civilian: April 2009 Update Report on The Use of Palestinian Civilians as Human Shields by the Israeli Occupation Forces', 9 April, <http://www.mezan.org/upload/8632.pdf> Adalah and Al Mezan Center for Human Rights are demanding the opening of a criminal investigation into the Israeli military's use of Palestinian civilians as human shields and as hostages during the military offensive in Gaza. See http://www.adalah.org/eng/pressreleases/pr.php?file=09_04_23_1

¹⁶⁵ Jean-Marie Henckaerts and Louise Doswald-Beck (2005), op. cit., Rule 97, p. 337.

¹⁶⁶ B'Tselem (2009) op. cit., p.10.

¹⁶⁷ Ibid. See HCJ 3799/02, Adalah, et. al. v. Yitzhak Eitan, Commander of the Israeli Army in the West Bank, et. al. (decision delivered 6 October 2005).

¹⁶⁸ PCATI (2009) 'Israel held many Gaza prisoners in harsh and humiliating conditions and threatened their lives and their health', 28 January, <http://www.stoptorture.org.il/en/node/1384> See also PCATI Press release 'Public Statement on the Treatment of Detainees Taken During the Current War in Gaza', <http://www.stoptorture.org.il/en/node/1368>

4.3 VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED BY HAMAS AND OTHER ARMED GROUPS

Among others, media reports,¹⁶⁹ NGOs, the United Nations¹⁷⁰ and Israeli authorities have pointed out the violations of IHL and IHRL committed by Hamas and other Palestinian armed groups. The Foreign Ministry of Israel stressed Hamas' use of Palestinian civilians as human shields or the placement of its military posts and ammunition depots in crowded population centers.¹⁷¹ As stated by B'Tselem: 'Hamas committed grave breaches of international humanitarian law. Directing rockets at a civilian population, shooting at soldiers from inside civilian neighborhoods, while endangering the lives of the residents, storing weapons in civilian structures, and execution of Palestinians suspected of collaborating with Israel are all absolutely forbidden. Israeli officials also contend that Hamas fighters forced civilians to serve as human shields, that they used ambulances to move from one hiding place to another, and that they hid inside hospitals. These acts are also forbidden, and if they were indeed committed, their perpetrators are responsible for serious breaches of international humanitarian law.'¹⁷² Al-Haq noted that 'rocket attacks by Palestinian armed groups, including Hamas, against civilian population centres within Israel are in violation of international humanitarian law'.¹⁷³ Similarly HRW stressed that 'Hamas and other Palestinian armed groups have also violated the laws of war by continuing to fire unguided Qassam and Grad rockets at population centres in Israel'.¹⁷⁴

In a newly published report, HRW documented 'a pattern since late December 2008 of arbitrary arrests and detentions, torture, maiming by shooting, and extrajudicial executions by alleged members of Hamas security forces' with the spate of attacks which began during Israel's military operation.¹⁷⁵ Various sources have reported that dozens of Palestinians accused of "collaborating" with Israel were summarily executed or injured by Hamas security forces and unidentified gunmen during the three weeks of the offensive.¹⁷⁶ PCHR in Gaza documented 32 such executions, 17 of which were of prisoners and detainees who fled the Gaza Central Prison after it was bombarded by the Israeli Air Force on 28 December 2008.¹⁷⁷ According

¹⁶⁹ See for example 'Hamas accused of war crimes in Gaza', The Guardian, 23 March 2009, <http://www.guardian.co.uk/world/2009/mar/23/gaza-war-crimes-hamas>

¹⁷⁰ See for example 'Human Rights Situation in Palestine and other Occupied Arab Territories', Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, Human Rights Council – Tenth Session, 17 March 2009, A/HRC/10/20, para. 26, and 'Human Rights Situation in Palestine and other Occupied Arab Territories', Combined Report, op. cit., Human Rights Council, A/HRC/10/22, 10 March 2009, para. 98.

¹⁷¹ 'Israel: Amnesty report on Gaza ignores fact Hamas are terrorists', Haaretz, 23 February 2009, <http://www.haaretz.com/hasen/spages/1066334.html>

¹⁷² B'Tselem (2009) op. cit., pp. 1-2.

¹⁷³ Al-Haq Brief (2009) op. cit., p. 6.

¹⁷⁴ Human Rights Watch (2009) 'Israel: Stop Shelling Crowded Gaza City' op. cit.

¹⁷⁵ Human Rights Watch 'Hamas Should End Killings, Torture', 20 April 2009, <http://www.hrw.org/en/news/2009/04/20/gaza-hamas-should-end-killings-torture> For the report, See HRW, Under Cover of War - Hamas Political Violence in Gaza, 20 April 2009, <http://www.hrw.org/node/82366>

¹⁷⁶ On this see 'We, the Undersigned Organizations, Condemn the Deterioration of the Rule of Law and Continued Internal Attacks in the Gaza Strip', signed by Al Haq, Addameer Association for Human Rights, Gaza Community Mental Health Program and Al Mezan Center for Human Rights, http://www.mezan.ps/en/details.php?id=8650&ddname=state%20of%20insecurity&id_dept=31&id2=9&p=center

¹⁷⁷ PCHR 'Inter-Palestinian Human Rights Violations in the Gaza Strip' 21 February 2009, http://www.pchrgaza.org/files/Reports/English/pdf_spec/Increase_rep.pdf See also B'Tselem 'Extra-judicial execution of alleged collaborators by Hamas', http://www.btselem.org/English/Collaboration/20090126_Killing_of_Collaboration_Suspects_in_Gaza.asp

to the organization, the spokesman of the Ministry of the Interior in the Gaza Strip admitted the execution of 'some collaborators with the (Israeli) occupation'. In addition, PCHR has documented dozens of other cases where suspected collaborators were put under house arrests, arbitrarily detained and severely beaten and tortured.¹⁷⁸

PCHR has documented hundreds of cases in which house arrest was imposed on Palestinian civilians across the Gaza Strip during the recent Israeli offensive. House arrests were imposed on activists from the Fateh movement, as well as on other civilians who were detained by the security services in the Gaza Strip for alleged criminal offenses.¹⁷⁹

4.4 CALLS FOR AN INVESTIGATION AND FOR ACCOUNTABILITY

Effective, independent and impartial investigations and mechanisms for accountability should primarily rest upon Israel and the Hamas authorities. In a letter sent by Israeli human rights organizations, including B'Tselem and PCATI, to the Israeli Attorney General, a call was made for an Israeli independent investigation, into the killing and injuring of civilians during the fighting, stressing that the government's failure to establish an independent investigation constituted a violation of Israel's responsibilities under international law.¹⁸⁰ In his letter of 24 February 2009, the Attorney General rejected this demand.¹⁸¹ Internationally, the UN Secretary-General, supported by the Office of the High Commissioner for Human Rights, has called for a thorough investigation by Israel into 'every single one of these incidents' of attacks on UN facilities and personnel.¹⁸² However, to date, as stressed by the UN Special Rapporteur on summary executions in March 2009: '(t)he responses at the national level to calls for accountability have been disappointing. Hamas, for its part, has given no indication of its willingness to investigate or respond to those allegations directed at it. Israel has announced several inquiries into specific incidents. But these are being undertaken by the military authorities themselves and the track record of the many such inquiries launched in the past are consistently problematic'.¹⁸³ In fact, on 22 April 2009, the Israeli army announced the conclusions of five investigative teams all headed by and composed of military officers that were assigned to inquire into the conduct of Israeli soldiers during "Cast Lead". It concludes that '(t)he IDF operated in accordance with moral values and international laws of war, trained its soldiers to act in accordance with the values and morals which bind the

¹⁷⁸ The undersecretary of PA Ministry of Prisoners Affairs in Ramallah Ziyad Abu Ein issued a statement mentioning 181 names of people from Gaza targeted by Hamas during the conflict. According to this statement, 11 were executed, 58 were shot in the feet or legs, and 112 had their legs broken. <http://www.maannews.net/en/index.php?opr=ShowDetails&ID=35455>

¹⁷⁹ See 'Inter-Palestinian Human Rights Violations in the Gaza Strip' 21 February 2009, op. cit., p. 5. The ICRC customary IHL study refers to the rule prohibiting arbitrary deprivation of liberty, see Jean-Marie Henckaerts and Louise Doswald-Beck (2005) International Committee of the Red Cross (ICRC) Customary International Humanitarian Law, op. cit., Rule 99, p. 344.

¹⁸⁰ B'Tselem Press Release 'Human Rights Organizations Call on the Attorney General: "Stop whitewashing suspected crimes in Gaza"', 19 March 2009, http://www.btselem.org/English/Press_Releases/20090319.asp

¹⁸¹ Both letters are available in English on the website of the Association for Civil Rights in Israel (ACRI): <http://www.acri.org.il/eng/story.aspx?id=602>

¹⁸² Secretary-General's statement to the Security Council on the Situation in the Middle East (Delivered by B. Lynn Pascoe, Under-Secretary-General for Political Affairs), New York, 21 January 2009, <http://www.un.org/apps/sg/sgstats.asp?nid=3667>

¹⁸³ See 'Human Rights Situation in Palestine and other Occupied Arab Territories, Combined Report', op. cit., Human Rights Council, A/HRC/10/22, 10 March 2009, para. 97.

IDF, and made an enormous effort to focus its fire only against the terrorists whilst doing the utmost to avoid harming uninvolved civilians.¹⁸⁴ Ten human rights organizations in Israel responded that, 'the only way to investigate violations of human rights committed in Gaza is by establishing an external, extra-military investigation mechanism.'¹⁸⁵ In this regard, HRW pointed out that "the Israeli military's findings about the conduct of its forces in Gaza, announced on April 22, lack credibility and confirm the need for an impartial international inquiry into alleged violations by both Israel and Hamas".¹⁸⁶ According to Amnesty International 'there is a strikingly large gap between the 'very small number' of mistakes referred to in the IDF's briefing paper and the killing by Israeli forces of some 300 Palestinian children and hundreds of other unarmed civilians'. It further stressed that 'the army briefing does not even attempt to explain the overwhelming majority of civilian deaths nor the massive destruction caused to civilian buildings in Gaza'.¹⁸⁷

At the international level, several investigating processes are underway. The independent international fact-finding mission established by the Human Rights Council¹⁸⁸, the Fact-Finding Mission mandated by the League of Arab States¹⁸⁹ and missions by NGOs, such as Human Rights Watch and Amnesty International,¹⁹⁰ are currently investigating, with slightly different mandates, alleged violations of IHL and IHRL committed during the conflict. The aforementioned UN Board of Inquiry established by the UN Secretary-General transmitted its report to the UN Secretary-General. After having noted that it was restricted in its Terms of Reference to examining the nine incidents affecting the UN and that these incidents were among many incidents involving civilian victims, it recommended that 'these incidents should be investigated as part of an impartial inquiry mandated, and adequately resourced, to investigate allegations of violations of international humanitarian law in Gaza and southern Israel by the IDF and by Hamas and other Palestinian militants'.¹⁹¹ However the UN Secretary-General decided not to follow this recommendation.¹⁹² The UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 went further by calling for an expert inquiry to report on the

184 Israel Ministry of Foreign Affairs, 'IDF: Conclusion of investigations into claims in Operation Cast Lead,' 22 April 2009, http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_Conclusion_of_investigations_Operation_Cast_Lead_22-Apr-2009.htm

185 See 'HR NGOs: Israeli Military Exonerates Itself,' 22 April 2009, <http://www.stoptorture.org.il/en/node/1413>

186 Human Rights Watch 'Israel/Gaza: Israeli Military Investigation Not Credible', 23 April 2009, <http://www.hrw.org/en/news/2009/04/23/israelgaza-israeli-military-investigation-not-credible> On 11 February 2009 EMHRN, Amnesty International and FIDH sent a letter to the EU Presidency urging the EU to take the lead in ensuring the prompt establishment of an international independent and impartial inquiry into all violations committed, with the mandate, composition and resources necessary to undertake and complete the task. The editorial of Haaretz declares that "The IDF investigated itself and exonerated itself," Haaretz; 'Unsatisfactory probes,' Haaretz, 26 April 2009, <http://www.haaretz.com/hasen/spages/1080714.html>

187 Amnesty International, 'Israeli army must make public findings of its probe into Gaza conflict', 24 April 2009, <http://www.amnesty.org/en/news-and-updates/news/israeli-army-must-make-public-findings-probe-gaza-conflict-20090424>

188 Human Rights Council 'The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip', Resolution of 12 January 2009, para. 14.

189 PCHR, Press release 'The Fact-Finding Mission Mandated by the League of Arab States to Investigate Israeli War Crimes Concludes Its Works in Gaza on Friday', 26 February 2009, <http://www.pchrgaza.org/files/PressR/English/2008/31-2009.html>

190 Human Rights Watch 'UN Should Ensure Impartial Inquiry Into Serious Violations by Both Sides', 27 January 2009, <http://www.hrw.org/en/news/2009/01/27/israelgaza-international-investigation-essential>

191 'Secretary-General Summary of the Report of the United Nations Board of Inquiry', op. cit., p.27.

192 See UN Secretary-General, 'Letter transmitting the Secretary-General Summary of the Report of the United Nations Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009', 4 May 2009, p. 3, <http://image.guardian.co.uk/sys-files/Guardian/documents/2009/05/05/4MayGiftrtoSCBrd.pdf>

implications of available evidence of IHL violations and in particular war crimes committed by both sides and not limited to attacks on UN facilities¹⁹³. This call has been echoed in a letter signed by a group of reputed international lawyers calling for an independent and impartial investigation into all allegations of serious violations of IHL committed by all parties, following the strictest of international standards and providing recommendations to the relevant authorities as to the appropriate prosecution of those responsible for gross violations.¹⁹⁴

To date the fact-finding mission established by the Human Rights Council seems to be the most comprehensive international investigating mechanism, however, Israel thusfar is refusing to cooperate with it and its mandate remains limited to the violations committed by Israel. Richard Goldstone, appointed chief of the mission on 3 April 2009, declared that 'it is in the interest of all Palestinians and Israelis that the allegations of war crimes and serious human rights violations related to the recent conflict on all sides be investigated'.¹⁹⁵ The President of the Human Rights Council also stated that he was "confident that the mission will be in a position to assess in an independent and impartial manner all human rights and humanitarian law violations committed in the context of the conflict".¹⁹⁶ Although this body will act within the limits of the resolution of the Human Rights Council that created it, this could lead to broadening the mandate of the mission.¹⁹⁷

Following the investigations, the paths for eventual prosecutions appear to be politically circumscribed. The case of prosecutions within the Israeli legal system appears to be very unlikely, as noted above.¹⁹⁸ More generally as stressed by HRW: 'Israel's poor record of investigating and

193 Human Rights Situation in Palestine and other Occupied Arab Territories, Combined Report, op. cit., Human Rights Council, A/HRC/10/22, 10 March 2009, pp. 18-19.

194 'Gaza: World's leading investigators call for war crimes inquiry - open letter', co-signed by a 16-strong group of the world's most experienced investigators and judges including Archbishop Desmond Tutu, Mary Robinson and Justice Richard Goldstone, 16 March 2009, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/RMOI-7Q6KGS?OpenDocument>

195 UN Press Release, Richard J. Goldstone appointed to lead Human Rights Council fact-finding mission on Gaza conflict, 3 April 2009, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/2796E2CA43CA4D94C125758D002F8D25?opendocument>

196 Ibid.

197 The example of the Commission of Inquiry on Lebanon in 2006, with the same limitation, however showed that the scope cannot be easily extended. 'Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1', A/HRC/3/2, 23 November 2006. The Commission stated that: 'A fundamental point in relation to the conflict and the Commission's mandate as defined by the Council is the conduct of Hezbollah. The Commission considers that any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved. Thus an inquiry into the conformity with international humanitarian law of the specific acts of IDF in Lebanon requires that account also be taken of the conduct of the opponent. That said, taking into consideration the express limitations of its mandate, the Commission is not entitled, even if it had wished, to construe it as equally authorizing the investigation of the actions by Hezbollah in Israel. To do so would exceed the Commission's interpretative function and would be to usurp the Council's powers' (paras. 14-15).

198 This is even less likely given the decision to close the investigations regarding the allegations by Israeli soldiers and the findings from the five military investigative teams that reveal that throughout the fighting, the soldiers operated in accordance with international law. 'The Military Advocate General, Brig. Gen. Avichai Mendelblit, made the decision to close the case in which the Criminal Investigation Department of the Military Police investigated statements made by soldiers at the Rabin Military Preparation Center in reference to Operation Cast Lead. This decision was made after the Military Police investigation found that the crucial components of their descriptions were based on hearsay and not supported by facts'. See IDF (2009) 'Hearsay: IDF Releases Findings of Investigation Regarding Remarks Made at Rabin Center', 30 March, <http://dover.idf.il/IDF/English/News/today/09/03/3001.htm> See also Israel Ministry of Foreign Affairs, 'IDF: Conclusion of investigations into claims in Operation Cast Lead,' 22 April 2009, http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_Conclusion_of_investigations_Operation_Cast_Lead_22-Apr-2009.htm

prosecuting serious violations by its forces, and the absence of any such effort by Hamas or other Palestinian groups, makes it essential that an inquiry be an independent international effort'.¹⁹⁹

With regard to prosecutions by the International Criminal Court, while Israel is not a party to the Rome Statute, the declaration of 21 January 2009 made by the Palestinian Authority under article 12 para. 3 of the Statute would be the only basis in theory. This declaration made on behalf of the Government of Palestine aims at recognizing the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002. However, given the fact that article 12 refers to a declaration made by a State and that the Palestinian Authority is not a state under international law, this initiative will probably fall short. This limitation notwithstanding and although with few chances of success in the current political context, there is also the theoretical possibility, under article 13 (b) of the Statute, for the Security Council acting under Chapter VII of the UN Charter, to refer the case to the Prosecutor. According to the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 prosecutions by an international ad hoc court such as the International Criminal Tribunal for Former Yugoslavia could also be envisaged, although it seems unlikely to conceive of the adoption of a UN Security Council Resolution on this issue.²⁰⁰

The most likely options to date regard prosecutions in third states, including member states such as Belgium, Spain and the UK, which give to their national courts legal authority to prosecute war crimes under universal jurisdiction. However such prosecutions are extremely difficult to maintain due to intense political pressures on third states not to intervene in these matters. Further these prosecutions are subjected to certain conditions depending on the country concerned, such as the fact that the alleged perpetrator has to be physically present in their territory.²⁰¹

Accountability with regard to the numerous violations of IHRL and IHL during the conflict is key for the peace process as whole. It would indeed be a mistake to strictly view this need for accountability only as a legal requirement. As underlined by the UN Special Rapporteur on summary executions: '(w)hile the Israeli military operation in Gaza was but one episode in a longstanding, complex, and highly contentious conflict, these characteristics make it more, rather than less, imperative that there be full accountability in relation to alleged violations. The alternative is de facto impunity. Such impunity mocks the international legal order, makes hollow the international obligations undertaken and reaffirmed by the parties, increases the likelihood of more flagrant violations in the future, and poisons the prospects for an eventual solution to the conflict'.²⁰²

¹⁹⁹ Human Rights Watch 'UN Should Ensure Impartial Inquiry Into Serious Violations by Both Sides', 27 January 2009, <http://www.hrw.org/en/news/2009/01/27/israelgaza-international-investigation-essential>

²⁰⁰ See 'Human Rights Situation in Palestine and other Occupied Arab Territories', op. cit. para. 36

²⁰¹ Interview with UN officials, and al Haq, March 2009.

²⁰² 'Human Rights Situation in Palestine and other Occupied Arab Territories', Combined Report, op. cit., Human Rights Council, A/HRC/10/22, 10 March 2009, para. 95.

5. THE EU'S REACTION TO THE ISRAELI OFFENSIVE ON THE GAZA STRIP

The preceding sections discussed how the EU, while vocally declaring its opposition to developments leading to "Operation Cast Lead", was in fact part of the international context that concomitantly facilitated Israel's escalation and Hamas' entrenchment and the military actions which ensued. The policy of boycotting Hamas and isolating the Gaza Strip, financing the PA-controlled West Bank and unconditionally supporting Israel, was not a road to a two-state solution and the respect for human rights and IHL, but rather made the accomplishment of these goals less likely. The offensive on the Gaza Strip is the tragic testimony of this fact. Having discussed the violations committed during "Operation Cast Lead", let us now turn to the EU's reaction during and after the military offensive.

5.1 THE EU'S COLLECTIVE RESPONSE

The EU reacted to "Operation Cast Lead" by mobilizing and/or signalling movement in the use of its three policy instruments applied to the conflict: diplomacy, assistance and contractual relations.

5.1.1 Diplomacy: unity of purpose, ineffective on the ground

On the diplomatic front, the Council of Ministers first reacted on 30 December 2008. Its position was clear in calling for an 'immediate and permanent ceasefire', which entailed an 'unconditional halt to rocket attacks by Hamas on Israel and an end to Israeli military action', and should be followed by a 'normal opening of all border crossings, as provided for in the 2005 Agreement on Movement and Access'.²⁰³ The EU declared its will to re-deploy EUBAM to monitor Rafah in collaboration with Israel, the PA and Egypt. The EU also called for immediate humanitarian action and committed to dispatch a needs assessment mission as soon as violence ceased. After the end of "Operation Cast Lead", the Council called for a permanent ceasefire implementing UN Security Council Resolution (UNSCR) 1860, an urgent reopening of Gaza's crossings on a regular and predictable basis so as to assure, inter alia, the unimpeded

²⁰³ Statement of the EU on the Situation in the Middle East, Paris, 30 December 2008, <http://www.franceonu.org/spip.php?article3201>

access of humanitarian assistance, as well as an effective mechanism to halt the smuggling of arms and ammunition. It declared its willingness to re-dispatch and expand EUBAM and 'identify ways to cooperate' with the US and Israel on anti-smuggling activities. It also backed intra-Palestinian reconciliation behind PA President Abbas, and committed to the rehabilitation, reconstruction and development of the Gaza Strip. In addition, the Council took 'careful note' of the UN Secretary General's 21 January 2009 statement calling for 'a thorough investigation by Israel into every single one of these incidents of attacks on UN facilities'.²⁰⁴ The Council however refrained from joining the UN Secretary General's call for an investigation on Israeli attacks on UN and other civilian targets. As for an explicit reference to IHL, following the end of the offensive, the Council 'remind(ed) all parties' to respect international humanitarian law and to comply with their obligations.²⁰⁵

The EU Presidency largely backed the positions of the Council. Upon the launch of the offensive on 27 December 2008, the French Presidency 'condemned the rocket strikes targeting the Israeli territory from Gaza' and 'the disproportionate use of force', reaffirming the EU's commitment to the full respect of IHL under all circumstances.²⁰⁶ This statement was the only time the Presidency raised the question of proportionality with regard to the conflict.²⁰⁷ Taking over from the French and espousing a far friendlier approach towards Israel, during the offensive the Czech Presidency issued four statements concerning the Gaza Strip. The first came in reaction to Israel's launch of ground operations on 3 January 2009. The Presidency deemed the launch of land operations as 'not surprising' and argued that the attack was carried out in self-defence,²⁰⁸ by stating that 'even the undisputable right of the state to defend itself does not allow actions which largely affect civilians'.²⁰⁹ The second statement, on 7 January 2009, deplored the loss of civilian life caused by Israeli military action, reiterated the call for an immediate ceasefire and called on Israel to open a humanitarian corridor. Yet it also condemned 'those who, by indiscriminately firing rockets into Israel, including from the densely populated areas of Gaza, began this tragic

conflict': Hamas.²¹⁰ On 9 January 2009 the Presidency issued a third statement urging all sides to respect UNSCR 1860 and expressing concern over Israel's firing at humanitarian convoys and staff. At the same time, it also shared 'Israel's concerns over the smuggling of weapons and asserted the EU's willingness to 'help(ing) secure the border', 'redeploy EUBAM Rafah and examine the possibility of extending its assistance to other crossing points'. In addition, the statement reaffirmed the need to 'fully open border crossings with Gaza to allow the regular and predictable movement of persons, humanitarian aid and commercial goods', and affirmed the need to restore Palestinian unity.²¹¹ Finally on 15 January 2009 the Presidency issued a fourth statement, using a more explicit language with regards to human rights and IHL, denouncing attacks on civilian and humanitarian targets, and calling on 'both parties to respect the principles of international humanitarian law and to comply with their obligations thereunder'.²¹² Summing up, the Czech Presidency's position, reaffirmed after the end of the offensive, included an unconditional halt of rocket fire and Israeli military (re)action, unimpeded humanitarian assistance, the prevention of smuggling and the opening of border crossings (through a redeployment of EUBAM), and the need for Palestinian reconciliation respecting the Quartet's principles.²¹³

The CFSP High Representative's declarations were largely in line with those of the Council and Presidency. On 27 December 2008, upon the launch of Israel's offensive, High Representative Javier Solana called for an immediate ceasefire.²¹⁴ During his visit to the region, he backed Egyptian President Hosni Mubarak's proposal for a ceasefire, the opening of crossing points to allow humanitarian aid and the need to address Israeli concerns over arms smuggling. On the latter point, Solana affirmed the EU's readiness to assist in the context of a ceasefire,²¹⁵ and backed the reopening of EUBAM in order to facilitate humanitarian relief, commercial trade, as well as to stop arms smuggling in collaboration with the PA.²¹⁶ The High Representative also called for Palestinian unity in order to manage the reconstruction and border crossings, prepare for elections, and push forward the peace process.²¹⁷

204 Council Conclusions on the Middle East Peace Process, 2921st External Relations Council Meeting, Brussels 26-27 January 2009. The Czech Presidency, on behalf of the EU, reaffirmed that the EU 'will closely follow investigations into alleged violations of international humanitarian law'. See 'Statement on behalf of the EU by H.E. Mr Martin Palous Permanent Representative of the Czech Republic to the United Nations on "The situation in the Middle East, including the Palestinian question"', 25 March 2009, http://www.mzv.cz/un.newyork/en/czech_eu_presidency_2009/statements_by_the_czech_presidency_on_statement_on_behalf_of_the_european_25.html

205 Council Conclusions on Middle East Peace Process, Brussels, 26-27 January 2009.

206 Declaration by the Presidency of the Council of the European Union on the violence in Gaza, 27 December 2008, http://www.eu2008.fr/PFUE/lang/en/accueil/PFUE-12_2008/PFUE-27.12.2008/PESC_Gaza_27_decembre_2008.html

207 By contrast, the UNSG, while recognizing 'Israel's security concerns regarding the continued firing of rockets from Gaza', reiterated 'Israel's obligation to uphold international humanitarian and human rights law'. He also 'condemns excessive use of force leading to the killing and injuring of civilians'. See UN Press Release 'Secretary-General urges immediate halt to renewed Israeli-Palestinian violence', 27 December 2008, <http://www.un.org/apps/news/story.asp?NewsID=29425&Cr=Palestin&Cr1=AsmaJahangir>, Chairperson of the coordinating body for independent United Nations human rights experts stated that 'the use of disproportionate force by Israel and the lack of regard for the life of civilians on both sides cannot be justified by the actions of the other party. They constitute clear violations of international human rights and international humanitarian law'. See, Press Release, 'UN Human Rights experts Call for Immediate Protection of Civilians in Middle East Crisis', 2 January 2009, <http://www2.ohchr.org/english/press/newsFrameset-2.htm>

208 The claim that Israel's operation was defensive in nature was later recalled by the Czech spokesman. Interview with member state diplomat, March 2009.

209 'EU Presidency Statement Concerning the Launching of Land Operations by the Israeli Forces in the Gaza Strip', <http://www.eu2009.cz/en/news-and-documents/cfsp-statements/eu-presidency-statement-concerning-the-launching-land-operatio-by-the-israeli-forces-in-the-gaza-strip--4695/>

210 'EU Presidency Statement on the current situation in Gaza, Government of the Czech Republic', 7 January 2009, <http://www.eu2009.cz/en/news-and-documents/cfsp-statements/eu-presidency-statement-on-the-current-situation-in-gaza-4960/>

211 'EU Presidency Statement on the Middle East, 9 January 2009', <http://www.eu2009.cz/en/news-and-documents/cfsp-statements/eu-presidency-statement-on-the-middle-east-5587/>

212 'EU Presidency Statement on ongoing attacks in Gaza', 15 January 2009, <http://www.eu2009.cz/en/news-and-documents/cfsp-statements/en-6201/>

213 Speech of Karel Schwarzenberg at a session of the European Parliament, 14 January 2009, <http://www.eu2009.cz/en/news-and-documents/speeches-interviews/speech-of-karel-schwarzenberg--session-of-the-european-parliament-6439>. See also the Czech Presidency's 'Statement on Israel's announcement of a temporary ceasefire in Gaza', 18 January 2009, <http://www.eu2009.cz/en/news-and-documents/cfsp-statements/eu-presidency-statement-6547/>

214 'La comunidad internacional pide el alto el fuego en Gaza', *El Mundo*, 27 December 2008, printed edition.

215 'Javier Solana, EU High Representative for the CFSP calls for ceasefire in Gaza during visit to the Middle East and Turkey', 9 January, Council of the EU, S004/09.

216 'Javier Solana quiere que la ANP retome el control de la seguridad en la Franja de Gaza', *El Mundo*, 7 January 2009, printed edition.

217 'EUHR Solana's summary remarks on the Gaza crisis', http://www.eu-un.europa.eu/articles/fr/article_8433_fr.htm, 21 January 2009; 'Javier Solana EU High Representative, supports unity amongst the Palestinians in meetings with President Abbas and Prime Minister Fayyad', 28 January 2009, Ramallah, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/105685.pdf

Finally, External Relations Commissioner Ferrero-Waldner also expressed concern at Israeli military strikes and distanced the Commission from the suggestion that Israel's attack was defensive in nature.²¹⁸ Upon the ceasefire declarations, Ferrero-Waldner insisted on the need to ensure the regular opening of crossings, the withdrawal of Israeli troops and supported the creation of a Palestinian national unity government.²¹⁹ Far more firmly, Commissioner Michel made the strongest legal assessment of the military offensive in an interview in *La Libre Belgique*, qualifying the Israeli offensive as 'totally disproportionate'.²²⁰

This apparent clarity of purpose and position did not translate into effective operational diplomacy on the ground to secure a ceasefire. On 4-6 January 2009 three separate European delegations travelled to the region: the first led by French President Nicolas Sarkozy; the second representing the EU Troika which included Czech Foreign Minister Karel Schwarzenberg, French Foreign Minister Bernard Kouchner (holding the previous EU Presidency) and Swedish Foreign Minister Carl Bildt (holding the next EU Presidency), as well as External Relations Commissioner Ferrero-Waldner and High Representative Javier Solana; the third by the Spanish Foreign Minister Miguel Moratinos. The aim of the delegations was to seek an end of violence, alleviate humanitarian suffering and discuss EU ceasefire proposals agreed in Paris. European diplomatic efforts persisted without practical success. European diplomacy did contribute to UNSCR 1860, calling for the unimpeded access of humanitarian aid and an intensification of efforts to bring about a durable ceasefire.²²¹ Yet the resolution's call for a ceasefire went unheard by Israel,²²² which declared its "unilateral ceasefire" on 17 January 2009 a few hours after signing a Memorandum of Understanding with the US, in which Washington committed to aiding Israel combat smuggling into the Gaza Strip.²²³ Israel's onslaught on the Gaza Strip thus ended not through an EU-Egyptian mediated agreement between Israel and Hamas, but after an agreement between Israel and its ally the US. Despite this, on the way to Sharm-el-Sheikh for the ceasefire conference on 18 January 2009, a European delegation dined with Israeli leaders in what appeared to be a "victory dinner" to many observers.²²⁴ EU diplomacy also failed to influence Hamas in view of its lack of contact with and thus possibility to exert influence on the movement. Hamas in fact declared its own unilateral ceasefire under Egyptian and Turkish mediation.²²⁵

218 'I cechi dividono l'Unione europea', *Corriere della Sera*, 4 January 2009, http://archivistorico.corriere.it/2009/gennaio/04/cechi_dividono_Unione_europea_co_8_090104026.shtml

219 'Statement of Commissioner Ferrero-Waldner ahead of Foreign Ministers meetings with Israel and Arab counterparts' and 'Statement by the Commissioner on ceasefire declared by Israel', 19 January 2009, http://ec.europa.eu/commission_barroso/ferrero-waldner/speeches/index_en.htm#19_01_2009

220 Interview with Louis Michel 'Guerre de Gaza : Les dégâts collatéraux sont là', 13 January 2009, *La Libre Belgique*, <http://www.lalibre.be/actu/monde/article/474111/les-degats-collateraux-sont-la.html>

221 'Security Council calls for immediate, durable, fully respected ceasefire in Gaza leading to full withdrawal of Israeli forces', Resolution 1860 (2009) Adopted by 14 in Favour at the Security Council 6063rd Meeting, <http://www.un.org/News/Press/docs/2009/sc9567.doc.htm>

222 Despite ignoring the call for a ceasefire, the Israeli government did slightly increase the access of humanitarian assistance to Gaza as urged for by UNSCR 1860, although the level of humanitarian aid allowed into the Strip remained far below the humanitarian threshold.

223 'Text of U.S.-Israel agreement to end Gaza arms smuggling', *Haaretz* <http://www.haaretz.com/hasen/spages/1056175.html>

224 Interview with EU official, March 2009.

225 'Turkey key to convincing Hamas on Gaza cease-fire', *Turkey NY.com*, <http://www.turkishny.com/tr/ingilizce-haberler/1639-turkey-key-to-convincing-hamas-on-gaza-cess-fire-.html>

5.1.2 Assistance to the Palestinians: the aid dilemma deepens

Turning to EU assistance to the OPT, during the military offensive, Commissioner for Humanitarian Aid Louis Michel committed €10.4 million in immediate humanitarian aid, focusing on food, emergency shelter and medical support. The provision of humanitarian assistance, governed by ECHO's principles of neutrality, impartiality and independence, was intended to be the most important, practical and rapid EU response to the conflict in the Gaza Strip, which would be able to detour political obstacles.²²⁶ Michel also affirmed the need to provide and facilitate access to humanitarian assistance under IHL, denounced attacks on civilians and the blocking of access to humanitarian convoys, called on Israel to allow the delivery of relief,²²⁷ and condemned Israel's attacks on UNRWA.²²⁸ At the 2 March 2009 Sharm el-Sheikh conference, the Commission pledged €436 million (out of a total of €4.5 billion pledged at the conference), of which over half would be earmarked for the Gaza Strip. Of these, €32 million would be delivered by ECHO in humanitarian assistance to the Gaza Strip in the context of the 2009 "Global Plan", while the rest would be channelled through PEGASE to cover for fuel, social allowances and salaries of PA employees.

Yet as in the pre-December 2008 situation, two principal questions remain unsolved in the EU's aid policy to the OPT. First is the question of whether earmarked funds will actually reach the Gaza Strip. In this respect the primary obstacle regards Israel's severe restrictions on access, including the restrictions on humanitarian convoys and personnel,²²⁹ on cash and on fuel, as well as Israel's refusal to allow reconstruction material (viewed as "dual use") despite the thousands of homeless persons in the Gaza Strip. Hence for example in April 2009, cash payments through PEGASE destined to 48,000 Palestinian families throughout the OPT, will not reach the 24,500 families in the Gaza Strip. The problem of access is primary, in so far as it prevents even a modicum of early recovery, rehabilitation and reconstruction, which could take place through UNRWA and international NGOs (e.g. the construction of housing units for homeless persons, the repair and rebuilding of schools, and the rehabilitation of water infrastructure). Following the end of violence, the EU's repeated calls for open access to the Gaza Strip have fallen on deaf ears, with Solana complaining that items and truckloads entering the Gaza Strip are 'totally inadequate'.²³⁰ Yet beyond words and surreal negotiations with Israel over what constitutes

226 Interviews with EU officials, March 2009. On those principles, see The 'European Consensus on Humanitarian Aid', paras. 10 and 18, December 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1957&format=HTML&aged=1&language=EN&guiLanguage=en>

227 'Commission launches €3 million emergency funding decision for humanitarian aid in Gaza', 4 January 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/2&format=HTML&aged=0&language=EN&guiLanguage=en>

228 'Statement by European Commissioner for Development and Humanitarian Aid Louis Michel on temporary suspension of movements of UNRWA staff throughout the Gaza Strip', 9 January 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/37&format=HTML&aged=0&language=EN&guiLanguage=en>

229 Approximately 120 truckloads are allowed daily to enter Gaza of which 60% are humanitarian and the rest commercial. Whereas the ratios of humanitarian and commercial goods changes, the over amount of goods allowed into Gaza does not. Interview with UN official, March 2009. See also OCHA 'The Humanitarian Monitor', No. 34, February 2009; and OCHA 'Field Update on Gaza from the humanitarian coordinator, 10-16 March 2009'. Other essential supplies such as construction materials, spare parts for water and waste infrastructure, industrial inputs and livestock have not been allowed to enter. There has been no improvement in the access of patients to go abroad for medical purposes. Restrictions on some food items, recreational kits, stationary, and veterinary drugs persist.

230 'Javier Solana EU High Representative supports unity amongst the Palestinians in meetings with President Abbas and Prime Minister Fayyad', 28 January 2009, Ramallah, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/105685.pdf

a humanitarian good, it remains unclear what the EU will do in order to alter Israel's policy and bypass Israel's insistence that access is conditional on the release of Gilad Shalit. Another obstacle regards the EU's lack of contact with the authorities in the Gaza Strip in order to engage in full-scale reconstruction, compromising ECHO's principles of neutrality, impartiality and independence.²³¹ In this respect, the EU is yet to take a clear stance on a possible revision or reinterpretation of the Quartet's conditions after the creation of a new government. The pledges of aid made by the EU and other donors at the Sharm-el Sheikh conference on 2 March 2009 thus took place before the political parameters for reconstruction were in place, including access, a permanent ceasefire and a Palestinian government recognized by the EU in the Gaza Strip.²³² Consequently, pledged funds are likely to merely serve to keep the PA afloat rather than to meaningfully engage in the rehabilitation and reconstruction of the Gaza Strip.

Second, is the unsustainability of ever-rising levels of EU assistance, which at best alleviate the most acute manifestations of the conflict while deepening its intractability, and at worst are channelled into property destroyed by Israeli attacks.²³³ On this latter point, while the European Parliament (EP) has called for damage assessments in the Gaza Strip,²³⁴ it is noteworthy that no mention has been made by the Commission regarding the claim for compensation for EU-financed facilities destroyed in the Gaza Strip. Ferrero-Waldner limited herself to stating that 'we must seek guarantees to end the "destruction-reconstruction" cycle', and calls for compensation are viewed as unlikely by several interlocutors.²³⁵ Beyond the difficulty of yielding consensus among the member states, several officials have dismissed the possibility of such requests in view of the fact that, upon completion of a project, the only actors with a legal interest to file a claim would be the recipients of EU assistance. This said, the EU could demand compensation for EU-funded projects that were still under construction when destroyed or damaged, or at the very least demand investigations into such destruction and damage. Moreover, the Commission has filed claims for compensation in the past and member states such as Sweden have already carried out investigations on the value of destruction of property in the Gaza Strip during "Operation Cast Lead".²³⁶ As for the estimates of damage and destruction of Commission-funded facilities, preliminary figures range from €20 million to €25 million.²³⁷ Beyond claims for compensation, the EU is shying away from holding Israel accountable for the reconstruction of the Gaza Strip, thus inducing Israel's shirking of its responsibilities under IHL.²³⁸ It is in fact paradoxical that Israel's

231 Interview with UN official, Ramallah, March 2009.

232 Interviews with EU and member state officials, March 2009.

233 The EU has recognized the unsustainability of current levels of assistance to the OPT. See Commission 'The EU in the Middle East Peace Process', MEMO/09/88, 27 February 2009.

234 European Parliament, 'Gaza: increased humanitarian aid, end of blockade and damage assessment needed', Press Release, 18 February 2009, http://www.europarl.europa.eu/news/expert/infopress_page/030-49757-068-03-11-903-20090218IPR49756-09-03-2009-2009-true/default_en.htm

235 Benita Ferrero-Waldner Commissioner for External Relations and ENP (2009) 'European Union Pledges Support for reconstruction of Gaza', International Conference in support of the Palestinian economy for the reconstruction of Gaza Sharm-el-Sheikh, 2 March 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/81>

236 A conservative estimate is that \$2,3m worth of investments by Sweden has been destroyed in attacks, although the cost of repair is significantly higher. See Johan Brisman (2009) 'Matching need with possibilities: Proposed fast track interventions to support recovery in Gaza post "Operation Cast Lead" and assessment of damage to facilities financed by Sweden', 26 March, Stockholm.

237 Interviews of EU officials, March 2009. The Commission has tasked a consultant to provide an assessment of damages caused by "Operation Cast Lead", but its results have not been published at the time of writing.

238 In addition EU assistance to Gaza pays VAT and storage costs to Israel. Interview with EU official, March 2009.

permission to allow the EU to channel assistance to the Gaza Strip is being debated as an Israeli concession rather than as its own legal obligation.²³⁹ As put by one official: 'in absence of a political position the EU once again turns up with more money'.²⁴⁰

5.1.3 Contractual relations with Israel: business as usual?

As far as relations with Israel are concerned, the question is whether the EU will proceed with the upgrade of contractual ties, originally scheduled for May 2009. During the offensive on the Gaza Strip, both Israel and the Commission agreed to freeze the process on a technical level. As put by Ramiro Cibrian-Uzal, the Commission's head of delegation in Israel: 'in a situation in which Israel is (...) using its war means in a very dramatic way (...) everybody realizes that it is not the appropriate time to upgrade bilateral relations'.²⁴¹ Yet the Council and Presidency, mandated to push forward the process at a political level, expressed their commitment to deepen EU-Israel ties as planned.²⁴² This position was espoused by Commissioner Ferrero-Waldner, stating that: 'the member states and the EU believe that such measures (suspension of the association agreement and the process of upgrading relations with Israel) would lead Israeli authorities to adopt a position which is less (and not more) receptive to the international community's efforts to promote a permanent settlement'.²⁴³ Commission representatives affirmed that: '(T)he EU has never contemplated, to my knowledge, has never seriously envisaged sanctions',²⁴⁴ at most recognizing that 'it is clear that the recent intervention in Gaza has not contributed to an atmosphere conducive to concluding the upgrading process with Israel'.²⁴⁵ In other words, the temporary freeze or "mutually agreed time-out" in the upgrade process was deliberately not portrayed as a form of conditionality due to Israel's offensive in the Gaza Strip, and officials went to great lengths to justify the delay by the fact that both the EU and Israel were "busy with other matters" and in no way did the EU want to signal to Israel that its offensive on the Gaza Strip would have medium-term political repercussions on bilateral relations.

In addition, Antonio Tajani, Vice President of the European Commission, visited Israel one week after the end of the offensive to discuss Israeli participation in EU space programmes in the context of the European Space Agency (ESA) and to boost the participation of Israeli industries and research institutes ESA projects.²⁴⁶ Alongside this, the European Parliament endorsed the launch of negotiations on Israel's participation in the Common Aviation Area in February 2009.²⁴⁷

239 Interview with EU official, March 2009.

240 Interview with EU official, March 2009.

241 'Europe stalls on closer Israel links in Gaza protest', The Guardian, 14 January 2009

242 'EU talks with Israel on upgrading ties put on hold', Reuters, 14 January 2009, <http://www.reuters.com/article/newsMaps/idUSTRE50D3GX20090115>; Leigh Philipps (2009) 'Brussels freezes talks on closer EU-Israel relations', EUObserver, 14 January 2009, <http://euobserver.com/9/27411/?rk=1>

243 'Benita Ferrero-Waldner, Membre de la Commission européenne chargée des relations extérieures et de la politique de voisinage répond aux courriers concernant la vente, en Europe, de certains produits provenant de colonies israéliennes en territoire palestinien occupé', February 2009, Brussels (authors' translation), http://ec.europa.eu/commission_barroso/ferrero-waldner/speeches/speeches/petition_products_opt_02_2009.pdf

244 'Statements by Commission Head of Delegation in Tel Aviv Ramiro Cibrian Uzal', Reuters, 14 January 2009.

245 Letter by Belen Martinez Carbonell, European Commission, BMC D(2009)417 A(2008)4680, March 2009

246 Israel Ministry of Foreign Affairs 'Vice-President of EU Commission visits Israel', Newsletter, 26 January 2009.

247 European Parliament 'Report on developing a Common Aviation Area with Israel', 23 February 2009, Brussels, A6-0090/2009.

Only a few lone voices in the European Parliament objected to the persistence of "business as usual" in EU-Israel relations. MEP Chris Davies stated: '(N)ow we are completing negotiations with Israel on an enhanced cooperation agreement. We do not plan to condemn Israel: we intend to reward it'.²⁴⁸ Similar calls to refrain from upgrading relations with Israel in this context were made by the Greens, Alliance of Liberals and Democrats for Europe (ALDE) and European United Left (GUE) in the European Parliament, as well as socialist parties across the EU and the British Liberal Democrat leader Nick Clegg.²⁴⁹ However the majority view within EU institutions is that, as calm settles after the storm, EU-Israel relations will resume despite a slight delay in the process.

By contrast, since the offensive in the Gaza Strip, developments in the West Bank including East Jerusalem (e.g. house demolitions) and above all the creation of an Israeli government whose prime minister and foreign minister are declaredly against the establishment of a Palestinian state have triggered far stronger European reactions. The EU-Israel Association Council, scheduled for May 2009, has been postponed by one month, the first EU-Israel summit has been temporarily shelved and European officials have used far clearer language regarding the link between EU-Israel relations and the Middle East Peace Process.²⁵⁰

5.1.4 The EU's collective response: old dilemmas, new ambiguities

The EU's collective reaction has thus been marked by a reiteration of largely unchanged policies fraught with old dilemmas. On diplomacy, the EU has remained largely ineffective. It has called for an immediate and permanent ceasefire on the basis of UNSCR 1860, yet has failed to secure this by refusing to exert pressure on Israel and not engaging with and thus being able to exert influence on Hamas. The EU has condemned attacks on civilian and humanitarian targets, yet it has refrained from calling for an investigation into violations of IHL and IHRL despite movement on this front in the UN. The EU has called for the opening of border crossings and for an end to smuggling, but as of April 2009 the only concrete steps taken have been on anti-smuggling rather than on border monitoring in order to ensure access. Finally, the EU has supported Palestinian reconciliation, yet it is unclear whether it is willing to press the Quartet to review its conditions or depart from their strict interpretation as and when such unity is forged.²⁵¹ On assistance, the EU has proposed a surge in humanitarian aid without demanding from Israel any compensation for destroyed facilities or investigations (including the circumstances under which damage or destruction took place) into such destruction, despite its ongoing inability to channel effectively funds to the Gaza Strip and regardless of the unsustainability of aid levels to the OPT. Finally, the EU has asserted its political intention to pursue an upgrade of bilateral relations with Israel, despite the violations committed by

248 European Parliament, 'Gaza: European Parliament calls for an immediate and permanent ceasefire and a negotiated truce', Press Release, 15 January 2009, Brussels.

249 'Greens/EFA Group Resolution points on the Gaza crisis', The Greens/European Free Alliance, 9 January 2009, <http://www.greens-efa.org/cms/topics/dokbin/264/264655.pdf>

250 Benita Ferrero-Waldner 'The Offer on the Table', Ha'aretz, 19 April 2009, <http://www.haaretz.com/hasen/spages/1079055.html>

251 The same positions were espoused by the European Parliament in its resolution on 15 January. With respect to the positions discussed above, the innovative aspects of the EP's resolution included the call for a multinational force to secure the ceasefire and the position that the 2007 Mecca constituted a fulfilment of the Quartet's principles. See European Parliament resolution of 15 January 2009 on the situation in the Gaza Strip, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0025+0+DOC+XML+V0//EN&language=EN>

Israel in and after "Operation Cast Lead". EU hesitations on the upgrade were voiced only later and primarily in response to the platform of the new Israeli government.

Examining these collective responses, we note three points of new ambiguity and confusion. The first concerns the actual cause of the conflict, with some assigning unambiguous responsibility to Hamas while others distancing themselves from this view. The second regards the EU's border monitoring efforts. Whereas on most occasions EU initiatives are mentioned in the context of the need to secure open access and implement the AMA,²⁵² on other occasions the emphasis is placed on anti-smuggling, which could entail a further sealing of Gaza's borders, particularly if actions are taken to detect and destroy tunnels before access is assured.²⁵³ A final point of ambiguity regards the formation of a Palestinian national unity government, and in particular whether reconciliation is genuinely favoured throughout the OPT or whether the EU simply feels the need more acutely to reinstate the PA in the Gaza Strip given its inability to conduct border monitoring, reconstruction and aid policy under current conditions.

5.2 CONSONANCE OR DISSONANCE BETWEEN THE MEMBER STATES?

In order to explain the EU's response to the offensive in the Gaza Strip let us delve into the positions of the member states. Several officials have highlighted the EU's impressive unity of response to "Operation Cast Lead", especially in comparison with the 2006 war in Lebanon. While recognizing that this unity of purpose had failed to yield results on the ground, these officials have praised the strong wording of the Council's statements and conclusions on 30 December 2008.²⁵⁴ By contrast, several European actors have finger-pointed the EU's internal paralysis, suggesting that diplomatic activism masked internal discord. The European Parliament referred to this implicitly when calling for 'a stronger and more united political stance on the part of the EU'.²⁵⁵ Former German Foreign Minister Joschka Fischer was far more explicit: 'the EU's current chaotic efforts should make us all blush with embarrassment. We Europeans are making ourselves look ridiculous. It is a diplomatic flea circus'.²⁵⁶ Particularly in early January 2009, the EU's diplomatic efforts did indeed look hyper-active and chaotic with separate delegations travelling to the region, signalling an evident state of intra-EU discord. Yet as the offensive persisted into 2009 did this divergence between the member states subsume, and if so, can the EU's reaction be best explained by a newfound accord between the member states? To address this question we turn to a set of EU member states, tracing how their positions evolved as the conflict unfolded.

252 Although there is a slight contradiction between a support for the AMA and for the complete opening of border crossings given that the former in practice relies on Israeli discretion as to when and whether crossings would be open.

253 While tunnels are allegedly used also to smuggle weapons, they are mostly used to smuggle goods in view of the closure policy on Gaza. As noted by OCHA: 'tunnels, however, remain an important economic lifeline for Gaza's population, supplying the market with goods restricted from entering Gaza through the Israeli-controlled crossings'. See OCHA 'The Humanitarian Monitor', No. 34, February 2009.

254 Interviews with EU officials, March 2009.

255 See European Parliament resolution of 15 January 2009 on the situation in the Gaza Strip, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0025+0+DOC+XML+V0//EN&language=EN>

256 'Israel Halts Offensive to Allow Aid into Gaza', 7 January 2009, Spiegel Online international, <http://www.spiegel.de/international/world/0,1518,599943,00.html>

5.2.1 Unconditionally supportive of Israel: Czech Republic, Germany, Italy and the Netherlands

A first set of member states, including the Czech Republic, Germany, Italy and the Netherlands adopted a strong pro-Israel line during the offensive. First and foremost, these member states unambiguously viewed the outbreak of hostilities as the result of Hamas' breach of the ceasefire and Israel's (allegedly defensive) response. This position thus ignored the string of events which led to the escalation,²⁵⁷ selecting only Hamas' resumption of rocket fire on 5 November 2008 and Israel's military response on 27 December 2008 as the relevant turning points. German Foreign Minister Steinmeier portrayed Israeli actions as a justified act of self-defence.²⁵⁸ Likewise Dutch Prime Minister Jan Peter argued that the offensive could not be condemned as long as Hamas continued to fire rockets,²⁵⁹ and the government asserted that it was Hamas, not Israel, which violated IHL by concealing its militants and weapons amongst civilian settlements.²⁶⁰ Likewise, the Czech Republic stated that Israel had an inalienable right to defend itself.²⁶¹ Italy towed the same line, with the government asserting that Hamas unilaterally breached the ceasefire in order to 'renegotiate a new deal in its favour' and Israel reacted in view of its 'legitimate right of self defence'.²⁶² Ignoring the persisting occupation of the Gaza Strip, the Italian government also asserted that Hamas had violated the "land for peace" principle in view of the "land" offered by Israel to the Palestinians through disengagement and the "peace" that was never reciprocated by Hamas.²⁶³

Second and alongside this stance, these member states remained staunch in their opposition to any form of engagement with Hamas. They reiterated the blunt "no talk with the terrorists" line, yet failed to recognize the ineffectiveness of this approach. As put by German Foreign Minister Steinmeier: 'I do not think that direct talks (of Hamas) with Germany or the EU would add any extra value. On the contrary, I think it's sensible for all contacts to run through Cairo. There is

a risk that Hamas would otherwise try to play each of us off against the others'.²⁶⁴ The Netherlands, alongside Italy, Germany and the Czech Republic, adamantly blocked attempts within the Council to reconsider conditionality on Hamas.²⁶⁵ Following this line, Czech Foreign Minister Karel Schwarzenberg declared that 'the shelling from the Hamas' side makes it impossible to consider this organization as a partner for negotiations and to lead any political dialogue with it'.²⁶⁶ The Italian government went further, calling for a reinforced boycott and "alliance" against Hamas until and unless it accepts the Quartet's conditions.²⁶⁷

Third these member states have displayed a strong commitment to assist Israel (and the US) in anti-arms smuggling activities. As put by German Foreign Minister Steinmeier 'effectively combating arms trafficking is one of the key contributions towards a durable ceasefire and the opening of the borders'.²⁶⁸ The Netherlands and Italy have backed the opening of the crossings only alongside a tightening of anti-smuggling activities.²⁶⁹ Dutch Foreign Minister Maxime Verhagen thus declared that '(t)he control of borders has to be "watertight"',²⁷⁰ and the Dutch-Danish proposal to redeploy EUBAM expressly cast the monitoring mission in the context of anti-smuggling efforts.²⁷¹ Echoing this line, Czech Foreign Minister Schwarzenberg declared that 'Israel constantly suffered from the missile attacks. It knew that the enemy was gradually amassing the stocks of lethal weapons...The stationing of a monitoring mission might help in the situation'.²⁷² Italy went further proposing an Italian military contribution to anti-smuggling through the patrolling of the sea, the training of Egyptian forces and by providing equipment to detect the presence of rockets underground.²⁷³ Germany, Italy, and Netherlands, alongside Denmark, France and the UK have participated in the first two meetings (held in Copenhagen and London) in 2009 to discuss cooperation on anti-smuggling. So far, these member states have agreed to engage in the patrolling of the Red Sea, which is unlikely to lead to a tightened closure of the Gaza Strip given the minimal humanitarian assistance transiting through the sea.²⁷⁴ However if these efforts were in the future to extend to land activities (e.g. training and equipment to detect and destroy tunnels) prior to a full opening of the crossings, these member states would become actively engaged in the collective punishment of the Gaza Strip.²⁷⁵

257 Including Israel's 42-year occupation, but particularly and more recently its closure of Gaza despite the terms of the ceasefire agreement, the fact that Hamas largely respected the ceasefire until November 2008, Israel's military incursion in Gaza on 4 November 2008 followed by Hamas' resumption of rocket fire and Israel's tightening of the closure, and Hamas' proposal (through Egypt) for a new ceasefire deal on 14 December 2008. See Gareth Porter (2008) 'Israel Rejected Hamas Ceasefire Offer in December', December, www.ipsnews.net/news.asp?idnews=45350

258 Speech by Foreign Minister Steinmeier in the German Bundestag on the situation in Gaza, Federal Foreign Office, 14 January 2009, <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Reden/2009/090114-AMBTGaza.html>; Federal Foreign Office, 27 December 2008, <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Meldungen/2008/081227-BM-Lage-Gaza.html>; 'Merkel Blasts Hamas for Middle East Violence', Spiegel Online, 29 December 2008, <http://www.spiegel.de/international/world/0,1518,598724,00.html>

259 'EU seeks Gaza role despite conflicting views', EurActiv, 5 January 2009, <http://www.euractiv.com/en/foreign-affairs/eu-seeks-gaza-role-despite-conflicting-views/article-178272>

260 'Dutch Government Says Hamas Violates War Law, Not Israel', NIS-News Bulletin, 9 January 2009, http://www.nisnews.nl/public/090109_1.htm

261 'Statement of Minister Karel Schwarzenberg on the situation in the Gaza Strip', Ministry of Foreign Affairs of the Czech Republic, 28 December 2009, http://www.mzv.cz/jnp/en/issues_and_press/events_and_issues/press_releases/statement_of_schwarzenberg_on_situation_in_gaza.html

262 'Medio Oriente, Striscia di Gaza: Berlusconi auspica dialogo', 27 December 2008, <http://www.governo.it/Governoinforma/Comunicati/dettaglio.asp?d=41514>; 'Il Ministro Frattini sulla crisi nella striscia di Gaza', 27 December 2008, http://www.esteri.it/MAE/IT/Stampa/Sala_Stampa/Comunicati/2008/12/20081229_FrattiniGaza.htm?LANG=IT

263 'Frattini. Subito la tregua un' Europa divisa non potrà fare nulla', Repubblica, 5 January 2009, <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2009/01/05/subito-la-tregua-un-europa-divisa-non.html>

264 'The danger is that Iran will profit from Gaza', Welt am Sonntag 11 January 2009, <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Interview/2009/090111-BM-WamS.html>

265 'Barak Ravid 'Israel stymies French push to lift European boycott of Hamas'', Haaretz, 27 January 2009, <http://www.haaretz.com/hasen/spages/1059097.html>

266 'Statement of Minister Karel Schwarzenberg on the situation in the Gaza Strip', Ministry of Foreign Affairs of the Czech Republic, 28 December 2009, http://www.mzv.cz/jnp/en/issues_and_press/events_and_issues/press_releases/statement_of_schwarzenberg_on_situation_in_gaza.html

267 'Intervista al Ministro Frattini: "L'Italia pronta a una mediazione deve prevalere il fronte moderato"', Il Messaggero, 8 December 2008, http://www.esteri.it/MAE/IT/Sala_Stampa/ArchivioNotizie/Interviste/2008/12/20081228_intervistaMessaggeroFrattini.htm

268 'German border experts arrive in Egypt', Federal Foreign Office, 27 January 2009, <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Meldungen/2009/090127-GrenzexpertenEGY.html>

269 'Intervento del Ministro Frattini di fronte alle Commissioni Esteri di Camera e Senato sui recenti sviluppi della situazione in Medio Oriente', 30 December 2008, http://www.esteri.it/MAE/IT/Stampa/Sala_Stampa/Interventi/2008/12/20081231_InterventoMinistro_sviluppiGaza.htm?LANG=IT

270 'MPs back Dutch Gaza ceasefire plan', DutchNews.nl, 7 January 2009, http://www.dutchnews.nl/news/archives/2009/01/mps_back_dutch_gaza_ceasefire.php

271 'Verhagen backs EU mission to Gaza', DutchNews.nl, 7 January 2009, http://www.dutchnews.nl/news/archives/2009/01/verhagen_backs_eu_mission_to_g.php

272 'Schwarzenberg sees end of Gaza conflict', Prague Daily Monitor 15 January 2009, <http://praguemonitor.com/2009/01/15/schwarzenberg-sees-end-gaza-conflict>

273 'Berlusconi: "Carabinieri e navi per la pace", La Repubblica, 19 January 2009; 'Militari in Egitto: proposta italiana', Il Corriere della Sera, 20 January 2009, printed edition.

274 Interviews with member state and EU officials, March 2009.

275 Interview with Gisha, Tel Aviv, March 2009.

Fourth, these member states have remained firm in their commitment to strengthen bilateral ties with Israel, without any strings attached. Both the Netherlands and the Czech Republic have rejected freezing the process of upgrading bilateral relations. As put by the Dutch government: '(t)he Netherlands is not of the opinion that Israel has moved to behaviour that prompts punishment or sanctioning'.²⁷⁶ In addressing the European Parliament in January 2009 Czech Prime Minister Mirek Topolánek asserted his unwavering commitment to strengthening EU-Israel ties.²⁷⁷

Yet on other counts, and particularly as the Israeli offensive persisted with increasingly grave human rights and IHL violations, even these member states nuanced their line. They concurred on the need to allow the free access of humanitarian assistance, to avoid civilian casualties and on the imperative of a permanent ceasefire.²⁷⁸ They also agreed on the need to provide economic and humanitarian assistance, with Italy rehashing its bombastic proposal for a "Marshall Plan" for Palestine in the context of its G8 Presidency.²⁷⁹ While adamant that aid would not be channelled to and through Hamas, these member states have also declared their support for Palestinian reconciliation.²⁸⁰ Indicative of the gradually shifting line of these member states' positions as the offensive aggravated, Czech Foreign Minister Schwarzenberg declared on 12 January 2009: 'I do think that each hour Israel is continuing its military operation it loses in the public opinion in Europe'.²⁸¹ Following the offensive, the lead taken by the Czech Presidency in objecting to house demolitions in East Jerusalem is also indicative of a marginally shifting approach towards Israel.²⁸²

5.2.2 Adding political nuance to the EU's stance: France, Spain and the UK

A second set of member states, including France, Spain and the UK, adopted positions which were not radically different in substance from those discussed above, yet added greater political nuance to the European policy narrative and approach. This group is characterized by its emphasis on the wider political context leading to the military offensive, on an immediate ceasefire and on intra-Palestinian reconciliation.

In terms of political narrative, these three member states have added some nuance to the black-and-white reading of the Israeli military offensive as a legitimate Israeli response to Hamas' breach of the ceasefire. They did attribute responsibility for the escalation to Hamas' 'irresponsible provocations which led to this situation', thus ignoring Israel's own breach of the ceasefire and its tightening of the siege in November 2008. This notwithstanding, they refrained from condoning

276 'Dutch Government Says Hamas Violates War Law, Not Israel', NIS-News Bulletin, 9 January 2009, http://www.nisnews.nl/public/090109_1.htm

277 Leigh Philipps (2009) 'Brussels freezes talks on closer EU-Israel relations', EUObserver, 14 January 2009, <http://euobserver.com/9/27411?rk=1>

278 'Israel Halts Offensive to Allow Aid into Gaza', Spiegel Online, 7 January 2009, <http://www.spiegel.de/international/world/0,1518,599943,00.html>

279 'Gaza: Berlusconi, l'Italia farà la sua parte', 18 January 2009, <http://www.governo.it/GovernoInforma/Comunicati/dettaglio.asp?d=41670>

280 'Fratini: "Niente aiuti ad Hamas." In Italia dieci bimbi malati di Gaza', La Repubblica, 21 January 2009; 'Da Roma aiuti per due milioni', Il Sole 24 Ore, 21 January 2009, printed edition.

281 'Schwarzenberg: The longer Israeli action, the lower EU support', Prague Mail, 12 January 2009

282 Interview with EU member state official, March 2009.

Israel's military response and condemned immediately Israel's 'disproportionate use of force'.²⁸³ The UK in particular cast the escalation in the Gaza Strip within the wider context of the stalled peace process, for which it recognized the international community's collective responsibility. As put by British Foreign Secretary David Miliband: 'we are now paying a terrible price for the slow and faltering negotiations'²⁸⁴... 'the crisis in Gaza is an indictment of our collective failure, all of us, over a long period, to bring about the two-state solution that offers the only hope of security and justice for Israelis and Palestinians alike'.²⁸⁵

In view of a more nuanced political narrative, these member states played a leading diplomatic role within the EU in striving for an immediate ceasefire. France stands out as the most proactive member state in securing a ceasefire working alongside Egypt. Launching its diplomatic endeavours during the last days of its EU Presidency, it persisted thereafter, adding to the confused European diplomatic response in early January 2009. France led the momentum within the EU to call for an immediate ceasefire on 30 December 2008.²⁸⁶ Both President Sarkozy and Foreign Minister Kouchner played key roles in securing a 48-hour "humanitarian ceasefire" on 31 December 2008. Alongside Egypt, the French ceasefire deal proposed on 5 January 2009 included a first phase featuring an immediate end of Hamas rocket fire and the Israeli military offensive, alongside a tighter control of borders in order to halt weapons smuggling; to be followed by a second phase whereby Israel would open all border crossings and the EU would assist in both border monitoring and anti-smuggling. The UK and Spain were also staunch advocates of an immediate ceasefire. On 29 December 2008, UK Foreign Secretary Miliband called for an immediate ceasefire and a resumption of humanitarian aid, to be followed by a reinvigorated political process.²⁸⁷ British Prime Minister Gordon Brown proposed a similar line: 'first we need an immediate ceasefire. Secondly, we need some resolution of the problem over arms trafficking into Gaza and, thirdly, we need the borders and the crossings open and that will need some international solution'.²⁸⁸ Likewise, Spanish Foreign Minister Miguel Moratinos on 31 December 2008 pleaded for an immediate reactivation of the ceasefire as well as a "humanitarian ceasefire",²⁸⁹ and thereafter travelled to the region to rally support for the French-Egyptian ceasefire deal. However, in pursuing these diplomatic efforts, these member states rejected both direct engagement with Hamas as well as pressure on Israel, going far in explaining the failure of European efforts to secure a ceasefire despite the flurry of diplomatic activity.

283 On France's reaction see 'Situation in the Middle East - Communiqué issued by the Presidency of the Republic', 27 December 2008, <http://www.ambafrance-us.org/spip.php?article1208>; on Spain's 'Communiqué on today's events in Gaza', Spanish Ministry of Foreign Affairs, 27 December 2008, <http://www.maec.es/en/MenuPpal/Actualidad/Comunicados%20DG%20Com%20Exterior/Paginas/99comunicado20081227EN.aspx> and 'Zapatero condena la acción desproporcionada del Gobierno israelí', El País 6 January 2009, printed edition.

284 'Foreign Secretary comments on the situation in Gaza', 29 December 2008, <http://www.fco.gov.uk/en/newsroom/latest-news/?view=Speech&id=11686310>.

285 'Statement to the United Nations on Gaza', 7 January 2009, <http://www.fco.gov.uk/en/newsroom/latest-news/?view=PressS&id=11818231>

286 'Statements made by the Ministry of Foreign and European Spokesperson', 5 January 2009, <http://www.ambafrance-us.org/IMG/html/briefing/2009/us050109.htm#2>

287 'BBC News interview on the situation in Gaza', 29 December 2008, <http://www.fco.gov.uk/en/newsroom/latest-news/?view=Speech&id=11409271>

288 'Brown repeats call for Gaza ceasefire', The Independent, 4 January 2009, <http://www.independent.co.uk/news/uk/home-news/brown-repeats-call-for-gaza-ceasefire-1224948.html>

289 'La UE, EEUU, Rusia y Naciones Unidas reclaman un alto el fuego "inmediato" en Gaza', El Mundo, 31 December 2008, <http://www.elmundo.es/elmundo/2008/12/30/internacional/1230654645.html>

Following the unilateral declarations of ceasefire, these member states have appreciated and voiced the need for intra-Palestinian reconciliation, declaring their support for Egypt's efforts in this regard. Palestinian reconciliation has been recognized as imperative in order to consolidate the ceasefire, channel reconstruction aid, ensure the regular opening of crossings in accordance with the AMA, and lead to Palestinian elections. Hence, as put by British Foreign Secretary Miliband: 'full humanitarian reconstruction will be impossible unless accompanied by political reconstruction. Unity in Palestinian politics is vital to so many things: to rebuilding Gaza, to holding elections, to delivering peace'.²⁹⁰ France in particular has hinted that engagement might be possible provided a NUG 'respects the principles of the peace process' and engages in negotiations with Israel leading to a two-state solution.²⁹¹ The French position was rejected however, and the Council of Ministers has reaffirmed the sanctity of the Quartet's conditions and the need for a NUG to be led by Abbas.

While adding greater nuance to the EU's overall political approach, these three member states have shied away from pursuing an EU policy with a more sound grounding on human rights and international law. None of these member states has officially called for a criminal investigation.²⁹² In Spain, the National Court has launched in January 2009 an investigation on several Israeli former military officials suspected of having committed war crimes in the Gaza Strip in 2002.²⁹³ Yet these actions have not been endorsed by the government, which, by contrast, has voiced its concern over a possible worsening of bilateral relations with Israel as a result of the judiciary's actions.²⁹⁴ Further, the Spanish Office of the Public Prosecutor has requested to dismiss the case against Israeli officials.²⁹⁵ These member states view other issues – namely reconstruction, access and Palestinian reconciliation – as far more pressing issues and are either unconcerned or reluctant to embark on a more confrontational path with Israel as entailed by an investigation.²⁹⁶ They are backed by the former group of countries including the Czech Republic, Italy, Germany and the Netherlands, as well as by Denmark and Romania.

290 'Stopping the flow of arms and starting the flow of aid into Gaza', 19 January 2009, <http://www.fco.gov.uk/en/newsroom/latest-news/?view=Press&id=12437321>

291 'Frattini: "Niente aiuti ad Hamas." In Italia dieci bimbi malati di Gaza', La Repubblica 21 January 2009, printed edition. Interview with EU and member state officials, March 2009.

292 Within these member states there were however a few lone voices calling for investigations into alleged war crimes, including Labour Member of Parliament Jeremy Corbyn calling for an indictment of officials for war crimes at the International Criminal Court or Liberal Democrat leader Nick Clegg calling for a suspension of the EU-Israel upgrade process until the results of an investigation of "Operation Cast Lead" are published. 'PM: Middle East first challenge for Obama', The Independent 14 January 2009, <http://www.independent.co.uk/news/world/americas/pm-middle-east-first-challenge-for-obama-1360132.html>

293 'Spain investigates claims of Israeli crimes against humanity in Gaza', The Guardian, 29 January 2009, <http://www.guardian.co.uk/world/2009/jan/29/spain-israel-gaza-crimes-humanity>

294 'Moratinos buscará una "solución satisfactoria"', El País, 30 January 2009, printed edition.

295 'La fiscalía se opone a que España investigue el bombardeo de Gaza', El País, 3 March 2009, http://www.elpais.com/articulo/espana/fiscalia/opone/Espana/investigue/bombardeo/Gaza/elpepiesp/20090403elpepinac_10/Tes

296 Interviews with EU and member state officials, March 2009.

5.2.3 Towards a more balanced approach: Belgium, Ireland, Sweden

A final set of member states, which includes Belgium, Ireland and Sweden, while sharing the overall policy line set by France, the UK and Spain, have placed greater emphasis on humanitarian questions as well as on the need to respect human rights and IHL.

First and on the humanitarian situation, Swedish Foreign Minister Carl Bildt recognized that the June 2008 ceasefire was not working effectively because of the persisting siege on the Gaza Strip,²⁹⁷ and stressed the need to open all border crossings in order to lift Gaza's isolation. Belgium also repeatedly called for the opening of crossing points and pursued an initiative to ensure the repatriation of children injured during the offensive.²⁹⁸ Pursuing a stronger line, Irish Foreign Minister Micháel Martin condemned 'in the strongest terms Israel's action in launching air strikes in Gaza against Hamas targets which have resulted in widespread civilian fatalities' and demanded that Israel 'must immediately cease its offensive operations in Gaza and allow unrestricted access for humanitarian agencies to assist the many victims of these appalling attacks'.²⁹⁹ Martin viewed Israeli attacks as 'a wholly disproportionate and unacceptable response to the violence which Hamas has inflicted on the people of Israel',³⁰⁰ and reminded all sides of their 'obligations to comply fully with international humanitarian law, including as regards facilitation of humanitarian operations and not impeding those humanitarian actors seeking to assist the injured and dying'.³⁰¹

As far as access is concerned, while appreciating Israel's concerns over arms smuggling, these member states have insisted on the imperative to ensure access and would support a revision of the AMA or the EU's terms of engagement within it in order to ensure a greater degree of openness and predictability. Of particular concern to these member states is both the question of engagement with the authorities in Gaza and Israeli control over the access of EU monitors to Rafah. In this context, Swedish Foreign Minister Bildt pointed out the tight interconnection between the persisting siege and smuggling activities, whereby the siege fuels the construction of tunnels in order to provide Gazans with necessary goods, yet the tunnels also facilitate the smuggling of arms.³⁰² In turn, Sweden has supported the redeployment of EUBAM and European efforts to counteract smuggling, while insisting that 'this must involve opening all border crossings for normal humanitarian and economic traffic'.³⁰³ In order to participate in reconstruction and border monitoring, Bildt has recognized the need to revise the EU's approach to Hamas, stating that: '(i) initially, an arrangement of this kind (i.e., EU border monitoring) must be accepted by the

297 'Bildt urges renewal of Gaza ceasefire', The Local, 28 December 2008, <http://www.thelocal.se/16606/20081228>

298 'Repatriation of children injured in the Gaza Strip: Charles Michel calls upon the Czech EU Presidency to arrange consultations very soon at European level', Belgian Ministry of Foreign Affairs, 7 January 2009, <http://www.diplomatie.be/en/press/homedetails.asp?TEXTID=94460>

299 'Minister for Foreign Affairs Condemns Israeli Air Strikes Against Gaza', Irish Ministry for Foreign Affairs, 28 December 2008, <http://www.dfa.ie/home/index.aspx?id=80742>

300 'Minister for Foreign Affairs calls for immediate ceasefire as he leaves for emergency EU meeting in Paris', Irish Ministry of Foreign Affairs, 30 December 2008, <http://www.dfa.ie/home/index.aspx?id=80749>

301 'Minister for Foreign Affairs Welcomes the Adoption of UN Security Council Resolution on Gaza', Irish Ministry of Foreign Affairs, 9 January 2009, <http://www.dfa.ie/home/index.aspx?id=80821>

302 'Speech by Minister for Foreign Affairs Carl Bildt on the situation in Gaza', Swedish Ministry of Foreign Affairs, 8 January 2009, <http://www.sweden.gov.se/sb/d/3211/a/118274>

303 'Speech by Minister for Foreign Affairs Carl Bildt on the situation in Gaza', Swedish Ministry of Foreign Affairs, 8 January 2009, <http://www.sweden.gov.se/sb/d/3211/a/118274>

political authorities in Gaza. At the same time, efforts to achieve a political reconciliation and union between Gaza and the West Bank must be intensified'.³⁰⁴

Second, this group of member states has adopted a more proactive stance on IHL compliance.³⁰⁵ In particular, prominent personalities within these countries have advocated holding Israel and Hamas accountable for their conduct in the war through legal investigations and eventual prosecutions. Deputy Chair of the Committee on Foreign Affairs of the Swedish Parliament Urban Ahlin argued that 'there must be prosecutions for war crimes'.³⁰⁶ In Belgium '(t)he government strongly condemns the continuing escalation of violence. The complaints made by the International Red Cross about the lack of treatment for the injured shows that the situation on the ground is entirely at odds with international humanitarian law and requires an immediate independent investigation. The government condemns these violations of the law applicable in armed conflicts'.³⁰⁷ Irish Foreign Minister Martin, focusing on the allegations of the use of white phosphorous, stated: 'I am also aware of some suggestions that white phosphorous may have been used in this attack. If that is so, I would strongly condemn such an act and call for this to be fully investigated by the United Nations'.³⁰⁸ The Irish foreign minister reportedly sent a letter to his EU counterparts calling for Israeli accountability for the alleged crimes committed during "Operation Cast Lead", a position backed by Belgium, Sweden, Finland, Luxembourg, Malta and Cyprus.

5.2.4 Understanding the EU's response

Taking these reactions together, the drivers of the EU's response come to the fore. Majority EU consensus explains the reinstatement of the EU's approach with its three old dilemmas. First, the inconsistency between diplomatic words and the absence of deeds, with the EU affirming the need to respect IHRL and IHL while not pressing for concrete action to ensure this. Hence, the reluctance to engage and exert pressure in order to put weight behind the calls for a ceasefire or for open access and the unlikelihood of a strong push for international investigations and prosecutions, whereby according to most interlocutors, the EU is likely to follow the issue with a "polite silence".³⁰⁹ Second, there is no comprehensive rethink of the effectiveness and purpose of aid to the OPT, not least because aid remains the only functioning element of the MEPP to which the member states latch on. Third, despite the collective recognition at the very least of Israel's disproportionate response there is no majority consensus on desisting from rewarding Israel through EU contractual relations or on ensuring that EU-Israel agreements are lawfully implemented. There is rather a shared unease with taking any action which may appear as a "punishment" of Israel.

304 'Speech by Minister for Foreign Affairs Carl Bildt on the situation in Gaza', Swedish Ministry of Foreign Affairs, 8 January 2009, <http://www.sweden.gov.se/sb/d/3211/a/118274>

305 'Gunilla Carlsson condemns attack on UNRWA headquarters in Gaza', Swedish Ministry of Foreign Affairs, 15 January 2009, <http://www.sweden.gov.se/sb/d/587/a/118676>

306 'Prosecute Israel and Hamas for war crimes', The Local, 28 January 2009, <http://www.thelocal.se/17200/20090128/>

307 'Operation to evacuate injured Palestinian children from the Gaza Strip', Belgian Government, 9 January 2009, http://www.belgium.be/en/news/2009/news_operation_evacuate_children_gaza.jsp

308 'Minister Martin condemns shelling of UNRWA HQ in Gaza', Irish Ministry of Foreign Affairs, 15 January 2009, <http://www.dfa.ie/home/index.aspx?id=80836>

309 Interviews with EU and member state officials, March 2009.

These three areas of convergence entail a shared unwillingness to take a firm stance regarding human rights and IHL. This reluctance in turn highlights two political and legal problems. First, while the EU has made clear legal commitments to integrate respect for and promotion of human rights within its external relations, little has been done in terms of implementation. To date, the EU has limited its action to denunciation and condemnation, while reminding Israel and the Palestinians of their obligations under international law. However, the violations of human rights and IHL on the ground have brought to the fore the limited use of legal tools by the EU and its member states, which in turn has harmed their reputation and credibility in the international arena. More specifically, many EU officials have viewed the EU's humanitarian response as the most significant aspect of the EU's reaction to "Operation Cast Lead". Indeed, the EU pledged significant amounts of humanitarian aid, and called on Israel to open the crossings and to ensure access to humanitarian assistance on the basis of IHL. Alongside this, the EU has been vocal in supporting a redeployment of its border monitoring mission in order to ensure open access. However, in a context in which most aid cannot be effectively delivered and EUBAM cannot be redeployed, the limits of an approach which relies exclusively on invoking international law in the diplomatic arena without providing further tools to ensure its implementation is put under the spotlight.

Second, the EU's continued unwillingness to seek a legal solution to Israel's misapplication of its agreements with the EU has resulted in a violation of the duty of non-recognition through the EU's provision of benefits to illegal Israeli actions and actors in the OPT. This violation of the duty of non-recognition is compounded by the EU's pursuit of an upgrade of relations with Israel, without either concrete conditionality in terms of improvement of the human rights situation on the ground, or safeguard measures to ensure that existing misapplications in EU-Israel agreements are not transferred, *mutatis mutandis*, to other policy domains as well. While this approach is deplored by some EU officials, expressing feelings of betrayal, frustration, anger and regret,³¹⁰ it represents the majority view within the Union.

Several factors explain the EU's approach, including the fact that support for the diplomatic process, aid policy and ESDP missions assuage the perceived need to "act" in the Middle East. This perceived need to act is felt particularly strongly by those member states whose political system and public opinion are sensitive to developments in the region. At the same time, these measures accommodate the unwillingness of the EU majority to take a firm stance towards Israel through deeds and not only words. This unwillingness is dictated by a plurality of interests, ranging from transatlantic relations to commercial ties with Israel, alongside an "ideological" commitment to Israel which persists even when the EU, knowingly, acts against its aims and interests in the region.³¹¹

310 This sentiment was expressed openly in almost all the interviews conducted in Brussels for the purpose of this report. Interviews with EU and member state officials, March 2009.

311 Most of the EU officials interviewed pointed out that the eastern enlargement has further undermined the EU's ability to reach a consensus, often resulting in a lowest common denominator position. Interviews with EU officials, March 2009.

Internal dissonance however has also featured, and goes far in explaining the three areas of new ambiguity in the EU's policy approach. Internal dissonance explains the EU's confused assessment of the triggers of the offensive, with views ranging from a wholehearted condemnation of Hamas and acceptance of Israel's legitimate right to self defence, to views condemning Hamas rocket fire while viewing Israel's response as offensive, disproportionate and unacceptable.

Some degree of divergence has also characterized the question of border monitoring. Some have viewed a redeployment and expansion of EUBAM above all in the context of assuring open access to the Gaza Strip, while others have focused more on the need to collaborate in anti-smuggling, possibly leading to a further sealing of Gaza's borders. On the specifics of the redeployment of EUBAM, differences can be noted regarding whether the EU should engage with the authorities in Gaza and how the EU should seek guarantees that Israel either allows EU monitors to cross to Rafah or abdicates its indirect control over the Rafah crossing through its liaison office at Kerem Shalom. These differences also relate to the serious risk that a redeployed EUBAM within the context of Israel's persisting closure or restricted access of its own crossing points into Gaza³¹² would serve to further kill the two-state solution (including the West Bank, East Jerusalem and the Gaza Strip as a single entity), increasingly push the Gaza Strip into Egypt's fold, while leaving the Gaza Strip without sufficient access and supplies given the inadequate capacity of the Rafah crossing alone.³¹³

Likewise, with respect to intra-Palestinian reconciliation, while some have advocated the need for reconciliation in and of itself and a possible revisiting of the Quartet's conditions in order to facilitate engagement with a future Palestinian government, others have interpreted reconciliation above all as a means to reassert Fateh/PA control in the Gaza Strip. To date, despite the sense of newfound flexibility on the interpretation of the Quartet's conditions, the EU has not elaborated a clear stance on the matter. It has not specified what interpretation it would be prepared to live with, it has not engaged in a debate on the human rights implications of the Quartet's conditionality, and it has not asserted whether it would demand that Israel complies with the conditions as well, particularly in view of the new Israeli government's positions. In the OPT, would the EU only be willing to engage with a technocratic government or would it recognize a government including Fateh and Hamas representatives or sympathizers? Would it only engage with a government whose ministers recognize the Quartet's principles while persist in boycotting Hamas as a movement? How does the EU in 2009 interpret the vaguely-articulated Quartet conditions and what composition and platform of a new government would it be willing to recognize and work with? Dissonance within the EU seems to prevent a clear line from emerging on these questions.

³¹²i.e., the Erez crossing is for people, the Sufa crossing is for goods, the Kerem Shalom crossing is for commercial and humanitarian goods, the Nahal Oz crossing is for fuel, and the Karni crossing is for goods and grain.

³¹³ Interviews with EU officials and Gisha, March 2009.

6. BRIDGING THE GAP BETWEEN THE EU'S POLITICAL PREFERENCES AND LEGAL OBLIGATIONS AND ITS CONDUCT IN PRACTICE

When assessing the EU's policies towards the Israeli-Palestinian conflict and its response to the offensive in Gaza, the observer is struck by the growing "gap" separating EU political aims and legal commitments and the absence of concrete measures to ensure that such aims are met and commitments kept. Not only has the EU failed to meet its objectives, a goal which the EU, as a secondary actor in the conflict, could not hope to achieve alone. But as the preceding sections have shown, EU strategies, policies and positions have actively acquiesced in the vicious cycle unfolding on the ground. In other words, beyond failing to deliver positive results, EU policies have paradoxically contributed to the opposite. As put by one observer: 'the EU did not simply achieve nothing. Nothing would have been an achievement'.³¹⁴

Unpacking the EU's response, we note that a critical element in the explanation lies in the EU's "active" pursuit of the "two state solution" alongside its increasing "acquiescence" in human rights and IHL violations. As underlined by one official, 'the EU and its member states have been blinded by their main objective of Palestinian statehood, neglecting the improvement of human rights and IHL'.³¹⁵ Yet the problem has not been the EU's pursuit and prioritization of a Palestinian state per se. It has rather been the EU's specific interpretation of such support. The EU has backed a Palestinian state by engaging in a set of policies ranging from supporting the diplomatic process to channelling increasing amounts of aid and deploying ESDP missions in the

OPT. Yet the EU has not supported a Palestinian state by taking any active or passive measure to contribute to dismantling the structure and changing the conduct of the occupation. Allegedly championing a Palestinian state without contributing to an end to the occupation of the territory where such a state would be established has meant that EU policies have become increasingly detached from genuine support for a viable Palestinian state.

The EU's specific interpretation of support for a Palestinian state has also meant that the two pillars driving the EU's long-standing vision for a peaceful Middle East – the two state solution and compliance with human rights and IHL – have become increasingly incompatible with each other and this incompatibility has strengthened the EU tendency to prioritise the former over the latter. In fact, as underlined by some interviewees, the prevailing approach within the EU is to dissociate the discussion on human rights and IHL from all the other allegedly technical fields, including both policies aimed at "building a Palestinian state" such as aid policy and security sector reform, as well as policies aimed at strengthening economic relations with Israel. Some actors within the EU have gone as far as claiming that human rights are irrelevant to the latter domains. As underlined by one member state official, there is very little substantive discussion and genuine dialogue in the Council on human rights issues. This glaring omission is in complete contradiction to the approach towards mainstreaming human rights in the EU's

³¹⁴ Speech by Middle East analyst, 'The EU and the Middle East Task Force', EUISS, Paris, 30 March 2009.

³¹⁵ Interview with EU official, March 2009.

external policies, as underlined in the 2008 EU Human Rights Report.³¹⁶ By actively pursuing diplomacy, aid and security policies within a context of occupation, without a readiness to contribute to an alteration of that context through the conduct of its relations with Israel and the PA, the EU has not only failed to deliver, but has also served to sustain the very context hindering the accomplishment of its objectives.

The EU's policies of "active acquiescence" have thus entailed both an inconsistency between aims and actions and a growing inconsistency between the formulation and prioritization of objectives as such. Hence it is necessary to systematically rethink EU policy towards the Israeli-Palestinian conflict. In this light, the EU finds itself at a crossroads. In order to ensure its internal coherence, the EU must engage in a rethink either of its policy objectives or of the deployment of the policy instruments used by it to pursue those objectives. A rethink of EU policy objectives, could, in theory, entail an abandonment of the goal of the two state solution, which is increasingly detached from physical and ideological developments on the ground. Yet there is broad EU and US consensus to retain this goal. Likewise, despite its de facto neglect of ensuring respect for human rights and IHL, the EU cannot, both politically and legally, abandon the goals of human rights and IHL. Hence, the only logical conclusion is a revision in the manner in which the EU deploys its policy instruments in order to contribute to, or at the very least stop hindering, the accomplishment of its objectives. By this, we do not mean that the EU's existing instruments and tools should be dismissed. On the contrary, the call is to strengthen existing instruments and above all to use them in a more efficient manner. Moving away from past dilemmas and resolving new ambiguities, concerted efforts should combine a more coherent and consistent general approach based on human rights and IHL, alongside specific measures to ensure concrete improvements on the ground.

Beginning with a more coherent and consistent general approach based on human rights and IHL, EU policy in the Israeli-Palestinian conflict could be assessed and developed in light of the benchmarks promoted by the EU in its 2008 Annual Report on Human Rights. These benchmarks include two general objectives. The first is the imperative of mainstreaming human rights in EU policies towards Israel and the PA by ensuring that:

- Respect and promotion of human rights and IHL is seen as an EU objective per se;
- The promotion of human rights and IHL is pursued when implementing all EU policies, and not as a separate issue distinct from economic or trade policies;
- Due diligence is applied with regard to policies and instruments applied in the context of relations with Israel and the PA;
- Dialogue on human rights is complemented by a consistent and effective use of conditionality.

The second general objective regards the need to enhance the EU's effectiveness in promoting human rights and IHL by:

- Applying the precautionary approach of the EU Code of Conduct on Arms Export to all EU policies;
- Strengthening the monitoring role of the European Parliament by establishing effective safeguard measures to ensure compliance with human rights and IHL in the context of EU relations with Israel and the PA;
- Making use of existing tools, such as the EU Guidelines on IHL that provide a coherent and articulate framework for EU policies and instruments.

Applying these general aims to the current context, several specific recommendations could be advanced in order to ensure a more consistent, credible and effective EU policy towards the conflict aimed at fulfilling the EU's political vision and complying with the EU's legal commitments.

First, the call for investigations and potential prosecutions, far from being a secondary aspect in the current political context, represents the only significant move the EU can make to ensure accountability of both Israel and Hamas and put a "price tag" on future rounds of confrontation. The EU and its member states should promote and support both international and domestic independent investigations with regard to the violations committed during the conflict by all parties by:

- Calling for effective, independent and impartial domestic investigations into all alleged war crimes violations and for potential prosecutions in Israel and the OPT;
- Supporting the UN Board of Inquiry's conclusions and recommendations and designing ways of following up on its findings;
- Supporting and designing ways of following up on the fact-finding mission of the Arab League;
- Supporting the international fact-finding mission headed by Richard Goldstone and established by the UN Human Rights Council with a broad mandate for this mission, ensuring Israeli and Palestinian cooperation with this mission, and designing ways of following up on its conclusions;
- Calling for the accountability of perpetrators, as and when these investigatory bodies have published their results and recommendations. If those responsible are not prosecuted in Israel and the OPT, the Council should support prosecutions either through an ad hoc tribunal or through prosecutions within the member states.

³¹⁶ Council of the European Union (2008) 'EU Annual Report on Human Rights', 14146/2/08 REV 2, 27 November, p. 202.

Second, the EU must give a longer-term orientation to its aid to the OPT, while being careful to respect the principles of neutrality, impartiality and independence in channelling humanitarian assistance.

- In the short and medium-term, it is imperative that the EU's humanitarian aid respect ECHO's principles of neutrality, impartiality and independence, particularly in the context in which humanitarian relief, including food, medicine and shelter are desperately needed in the Gaza Strip. Humanitarian aid must be provided on a needs-only basis.
- In the medium and long-term, the EU must seek ways to reverse the ongoing trend, at work since the Oslo process and most acutely since its collapse, of directing aid towards emergency assistance, regime stabilization and paying recurrent expenditure, as opposed to development aid and capacity-building. To achieve this and thus reverse the growing aid dependency and vulnerability of the OPT, EU aid policy must be pursued alongside effective engagement of Israel as the occupying power;
- A different political approach to aid delivery must involve respect for Palestinian democracy and incentives for Palestinian respect for human rights. The EU should not understand "supporting reform" to mean favouring moderates seen as "our allies". The point is to support the democratic process and to induce respect for human rights and international law by all.

Third, the EU must formulate a viable and well thought-out strategy to engage with a new Palestinian government representing a first step towards Palestinian reconciliation and respecting human rights and democratic principles.

- The EU cannot be caught unprepared once again and fall into the mistakes of 2006 and 2007, when the blunt US approach was unquestioningly followed, causing an unintended overhaul in EU aid policy. Such a strategy is also desirable in order to send positive signals with a view to Palestinian reconciliation, which is in high demand from the population of the OPT. It is also essential in order to induce a move away from authoritarianism and national security regimes in the OPT and towards a single authority based on the respect for human rights, international law and democratic principles. This policy shift would entail an internal debate within the EU on the actual meaning of the Quartet's conditions, to be followed by a benchmarking process and the elaboration of a set of minimum thresholds of interpretation of the conditions, to be applied to all parties.³¹⁷
- While distinct, the terms for recognition of a new government also relate to the question of engagement with Hamas. In this respect, it is crucial to note that the policy of isolation of Hamas has not only failed to positively influence the movement above all with respect to its own violations of human rights and IHL, but has also bolstered its more rigid positions, as most policy-makers will admit, at least in private. In addition, by isolating Hamas, the EU has outmanoeuvred itself, delegating what could have been a key mediating role to other non-EU actors such as Turkey, Norway or Switzerland.

³¹⁷ In this respect it is critical to note that the Israeli Likud party platform explicitly rejects the two state solution.

Fourth, on the question of access, the EU must re-evaluate its border monitoring activities.

- At a very minimum, the EU must ensure that member states' anti-smuggling efforts, particularly if extended to land operations, take place only following the regular opening of all crossings to the Gaza Strip. Whereas the EU and its member states are well advised to contribute to curbing arms smuggling into the Gaza Strip, acting against all smuggling (including that of essential medical and food supplies) prior to opening access to the Gaza Strip would mean that the EU and its member states would contribute to the collective punishment of the civilian population of the Gaza Strip.
- Beyond this, the EU must confront the fact that, even if it were to recognize and work with a new PA government in the Gaza Strip, its role within the AMA has been inadequate from the outset in so far as it failed to ensure open access. This policy shift would entail either receiving binding guarantees from Israel not to impede the access of EU monitors to Rafah, or stationing EUBAM monitors in Egypt rather than Israel.
- The EU should also act to ensure that the Rafah crossing is but one access point, and that Israel, in view of its IHL obligations, its commitments under the 1994 Paris Protocol and its acceptance of the two-state solution, ensures full access to and from the Strip.

Finally, the EU must seriously reassess its bilateral relations with Israel. Israel's military offensive in the Gaza Strip should mark the end of the EU's rewarding of Israel irrespective of Israeli conduct in the conflict. The EU has never sanctioned Israel for its illegal actions in the OPT, nor has it ever attempted to use positive conditionality to induce Israel to modify its actions in the OPT in the context of the Association Agreement, the ENP or the myriad of EU programmes and agencies of which Israel is part. On the contrary, the recent upgrade process demonstrates how the deepening of relations with Israel is taking place alongside Israel's increasing violations of IHL and IHRL both in the Gaza Strip and in the West Bank and East Jerusalem. Against this backdrop, the EU's dialogue with Israel on human rights, as the main approach and method employed by the EU, cannot expect to produce results. It is time for the EU to stop its blind eye approach to Israeli actions and to introduce the logic of human rights and IHL as the cornerstone of its "political" approach towards the conflict. This policy shift could entail several measures:

- The EU must provide aid to the OPT in a manner that does not reward Israel and release it from its legal obligations and responsibilities toward the welfare of the protected Palestinian civilian population. In this respect, the EU could:
 - Ensure that its fuel payments do not recognize internationally wrongful acts such as Israel's restrictions on fuel supplies. The EU could ensure its compliance with the duty of non-recognition by relying on a European operator either to provide the entire amount of fuel to allow Gaza's power plant to operate at full capacity or to supply the amount that Israel refuses to allow into the Gaza Strip. In the medium term, the EU could also support the project of the construction of a gas pipeline from Egypt into the Gaza Strip as an alternative for the functioning of the power plant;
 - Investigate the conditions under which European funded properties were damaged or destroyed and demand compensation for EU-funded properties which were under construction during "Operation Cast Lead", and seek guarantees from Israel regarding the avoidance of destruction and damage to EU projects in future.

- As far as EU contractual relations with Israel are concerned, the freezing of the process of an upgrade is imperative for both political and legal reasons:
 - Politically, a “business as usual” approach towards Israel amounts to disregarding Israeli policies in the OPT, signalling EU acquiescence in or non-objection to Israel’s conduct. Politically, the EU could condition the upgrade process to:
 - o The full opening of crossings for humanitarian and commercial goods and movement of people to and from the Gaza Strip;
 - o The respect for IHL obligations in the West Bank and East Jerusalem, in particular with respect to ceasing house demolitions, dismantling settlements, and lifting movement restrictions;
 - o The recognition of the EU-PLO Interim Association Agreement
 - Legally, in order to comply with its duty of non-recognition of internationally unlawful acts, the EU must proceed with an upgrade only after it has sought an effective legal solution to the misapplication of existing agreements and has put in place effective safeguard measures to prevent future misapplications.

Let us make no mistake. Status quo policies mean that the Israeli-Palestinian conflict will keep on spiralling into a chain of human rights and IHL violations. And with this descent, the international political reputation of the EU and its role in the region and the world will deteriorate further.

ACTIVE BUT ACQUIESCENT: THE EU'S RESPONSE TO THE ISRAELI MILITARY OFFENSIVE IN THE GAZA STRIP



PROJECT BACKGROUND

The present report is the fourth in a series meant to assess the European Union's (EU) relations to Israel in terms of human rights. The report is published by the Euro-Mediterranean Human Rights Network (EMHRN), a network of more than 80 Arab, European, Israeli and Turkish human rights organisations, institutions, and individuals committed to universal human rights and based in more than 20 countries³¹⁰ of the Euro-Mediterranean region.

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

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

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

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

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

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

- Acsur – Las Segovias (Spain)
- Adalah – The Legal Centre for Arab Minority Rights in Israel (Israel)
- Al-Haq (The West Bank, Palestine)
- Al Mezan Centre for Human Rights (Gaza, Palestine)
- Arab Association for Human Rights (Israel)
- B'Tselem – The Israeli Information Centre for Human Rights in the Occupied Territories (Israel)
- Bruno Kreisky Foundation (Austria)
- Federation of Associations for the Defense and the Promotion of Human Rights (Spain)
- Greek Committee for International Solidarity (Greece)
- Palestinian Centre for Human Rights (Gaza, Palestine)
- Palestinian Human Rights Organisation (Lebanon)
- Public Committee Against Torture in Israel (Israel)
- Rehabilitation and Research Centre for Torture Victims (Denmark)

³¹⁰ Algeria, Tunisia, Morocco, Egypt, Jordan, Syria, Lebanon, Libya, Occupied Palestinian Territory, Israel, Turkey, Malta, Cyprus, Greece, Italy, France, Spain, France, Germany, UK, Denmark, Sweden, Norway, Ireland, Austria, Belgium, Finland, the Netherlands .

Following the recommendations of the EMHRN's 6th General Assembly, the PIP Working Group has engaged in a project that reviews the EU's human rights obligations and commitments in relation to Israel on an annual basis.

The current report was outlined during meetings of the Working Group in the course of 2007 during which the members of the PIP working group identified Gaza as priority for their joint work in the next two years. It was decided that the review should focus on the human rights situation in Gaza in relation to the EU-Israel agreements. Due to the recent events in the Gaza Strip, it was decided that the report would more specifically focus on EU's response to the Israeli military offensive in the Gaza Strip.

This report, as its predecessors, is meant to bring added value to current human rights work done in Israel and the Occupied Palestinian Territory by serving as a human rights guide to evaluate EU relations with Israel. The human rights review may also be used proactively as a means to build capacity in understanding EU Human Rights mechanisms, sharing information, and as a means of advocacy.

The report has been drafted by Nathalie Tocci³¹¹, Senior Fellow at the Istituto Affari Internazionali in Rome, Italy. This report has also benefited from the significant input by an international law expert, as well as the contribution and comments from the members of the PIP working group.

The project was steered by:

- Mahmoud Abu Rahma, Al Mezan Centre for Human Rights
- Hamdi Shaqqura, Palestinian Center for Human Rights
- Rina Rosenberg, Adalah
- Stefan Lütgenau, Bruno Kreisky Foundation

in close cooperation with Maysa Zorob, al-Haq and Member of the EMHRN Executive committee and the EMHRN Secretariat Staff.

The research conducted for the purpose of this report draws from both primary and secondary sources, as well as information collected through interviews with relevant actors.

The report was researched through the analysis of EU documents, statements and declarations to the media, newspaper articles, as well as academic and policy literature. The section on violations committed during Operation Cast Lead by Israel and Hamas and other Palestinian factions reports on the main violations as identified by EMHRN members and other human rights NGOs. The analysis of secondary literature was complemented by interviews conducted with civil servants from EU institutions in Brussels (Council of the EU and European Commission), diplomats from the Permanent Representations of the member states to the EU, officials from the Commission representations and member state embassies in Tel Aviv and Jerusalem as well as representatives from international organizations and international and local non-governmental organizations in Europe, Israel and the Occupied Palestinian Territory. Further information was obtained through the participation in workshops and conferences as well as supplementary telephone interviews with some interviewees in Jerusalem, London and Paris³¹².

The project is kindly supported by DANIDA and SIDA.

³¹¹ I would like to thank Donatella Cugliandro and Benedetta Voltolini for their invaluable research assistance.

³¹² The analysis and conclusions of this report are not necessarily shared by our interviewees

EXECUTIVE SUMMARY

In view of Israel's military offensive in the Gaza Strip between 27 December 2008 and 18 January 2009, which caused an unprecedented level of death and destruction, the Euro-Mediterranean Human Rights Network (EMHRN) set out to examine the policies of the European Union (EU) towards the conflict.

The report analyses the EU's policies towards Israel and the Palestinians and the manner in which the EU has deployed these policies, before and during the Operation Cast Lead³¹³. It finds that the EU's collective reaction has been marked by a reiteration of largely unchanged policies fraught with old dilemmas, which emerge from a general consensus between the member states:

- On diplomacy, the EU remained largely ineffective:
- It called for an immediate and permanent ceasefire, yet failed to secure this goal by refusing to exert pressure on Israel and by not engaging with and thus not being able to exert influence on Hamas.
- The EU condemned attacks on civilians and on UN and medical buildings, personnel and vehicles, yet refrained from calling for an international independent investigation into violations of international humanitarian law (IHL) and international human rights law (IHRL).
- The EU called for the opening of border crossings and for an end to arms smuggling, but has only engaged in petty negotiations on the precise nature and quantity of humanitarian goods allowed into Gaza.
- On EU aid to the Occupied Palestinian Territory (OPT), the EU proposed a surge in humanitarian aid without demanding from Israel any compensation for or investigation into destroyed facilities funded by the EU which are still under construction, despite its ongoing inability to channel effectively funds to Gaza and regardless of the unsustainability of EU aid policy towards the OPT.
- Finally, the EU asserted its political intention to pursue an upgrade of bilateral relations with Israel, despite the IHRL and IHL violations committed by Israel during and after "Operation Cast Lead" and without having found a legal solution to existing misapplications of EU-Israel agreements.

The report argues that before Operation Cast Lead and particularly since 2006, when Hamas won the Palestinian Legislative Council (PLC) elections, the Union acted within a wider international context within which the escalation of the conflict could take place.

More specifically, the policy of boycotting Hamas and isolating Gaza, financing the PA-controlled West Bank and unconditionally supporting Israel, was not a road to the respect of IHL or a two-state solution, but rather made the accomplishment of these two EU declared objectives for a peaceful Middle East less likely. The military offensive in Gaza was the tragic testimony of this fact.

The degree of divergence between the member states goes far in explaining the emergence of three points of current ambiguity within the EU.

³¹³While focusing on the EU's reactions in the run-up to, and the evolution and aftermath of, "Operation Cast Lead", the report begins by setting the political, legal and policy context in which the EU's reactions are constructed and pursued. The legal framework within which EU policies towards the conflict are pursued consists in two main sets of norms: (1) principles and norms pertaining to international human rights and humanitarian law as well as rules on responsibility of states and of international organizations; and (2) specific EU commitments and instruments that can be of a binding or non-binding nature. The specific policy instruments the EU can deploy in order to contribute to the fulfilment of its goals can be grouped under three main headings: diplomacy, contractual relations and capacity-building, the latter of which includes aid and European Security and Defence Policy missions to the OPT. Each policy heading has built into it different mechanisms for influencing the conflict and promoting the EU's objectives and compliance with legal commitments.

- The first concerns the actual cause of conflict, with some member states assigning unambiguous responsibility to Hamas while others distance themselves from this view.
- The second regards the EU's border monitoring efforts. Whereas on most occasions EU initiatives are mentioned in the context of the need to secure open access and implement the Agreement on Movement and Access (AMA), on other occasions the emphasis is placed on anti-arms smuggling, which could entail a further sealing of Gaza's borders, particularly if actions are taken to detect and destroy tunnels before access is assured.
- A final point of ambiguity regards the formation of a Palestinian national unity government, and in particular whether reconciliation is genuinely favoured by the EU throughout the OPT or whether the EU seeks to reinstate the PA in Gaza given its inability to conduct border monitoring, reconstruction and aid policy under current conditions.

When assessing the EU's response to the military offensive in Gaza³¹⁴, the observer is struck by the growing "gap" separating EU political aims and legal commitments, and the absence of concrete measures to ensure that such goals are accomplished and commitments kept. Following the analysis of the EU's response, the report argues that a critical reason for this discrepancy between words and deeds lies in the EU's "active" pursuit of the "two state solution" alongside its increasing "acquiescence" to human rights and IHL violations. As underlined by one official, "the EU and its member states have been blinded by their main objective of Palestinian statehood, neglecting the improvement of human rights and IHL"³¹⁵.

Moving away from past dilemmas and resolving new ambiguities, concerted efforts would combine a more coherent and consistent general approach based on human rights and IHL. Specific recommendations to ensure a more consistent, credible and effective EU policy towards the conflict aimed at fulfilling the EU's political vision and complying with the EU's legal commitments include:

- First, the EU and its member states should promote and support both independent international and domestic criminal investigations into alleged violations committed during the conflict by all parties;
- Second, the EU must give a longer-term orientation to its aid to the OPT, while being careful to respect the principles of neutrality, impartiality and independence in channelling humanitarian assistance;
- Third, the EU must formulate a viable and well thought-out strategy to engage with a new Palestinian government representing a first step towards Palestinian reconciliation and respecting human rights and democratic principles;
- Fourth, the EU must re-evaluate its border monitoring activities by ensuring that member states' anti-arms smuggling efforts take place only following the regular opening of all crossings to Gaza, by either receiving binding guarantees from Israel that it would not impede the access of EU monitors to Rafah or stationing EUBAM monitors in Egypt rather than Israel, and by ensuring that the Rafah crossing is but one access point, and that Israel allows the full access to and from the Strip.
- Finally, the EU must seriously reassess its bilateral relations with Israel. It is time for the EU to stop its blind eye approach to Israeli actions and introduce the logic of human rights and IHL as the cornerstone of its "political" approach towards the conflict.

³¹⁴Regarding the military offensive itself, the report briefly presents an overview of the main actions and violations of IHL. While the EU's response is analysed within the legal framework of IHRL and IHL, we seek to present an overview of the main violations of IHL committed by all sides for the sake of analysing this response, based on the existing documents and reports from EMHRN members, other NGOs, the International Committee of the Red Cross and the United Nations.

³¹⁵Interview with EU official, March 2009.

LIST OF ABBREVIATIONS

ALDE	Alliance of Liberals and Democrats for Europe
AMA	Agreement on Movement and Access
CFSP	Common Foreign and Security Policy
ECHO	European Commission's Humanitarian Aid Office
EMP	Euro-Mediterranean Partnership
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood and Partnership Instrument
EP	European Parliament
ESA	European Space Agency
ESDP	European Security and Defense Policy
EU	European Union
EUBAM	EU Border Assistance Mission
EUPOL-COPPS	EU Police Co-ordinating Office for Palestinian Police Support
GAERC	General Affairs and External Relations Council
GUE	Gauche Unitaire Européenne (European United Left)
HCJ	High Court of Justice
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
MEPP	Middle East Peace Process
NGO	Non-Governmental Organization
NUG	National Unity Government
OCHA	UN Office for the Coordination of Humanitarian Affairs
OPT	Occupied Palestinian Territory
PA	Palestinian Authority
PEGASE	mécanisme 'Palestino-Européen de Gestion et d'Aide Socio-Economique'
PLO	Palestine Liberation Organization
PLC	Palestinian Legislative Council
PRDP	Palestinian Reform and Development Plan
TEC	Treaty of the European Community
TEU	Treaty on European Union
TIM	Temporary International Mechanism
UfM	Union for the Mediterranean
UN	United Nations
UNRWA.	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSCR	United Nations Security Council Resolution



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