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Title of thesis THE ROLE OF THE EUROPEAN UNION IN THE RESOLUTION OF THE ISRAELI-PALESTINIAN ISSUE: TOWARDS AN ENGAGEMENT BASED

ON RESPECT FOR INTERNATIONAL LAW AND HUMAN RIGHTS Degree PHD

This thesis consists in a legal analysis of the involvement of the European Union (EU) in the resolution of the Israeli-Palestinian issue. Its object is to investigate whether the EU in its policies directed at Israel and the Palestinians helps fostering, entrenching or decreasing the commission of violations of international law which result from the occupation of the Palestinian Occupied Territories.

After having offered an in-depth analysis of the content of Common Article 1 of the 1949 Geneva Conventions and the obligation to cooperate to put an end to a violation arising under a peremptory norm of international law, the obligation not to recognise and the obligation not to aid and assist, the thesis offers a legal framework based on an empirical approach to international law in order to explain how international actors can contribute to the commission or the perpetration of violations of international law. It further details the objectives of the EU in its external relations to promote respect for international law and human rights.

The thesis proceeds with an investigation of the diplomatic involvement of the EU in the resolution of the Israeli-Palestinian issue and the relations between the EU, Israel and the Palestinians taken individually. It analyses how violations of international law which derive from the occupation of the Palestinian Territories interfere in the implementation of these relations and how the EU reacts to this interference.

The thesis concludes that the EU is incrementally acquiescing in the violations of international law which result from the occupation of the Palestinian Territories, is giving incentives to the perpetuation of this situation, and is also breaching its commitment to base its relations with Israel and the Palestinians on respect for human rights. It ends by offering recommendations for a better-directed involvement of the EU with Israel and the Palestinians.

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The Role of the European Union in the Resolution of the
Israeli-Palestinian Issue:
Towards an Engagement Based on Respect for International
Law and Human Rights

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Agnès Bertrand

Abstract

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incredible friend and colleague. This PhD gained immensely from Charles' advice and ideas.

List of Abbreviations

CFSP	Common Foreign and Security Policy
CIHRE	Centre for International Human Rights Enforcement
ECHO	European Commission Humanitarian Office
EEC	European Economic Community
EC	European Community
ECJ	European Court of Justice
EFARev	European Foreign Affairs Review
EJIL	European Journal of International Law
EMP	European Mediterranean Partnership
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood Policy Instrument
EP	Enforcement Project
EU	European Union
EU COPPS	European Union Coordinating Office for Palestinian Police Support
EUBAM	European Union Border Assistance Mission
FINUL	Force Intérimaire de Nations Unies au Liban
GA	General Assembly
ICJ Rep.	Reports of the International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for Ex-Yugoslavia
IDF	Israeli Defence Forces
ILC	International Law Commission
MEPP	Middle-East Peace Process
PA	Palestinian Authority
PEGASE mechanism	Mécanisme Palestino-Européen de Gestion de l'Aide Socio-Economique
PLO	Palestinian Liberation Organisation
R&D	Research and Development
SC	Security Council
TIM	Temporary International Mechanism
TRNC	Turkish republic of Northern Cyprus
UN	United Nations
UNRWA	United Nations Relief and Work Agency for Palestinian Refugees
UNSCO	United Nations Special Coordinator for the Middle-East
VCLT	Vienna Convention on the Law of Treaties

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Introduction

1. Setting the Scene.

The Israeli-Palestinian conflict is a meta-conflict: there is no agreement between the parties on what the conflict is about.¹ The international community has now accepted that this conflict presented two competing claims of self-determination and that the solution to this conflict would be for the Palestinian people to exercise its right to self-determination over the West Bank and Gaza.² However, the principal impediment to this objective is the occupation of these territories which has been ongoing for more than forty years and which presents a claim for non-compliance with rules of international law. Since its beginning in 1967, this occupation has been characterized by violations of human rights and humanitarian law.³ From 1967 until now, the occupation of the Palestinian Territories has been placed at the service of a policy which some refer to as “an annexationist agenda”.⁴ Since 1967, the State of Israel has continuously established settlements of its civilian population in the territories it occupies in contravention of the

¹ C. Bell, *Peace Agreements and Human Rights*, (Oxford 2003), p. 15.

² *Ibid.*, p. 78.

³ The international law, human rights and humanitarian law violations which derive from the Israeli-Palestinian issue have been documented extensively by human rights organisations from the Palestinian Occupied Territories, Israel and Western countries, UN bodies and among them, the Special Rapporteur of the Commission of Human Rights on the Situation of Human Rights in the Occupied Territories Occupied Since 1967. For a sample of the documentation of the violations of international law, human rights and humanitarian law in the Palestinian Occupied Territories, see Al Haq, www.alhaq.org; Amnesty International, www.amnesty.org; B’Tselem, www.btselem.org; Human Rights Watch, www.hrw.org; Machsomwatch, www.machsomwatch.com; the Palestinian Centre for human rights, www.pchrgaza.org and Peace Now, www.peacenow.org. This dissertation is not covering violations of human rights by the State of Israel against its own citizens. For this issue, see Adalah, www.adalah.org; Association for Civil Rights in Israel, www.acri.org.il and Hamoked, Centre for the rights of the Individual, www.hamoked.co.il and Mossawa Centre, www.mossawacentre.org.

⁴ O. Ben-Naftali, A. Gross and K. Michaeli, “Illegal Occupation: Framing the Occupied Palestinian Territory” (2005) 23 Berkeley Journal of International Law, 551- 614.

provisions of the Fourth Geneva Convention and hence, according to the ICJ, has *de facto* annexed those areas of the Palestinian territories.⁵

The ongoing violence which derives from the occupation, the annexation and absence of protection have fomented frustration and anger and has led some extremist factions inside the Palestinian population to commit illegal acts of violence against Israeli civilians.⁶

Furthermore, the structure of the occupation has remained unchanged and Israeli settlement policy has continued unabated, despite the negotiation process in the 1990s and a clause in the Declaration of Principles (DoP)⁷ urging the parties to the negotiation to respect rules of international law.⁸ The only change brought about by the interim agreements negotiated between Israel and the PLO is the superposition of the structure of the Palestinian Authority below the structure of the occupation with a limited governance in certain zones (A and B) of the West Bank and control over Gaza.⁹

⁵ *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ Rep. 2004, p. 180 (para. 120). Chapter seven of this dissertation gives an overview of the political and legal aspects of the Israeli settlement policy in the Palestinian Occupied Territories. See pp. 256-258 below.

⁶ As formulated by Shehadeh in 1993: "But it must not be forgotten that fundamentalism develops in nations that feel the depth of historical injustice done to them only because of their weakness. In such a situation purism and narrow determinism appear the only way to win back usurped rights", R. Shehadeh, "Can the Declaration of Principles Bring About a 'Just and Lasting Peace?'" (1993) 4 EJIL 555-563, p. 563. On the contravention of Palestinian terrorist attacks against Israeli civilians with provisions of international and humanitarian law, see *Erased in a Moment. Suicide Bombing Attacks against Israeli Civilians* (Human Rights Watch), (November 2002).

⁷ The Oslo Accords or the Declaration of Principles on Interim Self-Government Arrangements were signed between the Palestinian Liberation Organisation (PLO) and the State of Israel on 13 September 1993 in Washington. The Accords were the outcome of secret negotiations between the PLO and Israel under the auspices of Norway. They set up a framework that governed the relations between the parties for five years and which should have led to the negotiations of a permanent agreement. The full text of the agreement is available on the website of the Israeli Ministry of Foreign Affairs, at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principle+s.htm> (last visited 15 December 2008).

⁸ In Article XIX of the Declaration of Principles, Israel and the PLO undertook to give "due regard to internationally-accepted norms and principles of human rights and the rule of law".

⁹ At the time of the peace process, the question whether the peace agreements ended the occupation provoked an academic debate. For instance, for Benvenisti the Declaration of Principles would only end the occupation over Jericho and Gaza. E. Benvenisti, "The Israeli-Palestinian Declaration of Principles: A

There exists a consensus among the international community that the creation of a Palestinian State is the principal solution to the Israeli-Palestinian conflict.¹⁰ However, there is also a growing realisation on the ground that Israel's settlement policy is diminishing day after day the chances of the creation of a viable Palestinian State as well as impeding the exercise by the Palestinian people of its right to self-determination.¹¹ Many are raising their concerns on the present human rights situation of the Palestinians in the Occupied Territories. Some have already drawn an analogy between the occupation of the Palestinian Territories by Israel and the Apartheid regime of South Africa.¹² Haaretz reported that in a private conversation, US Secretary of State, Condoleezza Rice compared the situation of the Palestinians to the one of the African-Americans during the 1960s.¹³ Furthermore, politicians in Israel are questioning the viability of the ongoing occupation. As stated by Ehud Barak himself:

Framework for Future Settlement" (1993) 4 EJIIL 542-554, p. 548. According to Shehadeh, the main arrangements imposed unilaterally by Israel in the past 26 years relating to land, water and Israeli settlements have been left intact throughout the negotiation of the DoP, and the jurisdiction of the Palestinian Authority has been restricted to exclude Israeli settlements. R. Shehadeh, note 3 above, p. 556-561 On this topic, see also C. Campbell, A Problematic Peace: International Humanitarian Law and the Israeli-Palestinian Peace Process, In C. Campbell, Karl Schulze and M. Stokes (eds.), *Nationalism, Minorities and Diasporas; Identities and Rights in Middle-East*, (London, New York 1996), pp. 39-54.

¹⁰ The Road Map, the peace plan launched by the Quartet, -the informal diplomatic group gathering the United States, the United Nations, the Russian Federation and the European Union and in charge of the Middle-East Peace Process- in April 2003 and which planned the creation of a Palestinian State by 2005 can be cited as one example of the existing consensus among the international community for the necessity of the creation of a Palestinian State.

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. (2004), p. 184, para. 122.

¹² L. Farsakh, Israel: An Apartheid State?, *Le Monde diplomatique*, (November 2003); A. Schocken, Citizenship Law Makes Israel an Apartheid State, *Haaretz*, (26 June 2008); The UN Human Rights Council rapporteur on Palestinian Occupied Territories, John Dugard employed this analogy in his reports. See Human rights situation in Palestine and other Arab territories, Human Rights Council, seventh session, A/HRC/7/17, 21 January 2008. One of the most prominent advocate of this analogy is former US president Jimmy Carter who published, a book where he draws a comparison between the two regimes. J. Carter, *Palestine, Peace Not Apartheid*, (New York 2006).

¹³ "In private conversations - and as she said in Annapolis - Rice tends to compare the Israeli occupation in the territories to the racial segregation that used to be the norm in the American South. The Israel Defense Forces checkpoints where Palestinians are detained remind her of the buses she rode as a child in Alabama, which had separate seats for blacks and whites". A. Benn and S. Rosner, What's the Hurry?, *Haaretz*, (27 December 2007).

“Any type of full control by Israel over the whole area from the Mediterranean to the Jordan... means inevitably either a binational State, if it is democratic and so-non-Jewish; or an apartheid State, which is non-democratic”.¹⁴

His statement was echoed by Prime Minister Ehud Olmert, who, more recently acknowledged that:

“If the day comes when the two-State solution collapses, and we face a South African style struggle for equal voting rights (also for the Palestinians in the territories), then, as soon as that happens, the State of Israel is finished”.¹⁵

In the European Security Strategy, the European Union stated that “the resolution of the Arab-Israeli conflict was a strategic priority for Europe”.¹⁶ Throughout the past two decades, the European Union has increased its diplomatic involvement in the Middle-East and has deployed a strategy directed towards Israel and the Palestinians in order to bring peace between them. This strategy focuses on three aspects which are analysed throughout this dissertation:

¹⁴ Barak E. “Remarks by Foreign Minister Barak to the International Press Institute, 27, March 1996”, cited in R. del Sarto, “Israel's Contested Identity in the Mediterranean” (2003) 8 *Mediterranean Politics* 27-58, p. 37.

¹⁵ Interview of PM Ehud Olmert, *Haaretz*, (29 November 2008). Available at <http://www.haaretz.com/hasen/spages/929439.html> (last visited 15 December 2008).

¹⁶ *A Secure Europe in a Better World, European Security Strategy Document*, 12 December 2003, Brussels, p. 8. This dissertation uses the generic term European Union and does not enter into the complexities of the attribution of competences in external relations between the different pillars of the European Union and the multiplicity of institutional actors and agencies. A reference to the European Community or to a specific EU institutions or agencies is made only in obvious cases when, for instance, this dissertation is referring to the period before the creation of the European Union by the Maastricht Treaty in 1992.

- State-building, i.e. building the structure and institutions for a future Palestinian State in order to prepare the ground if the negotiation process proves to be successful and maintaining an institutional structure that is able to pursue a form of “dialogue” with Israel.
- Creating the conditions for the socio-economic developments in the Palestinian Territories in order to reduce violence and maintain peace on the ground if the negotiation process attains its objective.
- Applying its own model of peace-building by creating space for dialogue, common projects and instruments of cooperation between the parties to the conflict and in the region in general.

The main purpose of this dissertation is to investigate the impact of the implementation of the EU policy towards Israel and the Palestinians in light of standards of *participative responsibility* taken from public international law, i.e. to analyse whether the European Union helps to foster or decrease the perpetuation of violations of international law which derive from the Israeli occupation of the Palestinian Territories.

2. A Research Journey.

The initial aim of this dissertation was to investigate whether the European Union was breaching international law in its relations with Israel and the Palestinians. In this respect, initially, three parallel research projects were conducted. I was looking at, first of all, the involvement of the European Union in the resolution of the Israeli-Palestinian conflict, second, the prescriptions of international law in relation to the obligations of third parties to the Israeli-Palestinian issue, and third to the European Union’s human rights policy. My methodology was mostly library-based. I came across primary and secondary

literature on State responsibility, European external relations and EU external human rights policy. From October 2004 until September 2006, I conducted several short periods of fieldwork in Brussels where I met regularly with Kirsten Sørensen, the Middle-East policy officer of APRODEV, the association of Protestant, Orthodox and Anglican European development and humanitarian agencies and Charles Shamas and Susan Rockwell of the Mattin group which have undertaken together law-based advocacy work directed at the institutions of European Union on the question of human rights and international law violations deriving from the Israeli-Palestinian issue. I am extremely grateful to them to have allowed me to attend several meetings with EU officials and members of the European Parliament. Furthermore, I conducted two periods of fieldwork in the Palestinian Occupied Territories and in Israel (June-July 2006 and June-September 2007). During those stays in the Middle-East and in Brussels I met with and interviewed members of Israeli, Palestinian and European NGOs, members of the PLO Negotiation Support Unit, EU officials (civil servants and MEPs) and UN and World Bank civil servants which I contacted directly without having met them previously or who I met before during conferences or other public meetings. For the purpose of this study, the semi-structured interview was the method chosen. Questions were prepared in advance but as the interview progressed, other relevant questions were inserted into the flow of the discussion.¹⁷ The interviews I conducted with several of them allowed me to obtain information and analysis which were not in the public domain and helped me refining my arguments.

However, during the course of this research, it became more and more evident that the framework offered by international law on obligations of States vis-à-vis violations of international law that do not directly injure them and which are detailed by the

¹⁷ A list of the 23 people interviewed can be found at p. 304-5 of this dissertation.

International Law Commission (ILC) in its Articles on State Responsibility, was too limited to explain how the EU “engaged” with the violations of international law which result from the occupation of the Palestinian Occupied Territories. This was not because the European Union is not a State and does not have a legal personality and therefore one can question whether the EU has to comply with the prescriptions of international law for States vis-à-vis violations of international law that do not directly injure them.¹⁸ It was principally because the framework offered by the ILC does not take into account the variety of positive and negative acts by a third party which can influence positively or negatively the perpetuation and consolidation of violations of international law. Therefore, it became evident that it was necessary to rethink the approach of the role of “third parties”, i.e. “those defined as outside a bilateral relationship whether formally created or occurring through events”¹⁹ outside of the framework offered by the International Law Commission. In this respect, this dissertation looked into international

¹⁸ Because this dissertation is no longer concerned with the issue whether the European Union is breaching international law in its relations with Israel and the Palestinians, it is not entering the academic debate on the legal personality of the European Union or the international responsibility of international organisations. On the responsibility of international organizations, see C. Amerasinghe, *Principles of Institutional Law of International Organizations*, (Cambridge, New York 1996); M. Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, (Dordrecht, London 1995); P. Klein and P. Sands (eds.), *Bonnet's law of International Institutions* (London 2001) and I. Scobbie, International Organizations and International Relations, In R.-J. Dupuy (ed.), *A Handbook of International Organizations*, 2d ed., (The Hague 1998), pp. 886-896. See also the reports of Giorgio Gaja on the responsibility of international organisations for the International Law Commission from 2002 to 2007. Available at <http://untreaty.un.org/ilc> (last visited 15 December 2008). On the possession or absence of legal personality by the European Union see P. Beekhout, *External Relations of the European Union. Legal and Constitutional Foundations*, (New York 2004), p. 154-160; J. Klabbers, Presumptive Personality: the European Union and International Law, In M. Koskenniemi (ed.), *International Law Aspects of the European Union*, (The Hague 1998), pp. 231-253; V. Lowe, Can the European Community Bind the Member States on Questions of Customary International Law?, In M. Koskenniemi (ed.), *International Law Aspects of the European Union*, (The Hague 1998), pp. 149-168; P. Palchetti, Reactions by the European Union to Breaches of *Erga Omnes* Obligations, In E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (The Hague 2002), pp. 219-230; S. Talmon, Responsibility of International Organizations: Does the European Community Require Special Treatment?, In M. Ragazzi (ed.), *International Responsibility Today, Essays in Memory of Oscar Schachter*, (Leiden 2005), pp. 405-421; T. Tiliainen, Does Europe Need a Common Identity?, In M. Koskenniemi (ed.), *International Law Aspects of the European Union*, (The Hague 1998), pp. 19-25; C. Tomuschat, The International Responsibility of the European Union In E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (The Hague 2002), pp. 177-191; R. Wessel, "Revisiting the International Legal Status of the EU" (2000) 5 EFA Rev. 507-537 and B. White, *Understanding European Union Foreign Policy*, (New York 2001), pp.22-23. It is important to note that the Treaty of Lisbon expressly abolishes the pillar structure and confers legal personality to the European Union. See article 47 of the Treaty of Lisbon: "The Union shall have legal personality".

¹⁹ *Dictionnaire de la Terminologie du Droit International*, (Paris 1960), p. 603. Cited in C. Chinkin, *Third Parties in International Law*, (Oxford 1993), p. 7.

jurisprudence and concepts of international law in order to detail several situations of *participative responsibility*, i.e., when an international actor participates in the commission of a violation of international law by another international actor or helps to maintain an illegal situation created by another international actor. It does so outside of any formal legal framework by analysing how situations emerge from the international scene and by being guided by several concepts of international law, especially the notion of acquiescence. Such an approach helped to shed light on the commitments undertaken by the European Union in the formulation of its human rights policy.

Therefore, this dissertation researches the influence of the European Union in the implementation of its policy and engagement with Israel and the Palestinians in the context of the occupation of the Palestinian Occupied Territories against standards of *participative responsibility*. In furtherance of this aim, it charts the entire policy of the EU in relation to Israel and the Palestinians in all its aspects, identifies cases where violations of international law interfere in the implementation of its relations and also the possible leverage the EU can exercise on the parties. The research conducted for this PhD dissertation stops in November 2008. Any event regarding the EU's involvement in the Middle-East Peace Process or the relationships between the EU and Israel and the EU and the Palestinians occurring afterwards is not taken into account.

3. Chapter Outline.

This dissertation is divided into eight chapters.

In its first chapter, this dissertation gives an account of the advocacy work undertaken by some Palestinian NGOs in the 1980s and 1990s, especially the reading of Article 1 of the

1949 Four Geneva Conventions provided by these organisations which was the central point of their arguments. Further, it analyses the scope and the content of this article in relation to contemporary academic literature and State practice. It concludes that the obligation set out in Article 1 of the Geneva Conventions can be better understood if looked at in relation to the legal regime of States responsibility for violations of international law that do not directly injure them.

The second chapter provides an in-depth analysis of the three obligations set out in Article 41 of the ILC Articles on State Responsibility which embody the idea of a differentiated responsibility for the breach of violations of certain obligations of international law which deserve more protection than others. Article 41 establishes that States shall cooperate to bring to an end through lawful means to any serious breach of an obligation arising under a peremptory norm of international law. It also states that no State shall recognise as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of international law, nor render aid and assistance in maintaining such a situation.

The third chapter analyses emerging customary obligations, case-law and concepts of international law in order to demonstrate that there exists a wide range of attitudes, actions and inactions of an international actor that can contribute to the commission or the perpetuation of violations of international law committed by another international actor. In this respect, the third chapter analyses the possible implementation of the duty of due diligence extra-territorially. It researches whether the *Soering* case offers any principle in international law not to provoke the commission of a violation of international law. It raises the case of Dutchbat at Srebrenica and questions whether any

principle of international law can be inferred from this case. Finally it researches the content of the duty not to encourage and the notion of acquiescence in international law.

The fourth chapter enquires into the European Union's commitment to uphold rules of international law, human rights and humanitarian law in the conduct of its foreign relations. It gives an account of the implementation of this objective in relation to its involvement with Israel and the Palestinians. As such, it details the declaratory policy of the European Union on the Israeli-Palestinian issue and investigates the content of the human rights clause contained in the EU-Israel Association Agreement and EC-PLO Interim Association Agreement.

The fifth chapter gives a broad account of the EU's involvement towards Israel and the Palestinians through a summary or compilation of the academic literature on the topic. It explains the political reasons for the limited diplomatic involvement of the EU as a third party. Second, it offers a summary of the EU's diplomatic actions in relation to the Middle-East Peace Process. Thirdly, it recounts the EU's strategy deployed towards both parties through their inclusion in the Euro-Mediterranean Partnership and the European Neighbourhood Policy. It finally gives an account of the recommendations and criticisms formulated in the current literature on the EU policy on the Middle-East.

The main operational links between the EU and the Palestinians are the EU-PLO Interim Association Agreement, the humanitarian aid provided to the Palestinian population and the EU State-building policy. The sixth chapter analyses how violations of international law which derive from the Israeli occupation of the Palestinian Territories disrupt the implementation of these instruments and policies, how the EU reacts to these interferences in the three aspects of its policy directed towards the

Palestinians and whether the EU's attitude towards these interferences helps or hinders the perpetuation of these violations of international law.

Although the relationships between Israel and the EU have been very heated, the cooperation between them has progressively expanded at the demand of Israel principally. Chapter seven demonstrates that it is impossible to detach the status of Israel as a trading entity and a scientific partner from its status as an Occupying Power in the context of this relationship. Violations of international law, notably the settlement policy, have constrained EU economic and commercial relations with Israel. This chapter details the case of the export of products coming from the settlements under preferential treatment in accordance with the EU-Israel Association Agreement in light of the duty of non-recognition.

Chapter eight reiterates the findings of each chapter and advocates for an engagement of the European Union based on international law, humanitarian law and human rights in its relations with Israel and the Palestinians.

Chapter One
The Use of the Political Logic and Protective Potential of the Law:
Recall and Analysis of the Advocacy Work of Palestinian Organizations in
Addressing Third Parties.

During a conversation I took part in, in July 2006, the same day of the visit to Ramallah of Condoleeza Rice, the US Secretary of States, Sha'wan Jabarin, the general secretary of Al Haq commented: "There is no such thing as the Road Map, the only Road Map to peace is respect for international law". Jabarin's assertion reflected a common and widespread belief on the Palestinian side that international law supports the interests of the Palestinian people.¹ This belief is fuelled by a sense of morality and the profound conviction of legal and moral wrongdoing on Israel's part.² It is reinforced by the fact that the entire international community acknowledges that Palestinians in the West Bank, Gaza and Jerusalem are under occupation and therefore, that the law applicable is international humanitarian law whose aim is to regulate the conduct of war and limit human suffering.

The creation of a Palestinian legal narrative dates from the 1970s and was developed by Palestinian human rights organisations, Al Haq being one of the first of these. The Palestinian legal narrative is, in the words of Raja Shehadeh, one of the founders of Al Haq, "the story of the Palestinian people's right to a land, using the symbolic language of the law". Human rights organizations developed a common language to evaluate and describe Israeli actions and other developments which took place in the territories and

¹ O. Dajani, *At the Shadow's Edge, Sir Joseph Hotung Seminars on Law Human Rights and Peace Building in the Middle-East*, (School of Oriental and African Studies, London 2005).

² R. Falk and B. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, In E. Playfair (ed.), *International Law and the Administration of Occupied Territories*, (Oxford 1992), pp. 125-149, p. 126.

this was shared by other organisations both inside and outside Palestine. It was also shared with progressive Israelis.³ This legal narrative is rooted in international human rights law and humanitarian law. It combines the rhetorical aspect of international law with its protective components and emphasises Israel's lawless conduct in the Occupied Territories. By developing this legal narrative, Palestinian human rights organisations have provided a new framework for the discourse on the Israeli Palestinian issue and for the nationalistic agenda of the Palestinian people which was an alternative to official politics.⁴

Increasingly, their efforts to demonstrate the absence of effective protection of the Palestinian population from human rights abuses was accompanied by a call to the international community to *ensure respect* for the provisions of the Fourth Geneva Convention. As such, Palestinian NGOs used international law as a strategic way to internationalize the conflict by urging the involvement of the international community. By grounding their argument on Article 1 of the Geneva Conventions which urges High Contracting Parties to ensure respect for the Conventions in all circumstances, they instigated a *renaissance* of this provision of international humanitarian law (IHL) and entered into pioneering advocacy work directed at third parties to the Israeli-Palestinian issue.⁵ This latter work was conducted first by the Enforcement Project which was hosted by Al Haq until 1993 and then by the Centre for International Human Rights Enforcement (CIHRE).

³ R. Shehadeh, *The Weight of Legal History: Constraints and Hopes in the Search for a Sovereign Legal Language*, In E. Cotran and C. Mallat (eds.), *The Arab-Israeli Accords: Legal Perspectives*, (London 1996), pp. 3-20, p. 18.

⁴ *Ibid.* at p. 26.

⁵ Common Article 1 of the Geneva Convention reiterated in the 1977 Protocols: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

The present chapter aims to introduce these efforts. First of all, it gives a brief historical account of Al Haq's Enforcement Project and CIHRE. Secondly, it presents the arguments on which their advocacy work was grounded. Thirdly, it offers an analysis of the extent of the duty to ensure respect by taking into account recent jurisprudential developments and academic writings on the topic.

1. The Enforcement Project and CIHRE: Addressing Third Parties and Recalling Their Legal Obligations.

In 1985, at the initiative of Charles Shamas, the Enforcement Project (EP) began its existence inside the human rights organisation Al Haq. The ambit of its work was to develop legal arguments defining third parties' obligations to intervene in order to ensure the implementation of international humanitarian law in the Palestinian Occupied Territories and to remind them of these obligations. Its creation was the result of the assessment of the general lawlessness in the Palestinian Occupied Territories whose investigation had been conducted by the organisation Al Haq. Third party intervention was urgently needed to ensure the protection of the Palestinian population as this was not being provided by the Occupying Power itself as it should have done in accordance with the provisions of international humanitarian law. The EP was, in essence, a continuation and an extension of the initial work conducted by Al Haq. Its work was *avant-garde*: it consisted of an attempt to depoliticise the Palestinian nationalistic discourse by utilising and reviving prescriptions of international humanitarian law.

1.1. The Enforcement Project: A Natural Prolongation in Al Haq's Work.

Al Haq was founded in 1979 by three men: Jonathan Kuttab, Charles Shamas and Raja Shehadeh. Its name means law, right or truth in Arabic. It is also called "Law in the Service of the Man". Al Haq's first main objective was to undertake systematic investigation of the system of government in the Palestinian Occupied Territories in the 1980s. Al Haq's *raison d'être* was a response to the ongoing occupation on the ground where respect for the rule of law was absent. The normative system in force was very opaque and the incoherence of its operation created the fertile ground within which many human rights abuses took place. However, the Israeli occupation of Jerusalem, the West Bank and Gaza enjoyed internationally the widespread image of being a *benign* occupation.⁶ There was, thus, a real need to detail the legal picture of the Israeli occupation and to combat this preconceived idea. Raja Shehadeh and Jonathan Kuttab set out and laid the foundation for this development. In 1980, they published *The West Bank and the Rule of Law: A Study*⁷ which was the first attempt to describe the arbitrary legal environment within which the Palestinian Occupied Territories were governed at the time. This book was followed by a defensive report by the Israeli branch of the International Commission of Jurists which set out to demonstrate how the rule of law had never been better served and implemented than by affording the rights and remedies Israel had made available to the residents of the territories it *administered*.⁸ As a rebuttal to this second report, Raja Shehadeh wrote *Occupier's Law: Israel and the West Bank*⁹ which focuses on the incompatibility of Israel's rule on the West Bank and Gaza with standards

⁶ F. Azzam, Al Haq in 2004: A Twenty Five Year Retrospective, In *Al Haq, 25 Years Defending Human Rights, Waiting For Justice*, (2004), p. 4.

⁷ J. Kuttab and R. Shehadeh, *The West Bank and the Rule of Law: A Study*, (Geneva 1980).

⁸ *The Rule of Law in the Areas Administered by Israel* (Israel National Section of the International Commission of Jurists), (Tel Aviv 1981).

⁹ R. Shehadeh, *Occupier's Law: Israel and the West Bank*, (Washington 1988).

and principles of international law. *Occupier's Law* demonstrates how law is used as an instrument by the Occupying Power to serve an agenda of annexation.

After having focused on the description of the Israeli occupation, Al Haq engaged in activities aimed at challenging the illegal practices pursued in this occupation. The organisation listed and denounced the violations of human rights and humanitarian law in the Palestinian Occupied Territories. Before the creation of Al Haq, violations of the human rights of the Palestinians in the Occupied Territories had only been raised sporadically inside UN forums. Al Haq was the first independent organisation to present international organisations, governments, international NGOs with thorough documentation of the violations of human rights and international humanitarian law on the ground.¹⁰ Another objective of Al Haq was to create and spread an awareness based on the rule of law in Palestine, and this in the expectation of the creation of a Palestinian State after negotiations with Israel. In furtherance of that aim, it provided free legal advice to Palestinian victims of abuses by the Israeli army, including helping those victims of abuse to take their case before Israeli courts.¹¹

Nevertheless, no effective legal redress was available for Palestinians in the Occupied Territories. This resulted from the plethora of contradictory bodies of legislation which were applicable in the Occupied Territories, the disregard of the doctrine of precedent by the military courts, the inevitable strong ties between the prosecution and the judges and finally the refusal to take into account the Fourth Geneva Convention by the same courts.¹² As put by George Bisharat, the legal system as a whole came to be viewed as an

¹⁰ Interview with Raja Shehadeh, Palestinian lawyer and writer, Glasgow, May 2006.

¹¹ *Ibid.*

¹² L. Hajjar, "Human Rights in Israel/Palestine: The History and Politics of a Movement" (2001) 30 *Journal of Palestinian Studies* 21-38, p. 24 and M. Rabbani, "Palestinian Human Rights Activism under Israeli Occupation: The Case of Al Haq" (1994) 16 *Arabic Studies Quarterly* 27-54, p. 30.

important bystander to, or worse, as an active participant in the execution of Israel's design in the region.¹³

The Enforcement Project came about as a result of the assessment described above. It took the view that if local remedies are ineffective, any protection for the population must come from outside. Enforcement is the third stage in the sequence of Al Haq's work, which follows the documentation of violations and the definition of the responsibility of the stakeholders in those violations. The Enforcement Project called for a redirection of Al Haq's efforts towards researching the ways to ensure that pressure for the observance of the rule of law could be exerted by actors located outside the Occupied Territories.¹⁴ The aim of this project was to develop legal arguments for international protection on the basis of third parties' legal obligations. In this respect, the enforcement team identified obligations for third states and explored the ways and means available for powerful third parties to discharge these obligations in order to ensure in an indirect way that the humanitarian protection of the Palestinian people was provided.¹⁵

1.2. Overview of the Activities of the Enforcement Project and CIHRE.

The main objective of the EP and CIHRE was to create among European political and academic circles a consensus on the doctrine of third States' responsibility. In furtherance of that aim, they organised seminars and conferences which focused on third States' obligations to uphold the enforcement of humanitarian law. These were held in London (1989), Dublin (1990), The Hague (1991), London (1992) and Jerusalem (1994), when a conference co-organised with Pax Christi International was convened entitled

¹³ G. Bisharat, *Palestinian Lawyers and Israeli Rules: Law and Disorder in the West Bank*, (Austin 1989), p. 21.

¹⁴ M. Rabbani, note 12 above, p. 36.

¹⁵ L. Welchman, The Enforcement Project, In *Al Haq, Celebrating Twenty Years of Human Rights Activism, Al Haq Annual Report*, (1999), p. 19.

“International Human Rights Enforcement: The Case of the Occupied Palestinian Territories in the Transitional Period”.¹⁶ The EP and CIHRE involved academics in their work and engaged with parliamentarians to spread knowledge of international humanitarian law in European political circles. They also worked in collaboration with other European organisations on the drafting of parliamentary questions and amendments to European legislative instruments related to the conduct of international relations of the European Union. Notably, the advocacy efforts of CIHRE led to the inclusion of a reference to the obligations of the High Contracting Parties to ensure respect for humanitarian law in the declaration of the European Council in Dublin in 1990.¹⁷ In addition, the EP and CIHRE attempted to popularise humanitarian law among members of the Palestine Liberation Organisation (PLO). However, as stated by Shamas, the PLO culture proved to be a big obstacle to this endeavour.¹⁸ The main reason for the PLO’s disinclination to utilise the processes of international humanitarian law was its reluctance to draw a clear legal distinction between the lands controlled by Israel before and after June 1967.¹⁹

CIHRE’s activities culminated with the advocacy work it conducted at the time of the ratification of the EU-Israel Association Agreement in the national parliaments of the member States of the European Union. This aspect of CIHRE’s work will be described in more detail in the fourth chapter of this dissertation.

¹⁶ International Human Rights Enforcement. The Case for the Occupied Palestinian Territories in the Transitional Period, *International Human Rights Enforcement. The Case for the Occupied Palestinian Territories in the Transitional Period*, (Jerusalem 1996).

¹⁷ Conversation with Pr Lynn Welchman (School of Oriental and African Studies, University of London), Ramallah, July 2006. Declaration of the European Council on the Middle East in Dublin, 25-26 June 1990, Annex V, p. 29-30.

¹⁸ Interview with Charles Shamas, senior partner of the Mattin Group, Ramallah, July 2006. On the failure of the PLO to adopt a legal strategy during the negotiations. See R. Shehadeh, note 3 above, p. 7-10.

¹⁹ C. Bell, *Peace Agreements and Human Rights*, (Oxford 2003), p. 75.

CIHRE stopped its activities in 1997. Since then, its work has been continued by the Mattin Group which undertakes with the collaboration of several European NGOs such as the Euromed Network on Human Rights and APRODEV, an advocacy project which directs its actions to the European Union's institutions.

1.3 Using the Language of Law to Get the Debate on the Israeli-Palestinian Issue Out of Politics.

Welchman stated, in describing the Enforcement Project, that one of its strategies was “making the law and complex legal arguments meaningful to politicians, without engaging [...] in politics”.²⁰ Indeed, one aspect of the novelty of the work of the EP and CIHRE is the use of a legal discourse in addressing third States. The advocacy work conducted by the EP and CIHRE endeavoured to move the focus of the debate on the Israeli-Palestinian conflict out of politics and to give it brand new clothes. This strategy presents several interesting elements that can be analysed retrospectively. First of all, the call for respect of international law by the EP and then CIHRE can be seen as a tool to create a consensus among the various political actors they addressed because international law enjoys universality as a body of law that everyone had agreed to. The claim that international law is a universal system has experienced heavy criticism.²¹ Nevertheless, the universal image conveyed by international law is crucial for the defenders of the rights of an oppressed people. It is a way to address their case worldwide in a language which is assumed to be understood by everyone and which is associated with the idea of rights and protection.²²

²⁰ See L. Welchman, note 15 above, p. 20.

²¹ See for instance M. Koskenniemi, “International Law in Europe: Between Tradition and Renewal” (2005) 16 *European Journal of International Law* 113-124, p. 113.

²² J. Beckett, “Rebels Without a Cause: Martti Koskenniemi and the Critical Legal Approach” (2007) 7 *German Law Journal* 1045-1088, p. 1086.

Furthermore, international law offers accurate tools to evaluate and assess the responsibilities of international actors. International law, unlike politics, carries an image of objectivity because law is associated with a method which encompasses scientific principles, and science draws on what is –once again- universal, not on what is particular.²³

Nonetheless, juridification is always an imperfect depolitisation.²⁴ Behind any legal arguments stand the intentions of their authors and it is crucial to identify their disposition in order to estimate the weight to be given to an argument.²⁵ The role of the Enforcement Project and then of CIHRE has been to expose methodologically the historical developments of humanitarian law and to establish that States have an obligation to use any means at their disposal to ensure that international humanitarian law is respected. As do all parties using and speaking the language of international law, they *played* with its indeterminacy to build a chain of legal arguments in which their claims equated with the prescriptions of international law.²⁶ This process maps the inevitable fate of anyone using the language of international law: what matters is the persuasiveness of their legal demonstration.

²³ M. Koskenniemi, “Letters to the Editor” (1993) 93 *American Journal of International Law* 351-361, p. 353.

²⁴ S. Sur, *L'interprétation en droit international public*, (Paris 1974), p. 51.

²⁵ I. Scobbie, *Wicked Heresies or Legitimate Perspectives? Theory and International Law*, In M. Evans (ed.), *International Law*, (Oxford 2006), pp. 83-114, p. 90.

²⁶ For indeterminacy the dissertation means “the claim that law can produce diametrically opposed answers to *any* question of legality”, see J. Beckett, note 22 above, pp. 1051-1052.

2. Third States are Under a Duty to Uphold International Humanitarian Law Obligations.

The Enforcement Project was born at the time of the first Intifada (1987-1990). The uprising of the Palestinian population in the Occupied Territories after 20 years of occupation was followed by a repression of the Israeli government at the time. The Prime Minister, Yitzhak Rabin announced a policy of “might, force and beatings” to repress the revolt which gave rise to systematic brutal behaviour towards the Palestinian civilian population by Israeli soldiers.²⁷ Furthermore, the Israeli army regularly had recourse to collective punishments. Repression over organisational activities and Palestinian infrastructures, notably, the closure of educational establishments was a constant pattern.²⁸

According to Palestinian human rights NGOs, law had to be respected in order to get out of this situation. It was thus urgent to obtain the enforcement of the protection provided by international humanitarian law and especially the 1949 Fourth Geneva Convention on the Protection of the Civilian Population, to which the Palestinians were entitled. Third parties were thus seen as the only recourse for Palestinian organisations which wished to ensure the enforcement of humanitarian law.

2.1 The Urgent Need for Third Party Intervention.

The applicability of the Fourth Geneva Convention to the Palestinian Occupied Territories has been a consensus among the international community. For instance, it has

²⁷ L. Benedikt, *Yitzhak Rabin: The Battle for Peace*, (London 2005), p. 120.

²⁸ Punishing a Nation. Human Rights Violations during the Palestinian Uprising (Al Haq report), (Dec 1987- Dec 1988).

been recalled several times by several UN Security Council resolutions²⁹ and UN General Assembly resolutions.³⁰ The International Committee of the Red Cross naturally has followed the same trend.³¹ During the first Intifada, the declarations and resolutions of international institutions and especially the UN emphasised the applicability of humanitarian law in the Occupied Territories. For instance, in 1988, at the height of violence in the Occupied Territories, the Security Council adopted resolution 605 which called Israel to “abide immediately and scrupulously” with the Fourth Geneva Convention and asked the Secretary General of the UN, then Javier Perez de Cuellar to report to it “the need to consider measures for impartial protection of the Palestinian civilian population under Israeli occupation...”. The Secretary General issued his report on the 21st of January 1988 and stated that the most effective method of protection “would be for Israel to apply in full the provisions of the Fourth Geneva Convention”.³²

Nonetheless, this general consensus was not followed by the most concerned actor, Israel, the Occupying Power. More specifically, the official view of the Israeli government was –and still is– to agree on the *de facto* but not *de jure* applicability of the Fourth Geneva Convention. Israel considers that the Fourth Geneva Convention only applies to territories which were placed under the authority of a sovereign prior to their occupation. The Palestinian Occupied Territories are considered by Israel to be “administered territories” and not “occupied territories”. Israel has always stated its

²⁹ See for instance UNSC resolution 237 of 14 June 1967 “recommending to the governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949” or UNSC resolution 446 of 22 March 1979 calling “*once more upon* Israel, as the occupying Power, to abide scrupulously by the 1949 Fourth Geneva Convention”.

³⁰ Among the numerous UNGA resolutions calling for the enforcement of the Fourth Geneva Convention in the Palestinian Occupied Territories, see for instance Resolution 36/147 of 16 December 1981 and Resolution 43/21 of 8 November 1988.

³¹ Resolution of the Twenty Fourth International Conference of the Red Cross, Manila, 1981 cited by P.-Y. Fux and M. Zambelli, “Mise en oeuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d’un processus multilatéral (1997-2001)” (2002) 84 International Committee of the Red Cross Review 661-695, p. 662.

³² “Report submitted to the Security Council by the Secretary General in accordance with resolution 605 (1987)” UN Doc. S/19443, 21 January 1988, para. 29.

willingness to conform to the “humanitarian provisions” of the Fourth Geneva Convention although it has never specified which provisions it considered to be of a humanitarian character.³³ Therefore, Israel dismisses the widely-accepted argument which sees the primary purpose of the Fourth Geneva Convention as the protection of the civilian population and the object of the second paragraph of Article 2 of the same Convention “not to restrict the scope of the Convention”.³⁴ Its view gave rise not only to the commission of violations of international law on the ground but also, as stated above, to the absence of any proper legal redress in the Israeli judicial system.³⁵

In the face of this situation, third party intervention was seen by the Al Haq and CIHRE as the only possible means to set a balance in the relationships between the Occupying Power and the occupied population and to bring the Occupying Power to an attitude of compliance with international law. More precisely, they advocated that third parties’ intervention was not only needed but dictated by international humanitarian law.

The work conducted by the Enforcement Project at the time and up to the present is unique in its style. Fateh Azzam³⁶, in Al Haq’s 25 years anniversary’s report said that the Enforcement Project has had some impact in reinvigorating discussion and development of international humanitarian law, where it contributed to and stimulated new studies and

³³ Before it became the official position of the Israeli government, this legal statement was first formulated by Meir Shamgar. M. Shamgar, “The Observance of International Law in the Administered Territories” (1971) *Israeli Yearbook on Human Rights* 262-277. See on this issue, A. Roberts, Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988, In E. Playfair (ed.), *International Law and the Administration of Occupied Territories* (Oxford 1992), pp. 25-85, pp. 44-45.

³⁴ Article 2 of the Fourth Geneva Convention: “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”. See *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. (2004), pp. 174-176 (para. 94-101). Hereinafter “*Advisory Opinion on the Legality of the Wall*”.

³⁵ The analysis of the jurisprudence of Israeli Courts in relation to violations of human rights and humanitarian law occurring in the Palestinian Territories is not the topic of this dissertation. For a thorough treatment of the jurisprudence of the Israeli High Court vis-à-vis the Israeli occupation of the Palestinian Territories, see D. Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories*, (Albany 2002).

³⁶ F. Azzam entered Al Haq as an administrator in 1987 and resigned as director in 1995.

challenging interpretations.³⁷ The original aspect of it at first consisted in the *renaissance* of international humanitarian law by highlighting the obligations of third States in this field.

These aspects were principally expressed in two publications edited by Marc Stephens³⁸ and Lynn Welchman³⁹ and during interventions before European politicians and at conferences.

2.2 Article 1 of the Fourth Geneva Convention: The Keystone of the Arguments of the Enforcement Project and CIHRE.

CIHRE and Al Haq stressed that the laws of war specifically recognise and detail the role of third States in protecting the civilian population against the violations of the Occupying Power. First of all, these obligations are to be met in the institution of the Protecting Power⁴⁰ and the obligation for the High Contracting Parties to repress any grave breaches of the Conventions and Additional Protocols.⁴¹ Secondly, the Geneva conventions contain a more general obligation, Article 1, which obliges the High Contracting Parties to ensure respect for the Fourth Geneva Convention. CIHRE and Al Haq emphasised that Article 1 is not a redundant statement of the former institution and obligation (Protecting Power and obligation to repress) but imposes a specific duty on third States to exhaust all the means at their disposal to ensure that the Occupying Power complies with its obligations.

³⁷ See F. Azzam, note 6 above, p. 17.

³⁸ M. Stephens, *Enforcement of International Law in the Israeli Occupied Territories* (Al Haq), (1989).

³⁹ L. Welchman, *The Role of the International Community In Annual Report on Human Rights in the Occupied Palestinian Territories, A Nation Under Siege*, (1989), pp. 643-667.

⁴⁰ Articles 9, 11, 55, 143 of the Fourth Geneva Convention. On the institution of the Protecting Power, see H. Coulbaly, *Le rôle des Puissances Protectrices au regard du droit diplomatique, du droit de Genève et du droit de La Haye*, In F. Kalshoven (ed.), *Implementation of International Humanitarian Law*, (Dordrecht, London 1989), pp. 69-78. and F. Kalshoven, *Constraints on the Waging of War*, (Geneva 1987), pp. 62-63 and 127-128.

⁴¹ Articles 146 and 147 of the Fourth Geneva Convention.

Article 1 of the Fourth Geneva Convention was the cornerstone of the advocacy work of Palestinian NGOs.⁴² As “interested parties”, in the words of Kalshoven,⁴³ Palestinian NGOs offered an extensive interpretation of the obligation “*to ensure respect* of the Convention in all circumstances” (emphasis added). In this respect, they were inspired by Sean MacBride, one of the founders of Amnesty International and Nobel Peace Prize Winner (1974).⁴⁴ At the time he was the Secretary General of the International Commission of Jurists, MacBride chaired the Tehran Conference on Human Rights in 1968. He was a supporter of an interpretation of Article 1 which provides positive obligations on third States to ensure that States involved in armed conflicts respect international humanitarian law. He introduced his ideas at the Tehran Conference where the participants to the conference adopted unanimously resolution XXIII which states that governments and the UN “must ensure, that [the Geneva Conventions] are known to all and respected in all circumstances”.⁴⁵

Although the last section of this chapter provides a detailed analysis of the content of Article 1, the present section provides a brief summary of the interpretation of Article 1 by Al Haq and CIHRE in the 1980s and 1990s.

Al Haq and CIHRE’s reading of Article 1 departed from the traditional one from the *travaux préparatoires* of the Geneva Conventions. According to the *travaux*, the obligation “to ensure respect” entails an obligation for a State signatory of the Geneva Conventions

⁴² See L. Welchman, note 15 above, p. 19.

⁴³ F. Kalshoven, “The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seeds to Ripening Fruit” (1999) 2 Yearbook of International and Humanitarian Law 3-61, p. 6.

⁴⁴ Interview with Charles Shamas, Ramallah, July 2006.

⁴⁵ Human Rights in Armed Conflicts. Resolution XXIII adopted by the International Conference on Human Rights, Tehran, 12 May 1968.

to make sure that not only its organs, officials and armed forces respect the Conventions but also its whole population.⁴⁶

Furthermore, Al Haq and CIHRE offered a more extensive reading than the one provided by the ICJ in the *Nicaragua* case which saw in Article 1 a negative obligation. According to the ICJ, the United States, the respondent in this case, was under the obligation “not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Convention”.⁴⁷ For Al Haq and CIHRE, Article 1 not only entails an obligation not to encourage but also imposes a positive duty for third States to ensure that the parties to a conflict respect humanitarian law obligations.⁴⁸ As such, they are under a duty to intervene in order to prevent or react to violations of humanitarian international law. This view was supported at the time by Boisson de Chazournes and Condorelli.⁴⁹

This reading of Article 1 was also supported by the ICRC whose interpretation evolved throughout the years. In its 1952, 1956 and 1958 commentaries on Convention I, IV and III respectively, it referred to the fact that other Contracting Parties “may and should” or just “should”, “endeavour to bring [the Power failing to fulfil its obligation] back to an

⁴⁶ Final Record of the Diplomatic Conference of Geneva of 1949. Cited in F. Kalshoven, note 43 above, p. 28.

⁴⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986), p. 114 (para. 220).

⁴⁸ M. Stephens note 38 above; L. Welchman note 39 above. See also F. Azzam, “The Duty of Third States to Implement and Enforce International and Humanitarian Law” (1997) *Nordic Journal of International Law* 55-75.

⁴⁹ L. Boisson de Chazournes and L. Condorelli, 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*, (Geneva 1984), pp. 17-35, pp. 26-35;

attitude of respect for the Convention". In 1985 it went one step further and referred to a "duty" in the Commentaries of the 1977 Protocols.⁵⁰

Elements of State practice also supported the assertion that Article 1 encompasses more than a moral principle. Azzam, Condorelli, Boisson and Stephens cite, among other examples, the solemn diplomatic declaration in 1968 at the Tehran Conference on Human Rights mentioned above and they acknowledge that the reiteration of the same article in the 1977 Protocol acts as a confirmation of the determination of the High Contracting Parties to ensure the enforcement of the rules of international humanitarian law.⁵¹ Examples drawn from the early 1990s confirm this position. For instance, resolution 681 of the UN Security Council of 20 December 1990 included a direct call to the High Contracting Parties to the Fourth Geneva Convention to ensure Israel's respect for the Convention in accordance with Article 1 after Israel deported four Palestinians from the Occupied Territories in contravention of its obligations under international humanitarian law. The Dublin Declaration of the EU member States in June 1990, which reiterated the obligation of the High Contracting Parties to the Convention to ensure respect while referring to the situation in the Palestinian Occupied Territories, is also a relevant example.⁵²

⁵⁰ See F. Kalshoven, note 43 above, p. 52. Nonetheless, according to Kalshoven, there is nothing in the records of the drafting of the Conference that supports this assertion, *Ibid.* p. 54

⁵¹ F. Azzam, note 48 above, p. 58; L. Boisson de Chazournes and L. Condorelli, note 49 above, p. 26 and M. Stephens, note 38 above, p. 9.

⁵² Declaration of the European Council on the Middle-East in Dublin, 26-27 June 1990, cited by L. Welchman, International Protection and International Diplomacy: Policy Choices for Third-Party States in the Occupied Palestinian Territories, *International Human Rights Enforcement. The Case of the Occupied Palestinian Territories in the Transitional Period*, (Jerusalem 1994), pp. 225-277, p. 244.

Furthermore, according to Al Haq and CIHRE –still supported by Boisson de Chazournes and Condorelli-, this interpretation of Article 1 is in accordance with the object and purpose of the Convention. As put by Stephens:

“It is submitted that a reading of article 1 which excluded inter-states obligation and enabled Israel to avoid the provisions of the Fourth Geneva Convention simply by denying its applicability would be to deny its main object as described in the title of the Convention itself, namely the protection of civilians in time of war”.⁵³

This argument is corroborated by the objective character of humanitarian protection. Humanitarian obligations are not synallagmatic obligations, i.e. obligations of State vis-à-vis another State, but a commitment which each State takes and fulfils before the other High Contracting Parties. The ICRC in its commentaries qualifies the motives of the Convention as an “imperative call on civilisation”.⁵⁴ Therefore, Article 1 establishes a direct obligation for the States which are party to the Convention to respect the provisions of the Convention.

However, the difference between Boisson, Condorelli and the ICRC, on the one hand, and Al Haq and CIHRE, on the other, lies in their interpretation of the extent of the obligation. Whereas the latter see Article 1 as establishing an obligation of result, the former consider that it is an obligation of means. Boisson, Condorelli and the ICRC

⁵³ M. Stephens, note 38 above, p. 18.

⁵⁴ Commentaries of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited 15 December 2008).

describe this obligation as a duty “to take all possible steps”⁵⁵ to ensure that the rules of international humanitarian law are respected by the parties to the conflict or as a duty to endeavour to bring the Occupying Power that fails to fulfil its obligations back to an attitude of respect of the Convention.⁵⁶ However, for Welchman, “under Article 1, High Contracting Parties have not undertaken to attempt to ensure respect, but to *ensure* respect”.⁵⁷ Therefore, their responsibility is not over until the Occupying Power has complied with its obligations under the Convention. Azzam similarly qualifies Article 1 as an obligation of result: “while the State has the freedom to choose the means, the obligation is to achieve the desired result (respect for the Conventions and Protocol)”.⁵⁸ In a similar vein, Stephens sees in Article 1 an absolute and unconditional obligation as opposed to a qualified and progressive obligation, because it is phrased in terms that require a strong reaction from the State parties when faced with a violation of the Convention.⁵⁹

2.3. The Failure of the High Contracting Parties to Fulfil their Obligations under International Humanitarian Law.

Having highlighted the various obligations incumbent upon third States in relation to the Israeli occupation of the Palestinian Territories, the members of the enforcement team outlined the non-compliance of the same third States with these obligations.

⁵⁵ L. Boisson de Chazournes and L. Condorelli, “Common Article 1 of the Geneva Convention Revisited: Protecting Collective Interests” (2000) 82 International Committee of the Red Cross Review 67-87, p. 69.

⁵⁶ Commentaries of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited 15 December 2008).

⁵⁷ L. Welchman, note 39 above, p. 652.

⁵⁸ F. Azzam, note 48 above, p. 73.

⁵⁹ M. Stephens, note 38 above, p. 22.

**2.3.1. The Non-Compliance of Third States with Their
Obligations under International Humanitarian Law
During the First Intifada.**

From the beginning of the Israeli occupation of the Palestinian Territories, the mechanisms of implementation internal to the Convention have remained inoperative. To take the example of the Protecting Power institution, Israel, while refusing to apply the Fourth Geneva Convention to the Palestinian Occupied Territories, has consequently not appointed any Protecting Power, nor has it requested any neutral State or impartial international organisation to act as such.⁶⁰

Furthermore, until the end of the first Intifada, the actions of third States were limited to making public criticisms of Israel's actions in the Occupied Territories through diplomatic channels and inside UN forums. Most of the time, these attempts were sporadic and frustrated by the paralysis of the UN Security Council because of the use or threat of veto by the USA.⁶¹

Therefore, for Al Haq, given the fact that the High Contracting Parties are under the obligation to search for any other means available under international law to make Israel comply with its obligations as an Occupying Power, and that they cannot absolve

⁶⁰ Al Haq notes that in an unprecedented development, foreign consular officials attempted to establish a physical presence in locations where human rights violations were in progress, such as during the six-week siege of Beit Sahour. Annual Report on Human Rights in the Occupied Palestinian Territories, A Nation Under Siege (Al Haq report), *Al Haq Annual Report*, (1989), p. 3. It is important to point that in 1971, the ICRC announced its willingness to assume the functions of the Protecting Power to the UN institutions. However, the General Assembly did not consider its call. See T. Van Boven, "Fact Finding in the Field of Human Rights" (1973) 3 *Israel Yearbook of Human Rights* 93-117, p. 114.

⁶¹ For an extensive review of the positions and actions taken by key third party States relating to international humanitarian law from 1987 to 1994, see L. Welchman, note 52 above.

themselves to fulfil this obligation by invoking the complexity of international relations, third States were considered to be in breach of their obligation to ensure respect.⁶²

**2.3.2. The Non-Compliance of Third States with Their
Obligations under International Humanitarian Law
at the Time of the Middle-East Peace Process.**

In 1991, the US convened with Russia, a Middle-East peace conference in Madrid. The UN and the EU, then European Community were invited as observers only. This event was followed by an encounter between Israel and the PLO in Oslo which agreed on the Declaration of Principles (DoP). The DoP gave rise to a number of agreements signed between the same parties requiring *inter alia* Israel to transfer to the newly created Palestinian Authority, certain powers and responsibilities exercised by its military authority in the prospect of the creation of a Palestinian State.

The beginning of the Middle-East Peace Process (MEPP) marked a brutal stop in what some have perceived as the beginning of a law-based involvement in the Israeli-Palestinian issue by the international community. At the time, the sensitivities of the US regarding Iraq's violations of humanitarian law in Kuwait had the effect of increasing the pressure on Israel to abide by humanitarian law. This shift mostly came from the fact that several Arab States participated in the international coalition against Iraq. As a consequence of this, when Israel announced the deportation of four Palestinians from Gaza, the Security Council adopted resolution 681 (1990) underlying the responsibility of

⁶² L. Welchman, note 39 above, p. 652.

the Occupying Power as well as the High Contracting Parties to the Geneva Conventions for ensuring the protection of the Palestinian civilian population.⁶³

The United States' views on the place of international law in the MEPP prevailed. Although the US has always taken the position that the Fourth Geneva was applicable to the Palestinian Occupied Territories, it was firmly opposed to any reference to international humanitarian law which it considered as an impediment to the good process of the negotiation.⁶⁴ Third parties then concentrated their efforts in maintaining the negotiation process as the ultimate end rather than an aim to achieve a just peace between Israel and the Palestinians. Their interventions in the negotiations and on the ground were devoid of any reference to international humanitarian law or human rights standards. Therefore third parties dismissed their obligations to ensure "international protection", i.e., as defined by Welchman as "the law-based action of third-party States in ensuring that the protections established in the law itself are actually implemented".⁶⁵

The discourse of the Palestinian NGOs adapted to this new context. They emphasised the critical connection between upholding the rules of international humanitarian law and human rights standards and the prospects for promoting and sustaining a peace process aimed at a just and durable resolution of the conflict. In line with several academic authors, they criticised the absence of any reference to international law in the MEPP and therefore questioned its long-term viability.⁶⁶

⁶³ L. Welchman, The Middle East Peace Process and the Rule of Law: Irreconcilable Objectives?, In E. Cotran and M. Yamani (eds.), *The Rule of Law in the Middle East and the Islamic World*, (London 2000), pp. 51-65, pp. 55-56.

⁶⁴ A. Abrash, Human Rights Related Policy, Policy Instruments and Roles: The United States, *International Human Rights Enforcement. The Case of the Occupied Palestinian Territories in the Transitional Period.*, (Jerusalem 1994), pp. 105-107.

⁶⁵ See Welchman, note 52 above, p. 226.

⁶⁶ For a non-exhaustive literature review on this issue: C. Campbell, A Problematic Peace: International Humanitarian Law and the Israeli-Palestinian Peace Process, In C. Campbell, Karl Schulze and M. Stokes (eds.), *Nationalism, Minorities and Diasporas: Identities and Rights in Middle-East*, (London, New York 1996), pp.

When it came to the obligations of third parties, the members of the enforcement team emphasised their obligations to uphold the rules of international humanitarian law and human rights in the Peace Process and in their involvement on the ground in order not only to discharge themselves of their obligations to ensure respect for the Convention but also to increase the prospects for peace and reconciliation. They highlighted the fact that reference to international humanitarian law with respect to this theatre has been placed out of bounds in the diplomacy of virtually all third States. In the words of Shamas, they endeavoured to challenge “the human rights collateral impacts” of the international diplomacy.⁶⁷

3. What is Behind the Obligation to Ensure Respect in All Circumstances?

As detailed in the previous section, in the 1980s and 1990s, Palestinian NGOs, supported by some authors and the ICRC gave a progressive and extensive reading of common Article 1 of the Four Geneva Conventions. Are their views at the time prevalent nowadays? The present section analyses the current debate on the nature and extent of the obligation to ensure respect. It then presents several arguments in favour of examining the obligation to ensure respect in the light of the general regime of State responsibility.

39-54; R. Falk, Some International Law Implications of the Oslo/Cairo Framework for the PLO/Israeli Peace Process, In S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, (1997), pp. 1-23; J. Quigley, The PLO-Israeli interim arrangements and the Geneva Civilians Convention, In S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, (1997), pp. 25-46 and R. Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, (London 1997).

⁶⁷ C. Shamas, Putting Human Rights in the Realpolitik of Third States: Giving a Destination to Political Transition, *International Human Rights Enforcement. The Case of the Occupied Palestinian Territories in the Transitional Period*, (Jerusalem 1994), pp. 160-167.

3.1. Overview of the Academic Literature on Article 1.

It is now generally agreed that the obligation to ensure respect set out in Article 1 does not set a mere legal interest but a proper legal obligation. This obligation has usually been confined into an upper and lower limit in order to describe the minimal negative obligation States must respect and possible positive action they can undertake in order to fulfil the obligation to ensure respect.

3.1.1. A “Legal Obligation”.

Article 1 has experienced recent judicial attention. It was expressly referred to by the International Court of Justice in its *Advisory Opinion on the Legality of the Wall*. In paragraph 159 of the opinion, the Court recalls three obligations incumbent upon third States in relation to the construction of the Wall: the obligation to cooperate to put an end to the violation, the obligation not to aid and assist and not to recognise the violation. It states that, “in addition”, all the States party to the Geneva Conventions are under an obligation to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁶⁸

Judge Kooijmans dissented from this paragraph of the *dispositif* as he was sceptical about the ruling. He acknowledged that he did not know if the scope given by the Court to this article was a correct statement of positive law. Judge Kooijmans could only envisage diplomatic démarches as a kind of positive action resulting from this obligation.⁶⁹ He refers in his opinion to the writing of Kalshoven who is one of the few authors who cannot see the slightest element in States’ practice and in the *travaux préparatoires* of the

⁶⁸ *Advisory Opinion on the Legality of the Wall*, p. 200 (para. 159).

⁶⁹ *Advisory Opinion on the Legality of the Wall*, Separate Opinion of Judge Kooijmans, pp. 233-234 (para. 50).

1949 Convention and its 1977 Protocols in favour of an obligation directed to third States to a conflict. Kalshoven, however, still believes that Article 1 encompasses a moral incentive when it comes to its effects beyond the internal sphere that “implies that in weighing the admittedly many factors involved in the process of decision making, the moral duty to ‘ensure respect’ for international humanitarian law carries particular weight: the graver the ‘situation of apparent disregard’, the heavier the weight of this factor”.⁷⁰

Despite Judge Kooijmans’ comments and Kalshoven’s views, it is now generally accepted that Article 1 contains a proper legal obligation and not just a mere moral principle. To cite some recent practice, the existence of this obligation was stated by the High Contracting Parties to the Geneva Conventions in the Final Declaration of the International Conference for the Protection of War Victims in 1993:

We affirm our responsibility, in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war. We urge all States to make every effort to: [...] Ensure the effectiveness of international humanitarian law and take resolute action in accordance with the law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations.⁷¹

Before the ICJ ruling, the International Criminal Tribunal for ex-Yugoslavia (ICTY) described Article 1 as “a legal entitlement [for each and every member of the

⁷⁰ F. Kalshoven, note 43 above, p. 60.

⁷¹ Final Declaration of the International Conference for the Protection of War Victims, ICRC, September-October 1993. See <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMVS> (last visited 15 December 2008).

international community] to demand respect for such obligations” - i.e. humanitarian law obligations.⁷²

Furthermore, at the more recent 30th Conference of the Red Cross and the Red Crescent in 2007, the States participating in the Conference reaffirmed the obligation of all States and parties to an armed conflict to respect and ensure respect for the provisions of humanitarian law.⁷³

3.1.2. The Upper and Lower Limits of the Obligation to Ensure Respect.

The studies on the scope of Article 1 have generally classified two sets of obligations defined by the duty: a negative obligation or lower obligation and a positive one or upper obligation. Levrat was the first author to have used this classification. He analysed the extent of the obligation to ensure respect only with regard to the provisions of the Geneva Conventions and found what he considered to be a very unsatisfactory result. He considers that Article 89 of Additional Protocol One is the only provision which concerns obligations of third States to ensure respect.⁷⁴ However, according to Levrat, its application is limited because it only concerns grave breaches to obligations of humanitarian law and its implementation is subject to the respect of the rules of the UN Charter. He thus concludes that the limits the Convention sets to the enforcement of the obligation to ensure respect are not clear enough for determining the content of the

⁷² *The Prosecutor v. Zoran Kupreškić and others*, ICTY, Judgement, 14 January 2000, Case No. IT-95-16-T., para. 517. See also L. Boisson de Chazournes and L. Condorelli, note 55 above, p. 76.

⁷³ “Reaffirmation and Implementation of International Humanitarian Law. Preserving Human Life and Dignity in Armed Conflict”. 30th International Conference of the Red Cross and the Red Crescent, Geneva, 26-30 November 2007.

⁷⁴ Article 89, Additional Protocol One: “In situation of serious violations of the Conventions or of its Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”.

obligation.⁷⁵ Such a conclusion seems nonetheless unduly restrictive and later ICRC studies and conference and academic works have helped to clarify the content concerning the nature of the limits to the scope of Article 1.

In 2003, the ICRC organised a series of regional expert seminars whose topic was “Improving Compliance with Humanitarian Law”. The objective of the seminars was to focus on ways in which common Article 1 could be operationalised and how the potential of Article 89 of Additional Protocol One could be better utilised. A final report was submitted during the ICRC 28th Conference in December 2003 and this report defines the scope of Article 1. According to the findings of the seminars, common Article 1 means that States must neither encourage a party to an armed conflict to violate international humanitarian law, nor take action that would assist it in such violation. Furthermore, seminar participants acknowledged a positive obligation on States not involved in an armed conflict to take action against States that are violating IHL, in particular to use their influence to stop the violations. Article 1 is viewed as an obligation of means on States to take all appropriate measures possible, in an attempt to end IHL violations.⁷⁶ All participants affirmed that this positive action is at minimum a moral responsibility and that States have the right to take such measures- with the majority of participants agreeing that it constitutes a legal obligation under common Article 1.⁷⁷

⁷⁵ N. Levrat, Les conséquences de l'engagement pris par les Hautes Parties Contractantes de “faire respecter” les Conventions humanitaires, In F. Kalshoven (ed.), *Implementation of Humanitarian Law*, (Dordrecht, London 1989), pp. 263-296, p. 291.

⁷⁶ ICRC report to the 28th ICRC Conference “International Humanitarian Law and The Challenges of Contemporary Armed Conflicts”, Annex III, (2003). Available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/\\$File/IHLcontemp_armedconflicts_FIN_AL_ANG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FIN_AL_ANG.pdf) (last visited 15 December 2008) Hereinafter “Annex III”. See also, J.-P. Lavoyer, “Should International Humanitarian Law be Reaffirmed, Clarified or Developed?” (2004) 34 *Israel Yearbook of Human Rights* 35-58.

⁷⁷ Annex III, *Ibid.*, p. 47

Finally, the enforcement of this duty is limited by the principle of non-interference in the internal affairs of another State and is not an entitlement to use force.⁷⁸

Furthermore, in its recent study on customary rules of international humanitarian law conducted by Louise Doswald-Beck and Jean-Marie Henckaerts, the ICRC acknowledged the existence of an obligation of States to ensure respect for rules of international humanitarian law.⁷⁹ The extent of the obligation is twofold: it implies a negative and positive duty. On the one hand, States may not encourage violations of humanitarian law by parties to an armed conflict. On the other hand, they must exert their influence, as far as possible, to stop violations of international humanitarian law. The ICRC bases its arguments on the existence of treaty provisions, national practice (military manuals, legislation and national case-law), practice of international organisations and conferences and practice of the International Red Cross and Red Crescent movement all of which relate to the obligation to ensure respect for international humanitarian law that it details in the second part of its study.⁸⁰ A very similar formula was used at the 30th Conference of the ICRC in 2007 to describe the obligations set in Article 1. In the final declaration, States stressed the obligation of all States to refrain from encouraging violations of international humanitarian law by any party to an armed conflict and to exert their influence, to whatever degree possible, to prevent and end violations, either individually or through multilateral mechanisms, in accordance with international law.⁸¹

⁷⁸ *Ibid.*

⁷⁹ L. Doswald-Beck and J.-M. Henckaerts, *Customary International Humanitarian Law. Volume 1: Rules*, (Cambridge 2005), p. 509.

⁸⁰ L. Doswald-Beck and J.-M. Henckaerts, *Customary International Humanitarian Law. Volume 2: Practice*, (Cambridge 2005), pp. 3289-3302.

⁸¹ "Reaffirmation and Implementation of International Humanitarian Law. Preserving Human Life and Dignity in Armed Conflict", 30th Conference of the ICRC, Geneva, 26-30 November 2007.

Finally, according to Kessler, who wrote the latest study dedicated essentially on the obligation to ensure respect, Article 1 sets two minimal negative and positive obligations.⁸² On the one hand States should abstain from acts that would contribute to a violation of the four Geneva treaties. On the other hand, States have to observe the other parties' compliance with their duties under the Convention and in some, albeit rare, cases, they must take positive action in order to stop severe violations of these treaties.⁸³ Interestingly, for Kessler, the legal structure of the Convention advocates that States can take countermeasures in addition to protests and measures of retorsion.⁸⁴ The obligations set out in the Geneva Convention are *erga omnes contractantes*, as the Conventions are not being performed in a bilateral way towards only one State, but every State is obliged towards the community of the Contracting Parties. Furthermore, for Kessler, it is generally admitted that *erga omnes* obligations can be enforced by third States using repressive measures. Therefore, for Kessler, considering the similarity between rules *erga omnes* and rules *erga omnes contractantes*, it follows that the rules set in the Geneva Convention can be enforced by countermeasures.⁸⁵ Nonetheless, according to her, the adoption of countermeasures is only a possibility and is not a legal obligation because to imply a duty to react against a breach of humanitarian law would entail that the States

⁸² B. Kessler, "The Duty to 'Ensure Respect' Under Common Article 1 of the Fourth Geneva Convention: Its Implications on International and Non-International Armed Conflict" (2001) 44 *German Yearbook of International Law* 498-516, p. 499.

⁸³ *Ibid.*, p. 506

⁸⁴ Countermeasures consist in an illegal and unilateral reaction by an international actor directed to another one or several others to an act that it considers contrary to international law and this, in order to procure its cessation and to achieve reparation for the injury. J. Combacau and S. Sur, *Droit international public*, 7th ed. (Paris, 2006), p. 520. The use of countermeasures has been supported by States practice, judicial decisions. For instance, in the *Gabčíkovo-Nagymaros Project* case, the ICJ accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and ... directed against that State", provided certain conditions are met (*Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Rep. (1997), p. 55 (para. 83). Countermeasures or reprisals are circumstances excluding the illegality of an international act. They have been tackled by the ILC project on State responsibility in this respect. See "Article 22. *Countermeasures in respect of an internationally wrongful act*."

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three". See ILC Report, 2000, 52d session A/55/10, p. 72-95.

⁸⁵ *Ibid.*, pp. 500-501.

which are under a duty to ensure respect, would automatically be responsible for the acts of the States which have infringed their obligations under humanitarian law.⁸⁶

The report submitted by the ICRC at the 28th ICRC Conference in December 2003 also suggests that States can take lawful reprisals or countermeasures to hold a State responsible for its violation under humanitarian law.⁸⁷ However, one unidentified participant questioned the lawfulness of third States taking reprisal action, referring to article 54 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.⁸⁸ Based on Article 54, the participant argued that the formulation of “lawful measures” excludes reprisals.⁸⁹ The doubts that surround the possibility of States taking countermeasures to ensure respect of the provisions of humanitarian law when they have not been injured by a violation of IHL are genuine. They call for a study of Article 1 in the light of the regime of international law on State responsibility, notably the obligations of States not injured by a violation of international law.

Nonetheless, as a final remark to end this section, the range of measures which States are entitled to take to abide by their obligation to ensure respect is wide. The participants to the ICRC regional seminars in 2003, by demonstrating creative thinking, have come up with a long list of possible measures States might undertake to fulfil their duty. One finds, for instance, the scrutiny by States of all intended sales of armaments to ensure their export is not contrary to the provisions of humanitarian law, the possibility for

⁸⁶ *Ibid.*, p. 505. The following chapter of this dissertation dedicates a long development on the possibility of States by a violation of international law to take countermeasures in reaction to violations of international law that do not injure them. See pp. 69-72 below.

⁸⁷ Annex III, note 76 above, p. 51.

⁸⁸ Article 54. *Measures taken by States other than the Injured State*: “This chapter does not prejudice the right of any State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached”.

⁸⁹ Annex III, note 76 above, p. 51. See also, I. Scobbie, “Smoke, Mirrors and Killer Whales: the International Court’s Opinion and the Israeli Barrier Wall” (2004) 5 *German Law Journal* 1107-1131, p. 1121.

States, in conflict to engage in confidential and discreet negotiations where they may have some influence, the making of public denunciations of violations of humanitarian law, etc...⁹⁰ Before the seminars, Palwankar and Azzam offered an extensive account of the measures available to States for fulfilling their obligation to ensure respect for IHL.⁹¹ Finally, Kessler classified the measures States can take in order to fulfil their obligation under Article 1 into four different means of enforcement: (1) repressive action against any violation of the Convention, (2) help by one State to enable another State to fulfil its duties under the Conventions, (3) control and (4) prevention.⁹²

3.2. Analysing the Nature and Extent of the Article 1 Duty in the Light of the Current Developments of State Responsibility in International Law.

There exist a number of different regimes of reactions by non-injured States in response to a violation of international law. Cassese has shown that there are diverse categories of responses by third States which differ dependent upon whether they are facing a violation of the prohibition of the use of force, an infringement of the right to self-determination, a human rights violation or an infringement of a rule of international humanitarian law.⁹³ However, this dissertation contends that Article 1 does not suggest such a potentially differentiated regime of responsibility and that the differences of reactions to these categories of violations lie essentially in the institutional mechanisms designed for the response of non-injured States by their violations. Article 1 addresses

⁹⁰ Annex III, note 76 above, pp. 50-52.

⁹¹ F. Azzam note 48 above, (1997) and U. Palwankar, "Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law" (1994) 298 *International Committee of the Red Cross Review* 9-25.

⁹² B. Kessler, note 82 above, p. 499.

⁹³ A. Cassese, Remarks on the Present Regulation of Crimes of States, In A. Cassese, M. Spinedi and J. Weiler (eds.), *International Crimes of States*, (Berlin, New York 1989), pp. 200-213.

States other than the ones involved in a conflict and is, therefore, the manifestation of the *erga omnes* nature of obligations of international humanitarian law. As stated by Scobbie in relation to the *Advisory Opinion on the Legality of the Wall*, it is possible that considerations pertaining to the implementation of the obligation set in Article 1 lie behind the Court's otherwise oblique assertion of the *erga omnes* nature of the rules of international humanitarian law.⁹⁴

Therefore, the issues posed by the enforcement of Article 1 parallel the issue posed by the mechanisms of enforcement of *erga omnes* obligations or, put differently, Article 1 recalls the *erga omnes* nature of the obligations of international humanitarian law. International humanitarian law was *avant-garde* in the trend towards, what is in the words of Frowein, a *constitutionalisation* of international law or of the international community.⁹⁵ Jean Pictet, himself, in his commentaries on the Fourth Geneva Convention spoke about the *erga omnes* nature of the provisions set in the Convention in 1958⁹⁶, twenty five years before the ruling of the International Court of Justice in the *Barcelona Traction case*.⁹⁷ For Meron, the language to ensure respect was a conventional precursor of the *erga omnes* principle enunciated for the first time by the International Court of Justice in the *Barcelona Traction case*.⁹⁸ In 1996, the ICJ asserted the *erga omnes* nature of a "great many rules of humanitarian law" in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear*

⁹⁴ I. Scobbie, note 89 above, p. 1121.

⁹⁵ The constitutionalisation of international law could be described as the process by which international law departs from a traditional bilateral relationship between the violator and the victim State to envisage a relationship between the violator and all other States and the possibilities for the former States to take actions against it. See J. Frowein, "Reaction by Not Directly Affected States to Breaches of Public International Law" (1994) IV Collected Courses of The Hague Academy of International Law 349-437.

⁹⁶ "The spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable *erga omnes*"; in J. Pictet, *The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Commentary* (Geneva 1958), p. 48, cited by M. Stephens, note 38 above, p. 35.

⁹⁷ *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)*, I.C.J. Rep. (1970), p. 32 (para. 33). At the time, the Court did not include rules of humanitarian law in the category of *erga omnes* obligations but gave as examples obligations deriving from "the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". *Ibid.* para. 34.

⁹⁸ T. Meron, *Human Rights and Humanitarian Norms as Customary International Law*, (Oxford 1989), p. 29.

*Weapons*⁹⁹ and formulated the same statement in the *Advisory Opinion on the Legality of the Wall* in 2004.¹⁰⁰ Meanwhile, academic writers established the link between the obligation set in Article 1 and the *erga omnes* nature of the obligations of international humanitarian law. Boisson de Chazournes and Condorelli made this connection in their study of Article 1 in their 1984 article in order to conclude that the specificity of the obligations of humanitarian law can exercise an important influence on the qualifications of the breach to these obligations and the conditions of enforcement of the international responsibility of States.¹⁰¹ This was at the time where the International Law Commission (ILC) was still formulating the distinction between “crimes” and “delicts” in its draft articles on State responsibility.¹⁰²

Finally, the ICRC in its 2005 study on customary international law refers to the *erga omnes* character of the obligations of humanitarian law when it qualifies the enforcement of Article 1 as “Ensuring Respect for International Humanitarian Law *Erga Omnes*” and uses this expression as the title of the section related to Article 1 on the volume relating to State practice.¹⁰³ It also refers to the *erga omnes* character of rules of humanitarian law in an indirect manner when it cites the rulings of the Trial Chamber of the International Criminal Tribunal for ex-Yugoslavia in the *Furundžija* and *Kupreškić* cases which affirmed the *erga omnes* nature of these rules.¹⁰⁴ Nonetheless, surprisingly, the ICRC study on customary international law does not make reference to the rulings on Article 1 of the *Advisory Opinion on the Legality of the Wall*. Moreover, when listing the international practice

⁹⁹ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. (1996), p. 257 (para. 79).

¹⁰⁰ *Advisory Opinion on the Legality of the Wall*, p. 199 (para. 157).

¹⁰¹ L. Boisson de Chazournes and L. Condorelli, note 49 above, p. 33.

¹⁰² “Comments on Article 19 (international crimes)” Yearbook of the International Law Commission 1976, vol. II, part Two, p. 113, (para. 70), cited in L. Boisson de Chazournes and L. Condorelli, *ibid.*, p. 33. The second chapter of this dissertation details the distinction between international “crimes” and “delicts”. See pp. 60-63 below.

¹⁰³ Doswald-Beck and Henckaerts, note 80 above, pp. 3288-3302.

¹⁰⁴ *The Prosecutor v. Anto Furundžija*, ICTY, Judgment, 10 December 1998, Case No. IT-95-17/1-T, para. 151 and *The Prosecutor v. Zoran Kupreškić and others*, ICTY, Judgment, 14 January 2000, Case No. IT-95-16-T, para. 519 at *Ibid.*, pp. 3298-3299.

and instruments referring to Article 1, it cites Article 16 of the ILC Articles on States Responsibility on “Aid or assistance in the commission of an internationally wrongful act” which deals with the responsibility of a State in connection with the act of another State¹⁰⁵ and not to Article 41 which refers to the obligations of States vis-à-vis a violation of “an obligation arising from a peremptory norm of international law” or to put it differently an *erga omnes* obligation.¹⁰⁶ However, Crawford, in his Commentaries on the ILC Articles on State Responsibility, insisted on the difference between the obligation not to aid and assist as stated in Article 16 and in Article 41. Although the elements of the aid and assistance are to be read in connection with Article 16, it extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether the breach is a continuing one.¹⁰⁷ Moreover, the two articles deal with two separate regimes of responsibility: Article 16 is concerned with “plain violations” of international law whereas Article 41 deals with violations of an obligation arising from a peremptory norm of international law.

4. Conclusion.

Al Haq and CIHRE managed to place the duty set in Article 1 at the centre of the political and legal debate on the involvement of third parties in the resolution of the Israeli-Palestinian issue. Almost sixty years after its adoption, it is now generally

¹⁰⁵ “Article 16. *Aid or assistance in the Commission of an internationally wrongful act*

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act
(b) the act would be internationally wrongful if committed by that State”.

¹⁰⁶ “Article 41. *Particular consequences of a serious breach of an obligation under this chapter*

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law”.

¹⁰⁷ J. Crawford, *The International Law Commission’ Articles on State Responsibility, Introduction, Text and Commentaries*, (Cambridge, New York 2002), p. 252.

acknowledged that Article 1 establishes an obligation addressed to third States to a conflict. This article entails a minimum duty not to encourage and to aid and assist violation of humanitarian law. If actively enforced, it is undisputable that Article 1 can offer a proper regime of protection or even the last remedy for an occupied civilian population against the unlawful practices of the Occupying Power as advocated more recently by Al Haq.¹⁰⁸

Nonetheless, the scope and the content of Article 1 are beset with ambiguities. The object of the next chapter is to examine the law of State responsibility and with special consideration of the duties of third States in respect to a violation of international law which does not injure them. This study sets out to clarify the regime of Article 1 and the nature of the obligation it imposes particularly on issues of institutional enforcement or the possibility of adopting countermeasures. At the same time it is possible that the ambiguities attached to the obligation remain unresolved

¹⁰⁸ In Need of Protection (Al Haq report), (2001), p. 230.

Chapter Two
Overview and Critical Analysis of the Obligations Set in Article 41 of the
International Law Commission Articles on State Responsibility.

In the *Advisory Opinion on the Legality of the Wall* of 9 July 2004, the International Court of Justice extended its ruling to the legal consequences of the construction of the wall for third States. It reiterated its previous case-law by stating that the right of people to self-determination, human rights and humanitarian law obligations were *erga omnes* and therefore their violations entailed obligations for third States that were actually the same obligations as the ones listed in Article 41 of the International Law Commission Articles on State responsibility.¹ Commentators have criticised the meagreness of the discursive justification and the absence of elaboration of the rules and principles of international law at issue in this passage.² However, the decision of the majority of the judges to insert in the Opinion a section on the obligations of third States amounts to a reiteration by the Court of the existence of a specific regime of responsibility for third States when particular norms have been violated. The trend towards the determination of fundamental rules of international law and hence a differentiated regime of responsibility for their breach had been initiated some forty years ago. It is the result of the aggregation of the specific provisions and obligations for third States or non-injured States as well as institutional response to breaches of international law in various branches of public international law. As detailed in the previous chapter, international humanitarian law sets

¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. (2004), pp. 199-200 (para. 155-159). Hereinafter, “*Advisory Opinion on the Legality of the Wall*”. The advisory opinion on the has given rise to a plethora of academic publications. To cite only a few, the American Journal of International Law dedicated the first volume of its 2005 publication to comments to the decision. The Palestine Yearbook of International Law did the same in its XIIIth volume (2004-5). For other writings, see for instance, A. Gross, “The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation” (2006) 19 *Leiden Journal of International Law*, 393-440 and R. O’Keefe, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary” (2004) 37 *Revue Belge De Droit International*, 92-149.

² See for instance, I. Scobbie, “Smoke, Mirrors and Killer Whales: the International Court’s Opinion and the Israeli Barrier Wall” (2004) 5 *German Law Journal* 1107-1131, p. 1114.

a specific obligation for the High Contracting Parties of the Fourth Geneva Convention to ensure respect for the Conventions in all circumstances. The Convention on the Prevention and the Punishment of the Crime of Genocide obliges the parties to this convention to prevent and punish the crime of genocide. For some, this trend marks the beginning of a process which shapes international law into a more “socially conscious legal order as opposed to a neutral, morally uncommitted law left to governments”.³

The International Law Commission initiated in 1956 a work of codification on State responsibility which started under the title “responsibility for injuries to aliens and property”. By 1976, the ILC introduced the notion of crimes of States –as opposed to international delicts- in this work and thus was giving shape to the idea that there exist international obligations that are more important than others and while these norms deserve more protection, they affect the regime of State responsibility and involve obligations for non-injured States. In the final draft, the notion of crimes of States was deleted but the idea of a differentiated regime of responsibility remains. It is embodied in Article 41 which provides in its first two paragraphs:

- “1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognise as lawful a situation created by a serious breach within the meaning of article 40, nor render aid and assistance in maintaining that situation”.⁴

³ P. Allott, *The Health of Nations*, (Cambridge 2002), pp. 418-419; B. Simma, Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?, In J. Delbrück (ed.), *The Future of International Law Enforcement, New Scenarios- New Law?*, (Berlin 1993), pp. 147-153, p. 129; M. Ragazzi, *The Concept of International Obligations Erga Omnes*, (Oxford 1997), p. 183 and P. Weil, “Vers une normativité relative en droit international” (1982) 86 *Revue Générale de Droit International Public* 5-47, pp. 16-17.

⁴ Article 40 provides: “*Application of this chapter*

After having offered a broad overview of the work of the ILC on obligations of non-injured States and explained the reasons for choosing this work as a starting point for the research on obligations of third States in relation to violations of international law that do not injure them, the present chapter details the object and extent of, first of all, the obligation to cooperate to put an end to a violation of an obligation arising from a peremptory norm of international law, then the obligation not to recognise and finally, the obligation not to aid and assist a State in the commission of such a violation.

1. Entering the Realm of the Regime of Responsibility for Breach of a Fundamental Norm of International Law.

Article 41 of the ILC Articles on State responsibility is not a codification of existing prescriptions of international law. Instead, in this Article, the ILC has tried to grasp the role of *erga omnes* obligations and peremptory norms in relation to State responsibility and has attempted to outline the obligations flowing from the emergence of these new types of obligations in public international law. As stated by the *rapporteur*, the provisions in this article are still subject to progressive development.⁵ However, it constitutes to date the most comprehensive attempt to spell out the legal consequences flowing from *erga omnes* breaches and to define the position of States affected by such breaches.⁶

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.”

⁵ J. Crawford, *The International Law Commission' Articles on State Responsibility, Introduction, Text and Commentaries*, (Cambridge, New York 2002), p. 38.

⁶ C. Tams, *Enforcing Obligations Erga Omnes in International Law*, (Cambridge 2005), p. 13.

1.1. Revisiting the Role of Third Parties and the Traditional Bilateral Framework of International Law.

In 1976, Roberto Ago, the special *rapporteur* of the ILC work on State responsibility at the time, introduced the concept of crimes of States. The overall objective was to reinforce international legality through a specific regime of responsibility when a fundamental norm of international law has been breached.⁷

With the introduction of the concept of crimes of States, the ILC was echoing article 53 of the 1969 Vienna Convention on the Law of Treaties on *jus cogens* or peremptory norms of international law which provides:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

The inclusion of this provision was novel and established a *hierarchy of norms* between peremptory norms and others. The text of the Vienna Convention was drafted by the

⁷ “Report of the International Law Commission on its 28th Session”, Yearbook of the International Law Commission 1976, vol. II, part Two, p. 75.

ILC which stated that the existence of a category of rules and principles from which States cannot derogate existed at the time it was preparing the draft of the Convention.⁸

In addition, the concept of crimes of States was giving shape in the field of State responsibility to the idea expressed by the ICJ in the *Barcelona Traction* case that some obligations because of their fundamental importance are owed *erga omnes* as opposed to being reciprocal obligations for the purposes of diplomatic protection. In an oft-cited dictum, the Court ruled that:

“In particular, 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*”.⁹

Therefore, the inclusion of the notion of crimes in the ILC project transformed the role of third parties in international law –those defined outside a bilateral relationship whether formally created or occurring through events.¹⁰ By granting rights and obligations to non-injured States by virtue of a violation of international law, the notions of crimes of States

⁸ Nguyen Quoc Dinh, P. Dailler and A. Pellet, *Droit International Public*, (Paris 1999), p. 201. The inclusion of this provision was however one of the main reason why many States refrained from ratifying the Convention. See G. Gaja, “*Jus Cogens* beyond the Vienna Convention” (1981) III Collected Courses of The Hague Academy of International Law 271-316, p. 279.

⁹ *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)*, ICJ Rep. (1970), p. 32, (para. 33). The passage of the judgement on *erga omnes* obligations is to be interpreted against the background of the controversy about the 1966 decision in the *South West Africa* case (*South West Africa case (Ethiopia v. South Africa and Liberia v. South Africa)*, ICJ Rep. (1966), p. 6). This decision provoked the mistrust of the developing countries for the Court because it rejected the idea of an *action popularis*, that is, of a right of every member of the international community to invoke violation of a special interest. The dictum of the *Barcelona Traction* case aimed at appeasing the tensions created by this former decision. See on this point, B. Simma, “From Bilateralism to Community Interest” (1994) VI Collected Courses of The Hague Academy of International Law 217-384, p. 295 and C. Tams, note 6 above, p. 15.

¹⁰ See note 19 of the Introduction Chapter of this dissertation, p. 18 above.

and *erga omnes* obligations have altered the traditional bilateral framework of international law. Their effect is the creation of a hierarchy of internationally wrongful acts in which different third parties' rights and obligations in response to the acts determine their ranking in hierarchy: at the lowest level, the violation of reciprocal obligations does not entail any rights and duties for third parties; at the medium level, the violations of provisions of a multilateral treaty which grant a legal interest in the implementation of the provisions of the treaty only to the parties to the treaty; finally, at the highest level, the violation of an international crime or *erga omnes* obligations gives rights and obligations to the member of the international community.¹¹

The idea of the existence in international law of norms that deserve a special protection due to the fundamental values they embody and whose violation is the concern of all States is now widely accepted. The ICJ, after 1970, made several references to *erga omnes* obligations in its case-law.¹² Despite an initial scepticism, the concept of *erga omnes* obligations has been accepted in doctrinal writings of international law. It is been referred to more rarely by international organisations and in the case-law of international and national tribunals alike which prefer the notion of *jus cogens*.¹³ Be as it may, there exists a trend towards what some calls a "publicisation" of international law¹⁴ or the

¹¹ C. Chinkin, *Third Parties in International Law*, (Oxford 1993), p. 292 and T. Meron, "International Law in the Age of Human Rights: General Course on Public International Law", (2003) *Collected Courses of The Hague Academy on International Law* 9-489, p. 259-264.

¹² See for instance, *East Timor (Portugal v. Australia)*, I.C.J. Rep. (1995), p. 102 (para. 29) on the rights of people to self-determination; *Case Concerning Application of the Convention of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia)*, ICJ Rep. (1996) p. 616 (para. 31) on the rights and obligations enshrined by the Convention on the Prevention and the Repression of the Crime of Genocide, and *Advisory Opinion on the Legality of the Wall*, p. 199 (para. 155-157) on the obligation to respect the right to self-determination, and certain obligations under international humanitarian law.

¹³ "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", International Law Commission, Fifty-Eight session 2006, A/CN.4/L.682, para. 377.

¹⁴ B. Simma, note 3 above, p. 129.

emergence of a community interest¹⁵ or even a “constitutionalisation” of the international law.¹⁶

1.2. Article 41 of the ILC Articles on State Responsibility.

In 2000, the ILC excised the notion of crimes of States and its associated regime from its draft Articles on State responsibility and replaced it with the concept of peremptory norms of general international law. Chapter Three of the final version of the 2001 Articles on States Responsibility refers to “Serious Breaches of Obligations Under Peremptory Norms of General International Law”. Within this Chapter, Article 41 details the obligations of those States not injured by these serious breaches. The *rapporteur* of the ILC explained that this article is a compromise accepted by the members of the Commission: Article 19 -the article referring to crimes of States- would be deleted but certain special consequences would be specified as applicable to a serious breach of an obligation owed to the international community as a whole.¹⁷ The objective of the ILC in deleting “crime” was to free the draft of a concept of criminal responsibility inspired by domestic law because of the embryonic state practice in the area and the inconsistency of the previous draft which had failed to establish a legal system specifically tailored to international crimes.¹⁸ The notion of “State crime” was then replaced by “serious breaches of obligations under peremptory norms of general international law”. The ILC did not use the term “*erga omnes* obligations”. However, the *rapporteur* specified that peremptory norms and *erga omnes* obligations coincide although there exists a difference

¹⁵ B. Simma, note 9 above, p. 234.

¹⁶ J. Frowein, “Reaction by Not Directly Affected States to Breaches of Public International Law” (1994) IV Collected Courses of The Hague Academy of International Law 349-437, pp. 355-366.

¹⁷ J. Crawford, note 5 above, p. 36.

¹⁸ J. Crawford, S. Olleson and J. Peel, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading” (2001) 12 EJIL 963-991, p. 977; E. Wyler, “From ‘State Crime’ to Responsibility for ‘Serious Breaches of Obligations under Peremptory Norms of General international law’” (2002) 13 EJIL 1147-1160, p. 1148 and “Interim Conclusion of Draft Article 19”, Yearbook of the International Law Commission 1998, vol. II, part Two, p. 77.

of emphasis between the two: “While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance”.¹⁹ Basically, as stated by Kadelbach, the effect of a *jus cogens* or peremptory norm is to make a treaty void whereas, the concept of an *erga omnes* obligation is connected to State responsibility.²⁰ However, whatever emphasis is preferred, it is widely admitted that there exists a substantial overlap between the two concepts and that, actually, the rules that belong to *jus cogens* and *erga omnes* obligations are basically the same.²¹ The object of this dissertation is not to analyse the ontological differences between *erga omnes* and *jus cogens*. It adopts the approach of the ILC which attempted to combine the two sets of obligations *ad unum*²² - albeit that attempt might be subject to criticism.

1.3. Any Alternative Route?

The existence of obligations which are the concern of all States and of peremptory norms has been the subject of long and intense debate in the academic world for the past forty years. In this respect, this dissertation is opening a door which gives access to an immense edifice not yet finished. Some suggest that it is possible to tackle the issue of third States obligations without engaging in this debate. As stated by Judge Higgins in her individual opinion in the *Advisory Opinion on the Legality of the Wall*: “I do not think that the

¹⁹ J. Crawford, note 5 above, p. 244.

²⁰ S. Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules - The Identification of Fundamental Norms*, In C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, (Leiden, Boston 2006), pp. 21-40, p. 27.

²¹ C. Tams, note 6 above, p. 148 and A. Orakhelashvili, “International public order and the International Court’s advisory opinion on legal consequences of the construction of a wall in the occupied Palestinian territory” (2005) 42 *Archiv des Völkerrechts* 240-256, p. 253. On this topic in general, M. Byers, “Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules” (1997) 66 *Nordic Journal of International Law* 211-239.

²² A. Gattini, “A Return Ticket to ‘Communitarisme’, Please” (2002) 13 *EJIL* 1181-1199, p. 1184.

specified consequences of the identified violations of international law have anything to do with the concept of *erga omnes* obligations”.²³ According to Higgins, the dictum of the *Barcelona Traction* was directed at a specific issue of jurisdictional *locus standi* and the concept of *erga omnes* has nothing to do with imposing obligations on States. She backs up her argument on the commentaries of the ILC Articles on State Responsibility by emphasising a difference between “obligations” and simple “legal interest”. Higgins had earlier expressed her rejection of a hierarchical or weighted normativity. She believes instead that some norms are identified by some authors as *jus cogens* because their violations will never affect their validity. It is not their qualification or their hierarchical superiority, that renders them unalterable but the fact that if a State breaches an obligation of that kind, it still believes in the necessity of its existence as a norm.²⁴

Nonetheless, although Higgins’ arguments are attractive because they offer an alternative route, it is almost impossible to carry out research on the obligations of third parties in respect of violations of international law that do not injure them by overlooking the plethora of literature that has been covering the subject of *erga omnes* obligations and *jus cogens* norms. As stated by Prosper Weil, who certainly has not been the strongest supporter of the existence of fundamental obligations in international law, the concept is one of the “pieces maitresses du droit international d’aujourd’hui” –“one of the keystones of today’s international law”.²⁵ *Erga omnes* obligation is a concept in today’s international law whose implications are still unclear but which cannot possibly be ignored. *Erga omnes* is the main door which needs to be opened if one is to research the regime of third States’ obligations towards a violation of international law that does not injure them, although the chapter might conclude that the fundamental importance of

²³ *Advisory Opinion on the Legality of the Wall*, Separate Opinion of Judge Higgins, p. 216 (para. 37 and 38).

²⁴ R. Higgins, *Problems and Process: International Law and How We Use It*, (Oxford 1994), p. 22.

²⁵ P. Weil, “Le droit international en quête de son identité” (1992) VI *Collected Courses of The Hague Academy of International Law* 9-370, pp. 286-287.

some international obligations is not relevant for detailing a specific regime for third States.

Therefore, the present chapter details the obligation set out in Article 41 i.e. the obligations of non-injured States in the face of a serious violation of an obligation arising under a peremptory norms of general international law.²⁶

2. An Obligation to Cooperate To Put an End to a Violation of International Law Arising from a Peremptory Obligation.

The obligation to cooperate to put an end to a serious violation of international law has been formulated in the 1970 Declaration of Principles on Friendly Relations and Cooperation of States.²⁷ It is referred to in the ILC Articles on State Responsibility since the introduction of the notion of crimes of States as a response of States to the commission of a crime. The obligation to cooperate is said to be in line with the Grotian tradition of solidarity in the international community.²⁸ However, given the many theoretical issues revolving around this obligation, it is very unlikely that it has reached the threshold for being a customary obligation. The main crux of the obligation is about its mechanisms of enforcement. Furthermore, the obligation poses broader issues as to

²⁶ The dissertation is limited to the study of obligations of non-injured States vis-à-vis a violation of an obligation arising under a peremptory norm of general international law. It does not tackle the issue of invocation of responsibility or the distinction between “injured states” and “other states entitled to invoke responsibility” as reflected in articles 42 and 48 of the ILC Articles. On this issue see, A. de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, (The Hague 1996), pp. 27-37, T. Meron, note 11 above, p. 280-286 and I. Scobbie, “The Invocation of Responsibility for the Breach of ‘Obligations under Peremptory Norms of International Law’” (2002) 13 EJIL 1201-1220.

²⁷ In Paragraph Four “Duty of States to Cooperate with one another according to the Charter.

- (a) States shall cooperate with other States in the maintenance of international peace and security;
- (b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance”.

²⁸ A. Gattini, note 22 above, p. 1185 and J. Charney, “Third State Remedies in International Law” (1989) 10 Michigan Journal of International Law 57-101, p. 61.

which entity or institution can determine the fundamental character of a norm and who are the addressees of the *erga omnes* obligations.

2.1. Does This Obligation Require an Institutional Enforcement?

The major issue which underlies the obligation to cooperate to put an end to a violation of a peremptory norm of international law is whether its enforcement can be permissible outside the framework of an international organisation with global membership and general competence, i.e., the United Nations, and then whether it implies the permissibility of countermeasures of general interest.

2.1.1. Is the UN the Guarantor of the Respect of *Erga Omnes* Obligation?

The acknowledgement of a differentiated regime of responsibility which entails a move from a bilateral to a multilateral framework raises the question of the necessity of an institutional structure for its enforcement. The question whether the international community possesses an institutional representation or “representation *organique*”²⁹ able to act for the protection and preservation of its system, has arisen since the ILC undertook to design a regime of responsibility for a breach of a fundamental norm of international law. Whereas Ago did not tackle the issue of the mechanisms of enforcement of the regime of responsibility for crimes, Riphagen, the special *rapporteur* after him acknowledged that the violations of *erga omnes* obligations when they amount to international crimes, must be implemented by the mechanisms of the United Nations.³⁰

²⁹ P. Weil, note 3 above, p. 32.

³⁰ “Third Report on the Content, Forms and Degrees of International Responsibility”, Yearbook International Law Commission 1982, vol. II, part One, p. 48, para. 4 and P. Klein, “Responsibility for

Because of its *quasi*-universal character, the United Nations was identified as the only eligible organisation which was in the position to enforce *erga omnes* obligations towards the international community. However, this interpretation presupposed a transfer of a right of representation of the international community to the United Nations which can be inferred neither from state practice nor from *opinio juris*.³¹ Furthermore, regarding the competences *ratione materiae* set by Chapter VII of the UN Charter, even if there can be an overlap between a violation of an *erga omnes* obligation and a threat to peace, it cannot be deduced from the Charter that the actions taken by the Security Council shall replace the measures destined to implement State responsibility.³² Finally, the political nature of the Security Council (SC) resolutions and the questionable legitimacy of the SC as a body acting in the name of the international community can raise questions as to whether the UN is the proper organisation for the implementation of the mechanism of protection of peremptory norms of general international law.³³

In order to respond to these issues, Arangio-Ruiz, when he was *rapporteur* to the ILC designed a complex system which had the advantage of bringing in the three principal organs of the UN in combined fashion “each bringing into play the role that matched its own characteristics”.³⁴ However, the ILC in the final Articles reduced to the minimum the reference to institutional enforcement for aggravated responsibility. The commentary on Article 41 indicates that “cooperation *could* be organised in the framework of a competent organisation, in particular the United Nations”.³⁵ Suffice it to say that this

Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law” (2002) 13 EJIL 1241-1255, p. 1245.

³¹ C. Annacker, “The Legal Régime of Erga Omnes Obligations in International Law” (1994) 46 Austrian Journal of Public and International Law 131-166, pp. 158-159.

³² *Ibid.*, p. 157.

³³ P. Klein, note 30 above, pp. 1248-1249 and B. Simma, note 9 above, pp. 264-274.

³⁴ “Summary Presentation of the 7th Report by Arangio-Ruiz”, Yearbook International Law Commission 1995, vol. II, part Two, at 46, para. 245 and P. Klein, *ibid.*, p. 1251.

³⁵ Italics added. J. Crawford, note 5 above, p. 249 and “Debate on Countermeasures”, Yearbook of the International Law Commission 2001, vol. II, part Two, p. 23.

passage, and especially the expression “within the framework”, does not give a clear answer to the issue whether international law prescribes institutional cooperation for States and require them to abide by the obligation to cooperate to put an end to a serious violation of international law. This is corroborated by the wording of Article 59 of the Articles which provides that the ILC Articles are without prejudice to the Charter of the United Nations.

2.1.2. The Admissibility of Countermeasures of General Interest.

The uncertainty revolving around the requirement of institutional cooperation to put an end to a violation of a peremptory norm raises the question whether States can justifiably act outside an institutional framework. The possibility for States to take acts of retorsion and use force does not pose the same types of questions. Retorsions do not constitute a violation of international law and therefore do not need to be justified and the use of collective self-defence and the authorisation to use force are expressly governed by the Charter of the United Nations (Chapter VII).³⁶ The taking of collective reprisals or countermeasures of general interest is of importance in this context.³⁷ This is the case because it allows the possibility for States individually or jointly to depart from their obligations under international law in order to force a State violating international law to cease its breach of the law. They could do so by claiming a right to this action

³⁶ Taking a measure of retorsion consists in an adopting an “unfriendly” act against an international actor in response to an initial act of the same character. Retorsion does not involve a violation of international law and therefore the responsibility of the actors concerned. J. Combacau and S. Sur, *Droit international public*, 7th ed. (Paris, 2006), p. 215. Self defence is the right to of any State to use force in response to an armed attack. The right to self defence is enshrined in article 51 of the UN Charter (Chapter VII) which provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

³⁷ For a definition of the notion of countermeasure, Chapter One of this dissertation, p. 50, note 84 above.

without being directly affected by the breach of international law.³⁸ The permissibility of the adoption of countermeasures of general interest by third States under the remit of international law remains an open issue.

The possibility for States to take countermeasures of general interest has always been acknowledged by the ILC since the adoption of the notion of crimes of States.³⁹ Countermeasures of general interest were envisaged as a natural consequence for the commission of a crime or serious breach of a peremptory norm. As stated by Alland, “with a combination of an extended notion of injured states and the concept of international crime, mechanically, the institution of *actio popularis* was arrived at”.⁴⁰ This express authorisation was excised from the draft a few weeks before its submission. The *rapporteur* explained this deletion as being necessary because of the uncertainty of the current state of international law on this issue and the sparsity of State practice which involves only a small number of States.⁴¹ Instead, the ILC left the issue open by making what looks like an indirect reference to countermeasures of general interest in Article 54. This Article states that the Chapter on Countermeasures of the ILC Articles does not prejudice the right of any State other than the injured State to take “lawful measures” against the responsible State. However, Article 54 leaves some ambiguity. It refers to lawful measures when countermeasures are intrinsically unlawful and Article 22 of the Articles refers to the wrongfulness of an act when describing the act as a countermeasure.⁴²

³⁸ J. Frowein, note 16 above, p. 416 and C. Hillgruber, The Right of Third States to Take Countermeasures, In J.-M. Thouvenin and C. Tomuschat (eds.), *The Fundamental Rules of the International Legal Order*, (Leiden, Boston 2006), pp. 265-293, p. 266.

³⁹ C. Tams, “All’s Well That Ends Well? Comments on the ILC’s Articles on State Responsibility” (2001) *Zeitschrift für ausländisches Recht und Völkerrecht* 759-796, p. 789.

⁴⁰ D. Alland, “Countermeasures of General Interest” (2002) 13 *EJIL* 1221-1239, p. 1229.

⁴¹ J. Crawford, note 5 above, p. 305.

⁴² D. Alland, note 40 above, p. 1133.

However, the silence of the ILC on this issue does not preclude a possible tolerance of international law for countermeasures of general interest. In this area, the arguments supporting the legality of the practice would carry as much weight as the opposite arguments. It is certainly an issue where the factual assessment of the bulk of State practice and legal justification surrounding it can be used to support either way.⁴³ For instance, Tams makes his own factual assessment to demonstrate that countermeasures of general interest are permissible under international law.⁴⁴ A different assessment is possible especially if one evaluates the interplay between institutional and decentralised responses in each case where countermeasures of general interest have been adopted. Hillgruber, for instance, examines on the one hand, the international treaties which allow third States to take countermeasures or reprisals to respond to their violations and their related practice and, on the other hand, State practice in relation to countermeasures adopted by third States outside the framework of a treaty or an agreement. He concludes that reprisals by third States are generally adopted when there exists an agreement between the State violating international law and the States taking reprisals, and that States practice in relation to reprisals taken on the basis of customary international law is too limited and does not include enough States, therefore not permitting the inference that reprisals by third States are permissible under customary international law.⁴⁵

Finally, some commentators regret that the legal analysis on countermeasures of general interest has often been obstructed by what might be labelled the problem of politicisation and the replacement of legal arguments by policy arguments.⁴⁶ This thesis contends that arguments of political considerations add relevance to the analysis of the legality of countermeasures of general interest. Countermeasures are a mechanism of

⁴³ C. Tams, note 6 above, p. 234.

⁴⁴ *Ibid.*, pp. 198-249.

⁴⁵ C. Hillgruber, note 38 above, p. 284, 285 and 287.

⁴⁶ C. Tams, note 6 above, p. 199.

“private justice” and they all bear one common feature: self assessment that an obligation of international law has been violated.⁴⁷ This assessment and, more importantly the decision to adopt a countermeasure, are inevitably surrounded by many political considerations. The same political considerations have also led States to adopt this option extremely cautiously as well as to use the mechanisms offered by the UN Charter when responding to a grave violation of international law.⁴⁸

2.2. Issues on *Erga Omnes* Obligations in Relation to the Obligation to Cooperate.

The issues raised by the enforcement of the obligation to cooperate to put an end to a violation of a peremptory norm go beyond its institutional enforcement. They tackle indirectly broader issues related to the readiness of international law to welcome and enforce a system of aggravated responsibility or the implications of determining the existence of fundamental norms in the present international legal system.

2.2.1. Who Is to Assess the *Erga Omnes* Character of an International Obligation?

Erga omnes obligations protect values of community interests and since the Second World War, there has been a growing trend to recognise and respect these values as indispensable to the international community.⁴⁹ Therefore, these obligations presuppose a universal agreement for the protection of certain values, or the universal recognition

⁴⁷ D. Alland, note 40 above, p. 1134.

⁴⁸ B. Simma, note 3 above, p. 136; J. Charney, note 28 above, p. 97 and L. Boisson de Chazournes and L. Condorelli, “Common Article 1 of the Geneva Convention Revisited: Protecting Collective Interests” (2000) 82 International Committee of the Red Cross Review 67-87, pp. 80-82.

⁴⁹ C. Annacker, note 31 above, p. 136.

that these rules prescribe values which are no longer at the discretion of individual States.⁵⁰ The ICJ however has failed to provide helpful guidance to determine which obligations in international law bear the qualification *erga omnes*. In this respect, it always followed or reiterated the criteria set out in the *Barcelona Traction case*, i.e., the protected value must be of fundamental importance to the international community, and *erga omnes* obligations must be seen in opposition to reciprocal obligations like those in the field of diplomatic protection. The Court in its case-law has given examples of obligations *erga omnes*: the right of people to self-determination, the rules of humanitarian law embodying “elementary considerations of humanity”⁵¹ and the prohibitions against racial discrimination, aggression, slavery⁵² and genocide.⁵³ The Court has always been reluctant to determine *jus cogens* norms, while other international courts have demonstrated more readiness to identify rules of *jus cogens*.⁵⁴

However, the determination of the *erga omnes* or *jus cogens* nature of a norm remains subject to the self-assessment of, for instance, an international judge, a national judge or a political body. Anyone will determine what a fundamental value is from his or her own perspective, from his or her own prism. It is an expression of political pluralism internationally⁵⁵ and at the same time, one of the consequences of the decentralised

⁵⁰ B. Simma, note 3 above, p. 130 and B. Simma, note 9 above, p. 291.

⁵¹ *East Timor case* and *Advisory Opinion on the Wall*, see note 12 above.

⁵² *Barcelona Traction case*, note 9 above, p. 32 (para. 34)

⁵³ *Ibid.* and *Case Concerning Application of the Convention of the Crime of Genocide*, see note 12 above.

⁵⁴ The International Criminal Tribunal for the Former Yugoslavia recognised that the prohibition of torture was a norm of *jus cogens*. *The Prosecutor v. Anto Furundžija*, ICTY, Judgement, 10 December 1998, Case No. IT-95-17/1-T., para. 153-157. The European Court of Human Rights did the same in *Al Adsani v. United Kingdom*, judgement 21 November 2001, (2002) 34 EHRR 11, para. 60 and 62. See P. Tavernier, *L'identification des règles fondamentales - un problème résolu?*, In C. Tomuschat and T. Jean-Marc (eds.), *The Fundamental Rules of the International Legal Order*, (2006), 1-20, pp. 8-10.

⁵⁵ The expression is taken from Martti Koskenniemi in relation to the proliferation of jurisdiction in the international system in M. Koskenniemi, “Fragmentation of International Law? Post-Modern Anxieties” (2002) 15 *Leiden Journal of International Law*, 553-579, p. 553.

structure of international law. As pointed out by Brownlie, “more authority exists for the category of *jus cogens* than exists for its particular content”.⁵⁶

2.2.2. Who Is/Are the Addressee(s) of These Obligations ?

According to the ICJ in the *Barcelona Traction case*, the right to have *erga omnes* obligations respected is vested in the international community as a whole. *Erga omnes* obligations are thus owed to the international community as a whole.⁵⁷ However, the existence of an independent entity which could be referred to as the international community remains problematic and uncertain. A public law construction would require the personification of such a community and this is not possible due to the contemporary structure of international law which is still very much State-centric. However, legal norms alone do not make a community, a “societal consensus” is still needed as a precondition for the formation and respect for legal rules.⁵⁸ In the present circumstances, none can pretend that the solidarity between States is solid enough to impose on them a positive duty to cooperate to put an end to a serious violation of an obligation of international law. The structure of the international society is made of juxtaposed sovereignty, and the obligation to cooperate mentioned in Article 41 corresponds to the timid progresses of international solidarity.⁵⁹

If an internationally community does not exist legally and in a societal way, who therefore are or is the addressee(s) of the obligation to cooperate? States taken *ut singuli*? This may well be the only foreseeable option at the moment.⁶⁰ Does that mean that

⁵⁶ I. Brownlie, *Principles of International Law*, 6th ed., (Oxford 2003), p. 490.

⁵⁷ C. Annacker, note 31 above, p. 138.

⁵⁸ B. Simma, note 3 above, p. 131 and B. Simma, note 9 above, p. 245.

⁵⁹ Nguyen Quoc Dinh, P. Dailler and A. Pellet, note 8 above, p. 802.

⁶⁰ C. Annacker, note 31 above, p. 120.

States can act individually? Although a very limited State practice supports the possibility of States acting individually,⁶¹ collective enforcement is preferable not only to prevent the risk of abuses but also to preserve the rationale behind the respect for *erga omnes* obligations, which requires a high degree of solidarity among States. This is also because most of the time, only collective action of States will put an end to a violation of international law. In this respect, an individual action by a particular State is not likely to have the same impact as a collective action.

The many issues revolving around the enforcement of the obligation to cooperate and the determination of whose breach of which can trigger its enforcement are impediments to its emergence as a positive obligation of international law. However, despite the difficulties posed by the obligation to cooperate, the ILC kept this obligation as one of the obligations of States not injured by a serious breach of a violation of a norm arising of peremptory international law because it reflects and strengthens the existing mechanisms of cooperation for States to respond to a breach, notably the UN system.⁶²

3. The Duty Not to Recognise As Legal a Serious Violation of International Law.

The duty not to recognise as lawful a serious breach of an obligation arising under a peremptory norm of international law is one of the obligations of non-injured States required by Article 41 of the ILC Articles on State Responsibility. According to the *rapporteur* of the ILC Articles on State Responsibility, the duty of non-recognition represents the “minimum necessary response” by States to these breaches.⁶³ However,

⁶¹ C. Tams, note 6 above, p. 240. For an opposite opinion, see A. Gattini, note 22 above, p. 1187.

⁶² J. Crawford, note 5 above, p. 249.

⁶³ *Ibid.*, p. 251.

the content of the obligation of non-recognition is difficult to grasp and its practical consequences, at first, are hardly intelligible to the extent that one may wonder with Judge Kooijmans whether the duty of non-recognition does amount to “an obligation without real substance”.⁶⁴ After having briefly introduced the origin of the duty not to recognise, the following section examines its ambit, whether this obligation is to be enforced collectively, and finally the scope of the duty not to recognise as legal a violation of international law.

3.1. A Customary Obligation.

Contrary to the obligation to cooperate, the duty not to recognise as lawful a situation arising under a serious breach of an international obligation forms part of customary international law since it combines both elements of international customary law which are effective practice and *opinion juris*. The existence of this obligation as a customary obligation is amply supported by State practice and the case-law of the ICJ. The duty of non-recognition finds its origin in the Stimson doctrine. In 1932, after the declaration of independence of three north-eastern provinces of China known as Manchuria, earlier occupied by Japan, the Assembly of the League of Nations, pursuant to an initiative of the American Secretary for Foreign Affairs, Henry Stimson, declared that it was incumbent upon the members of the League not to recognise any situation, agreement or treaty that might have arisen under a breach of the Covenant of the League or the Pact of Paris.⁶⁵

⁶⁴ *Advisory Opinion on the Legality of the Wall*, Separate Opinion of Judge Kooijmans, p. 232 (para. 44).

⁶⁵ On Manchuria/Manchukuo see D. Turns, “The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law” (2003) 2 *Chinese Journal of International Law*, 105-143, pp. 107-113.

Since then, the obligation not to recognise has acquired the status of a customary obligation. The UN Security Council called for the non-recognition of situations arising out of a violation of international law in several instances. For instance, it called upon member States not to recognise as legal the State of Rhodesia, the South African Bantustans and the Turkish Republic of Northern Cyprus,⁶⁶ the annexation by Israel of Jerusalem,⁶⁷ the annexation of Kuwait by Iraq,⁶⁸ the legality of the presence and administration of South Africa over Namibia⁶⁹ and the organs established by elections in Namibia.⁷⁰

The ICJ referred to this duty for the first time in 1971, in its *Advisory Opinion on the Legal Presence of South Africa in Namibia*. The Court ruled that member States of the United Nations were under the duty to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of South Africa's presence in Namibia.⁷¹ The same duty was reiterated by the ICJ in its *Advisory Opinion on the Legality on the Wall* in which the Court stated that given the importance of the rights and obligations involved, all States were under an obligation not to recognise the illegal situation resulting from the construction of the wall.⁷²

The obligation is also to be found in a number of international instruments such as for instance, the 1949 Draft Declaration on the Rights and Duties of States (Article 11), the

⁶⁶ On practice of non-recognition of States created pursuant a breach of international law. J. Crawford, *The Creation of States in International Law*, (Oxford 2006), pp. 157-173; J. Dugard, *Recognition and the United Nations*, (Cambridge 1987) pp. 81-170; V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law*, (Dordrecht, London 1990), pp. 273-319 and C. Warbrick, States and Recognition in International Law, In M. Evans (ed.), *International Law*, (Oxford 2006), pp. 217-275.

⁶⁷ Security Council resolution 478 (1980), 2 August 1980

⁶⁸ Security Council resolution 662 (1990), 6 August 1990

⁶⁹ Security Council resolution 283 (1970), 29 July 1970

⁷⁰ Security Council resolution 554 (1985), 17 August 1984.

⁷¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971, pp.55-56 (para.123-124).

⁷² *Advisory Opinion on the Legality of the Wall*, p. 200 (para. 159).

1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, the 1975 Helsinki Final Act of the Conference of Security and Co-operation in Europe. It is today acknowledged that the obligation arises without the need for a prior authoritative finding by the UN Security Council that a serious breach has occurred.⁷³

3.2. The Ambit of the Duty of Non-Recognition.

The rationale of the duty not to recognise an unlawful situation can be better understood when it is contrasted with the purpose and effects of the act of recognition in international law. Recognition may be defined as a discretionary act by which a State or an international organisation accepts the opposability for its own legal system of the existence of a situation and hence respects the legal consequences arising from this situation.⁷⁴ The breach of the duty of non-recognition has logically the same consequences as the discretionary act of recognition. The State which recognises an illegal situation endorses the legal consequences of the unlawful act and gives to this illegal situation the rights that its own law requires it to give. Concretely speaking that means for the recognising State a waiver of its own rights to contest the illegality of the act or situation.⁷⁵

⁷³ S. Talmon, The Duty Not to "Recognise as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without real Substance?, In J.-M. Thouvenin and C. Tomuschat (eds.), *The Fundamental Rules of the International Legal Order*, (Leiden, Boston 2005), pp. 99-125, p. 121.

⁷⁴ Nguyen Quoc Dinh, P. Dailler and A. Pellet, note 59 above, p. 550.

⁷⁵ D. Anzilotti, *Cours de droit international*, (French translation by Gidel), (Paris 1929) cited in I. McGibbon, "The Scope of Acquiescence in International Law" (1954) 31 *British Yearbook of International Law* 143-186, p. 145, note 2 and V. D. Degan, *Opposable Situations in International Law*, In M. P. Gonzáles (ed.), *Hacia un nuevo orden internacional y europeo: estudios en homenaje al Profesor Don Manuel Diez de Velasco*, (Madrid 1993), pp. 231-243, p. 238.

According to Dugard and Orakhelashvili, the doctrine of *jus cogens* provides a doctrinal coherence to the doctrine of non-recognition.⁷⁶ Those authors take the view that the ambit of the obligation not to recognise is to nullify or invalidate the violation of a norm of *jus cogens*. By analogy with the provision of the Vienna Convention of the Law of Treaties, a factual situation arising out of a violation of a peremptory norm is null and void.⁷⁷ To take such a stance, one must acknowledge that it is doubtful that in international law, prescription could create rights out of a situation brought about by an illegal act and especially a violation of a *jus cogens* norm.⁷⁸ However, this latter proposition is less convincing. Given the paucity of the enforcement mechanisms in international law, it is far from being unusual that illegalities perpetuate to the extent that it is impossible to reverse their effects. Thus, the notion of *fait accompli* as formulated by the Court in relation to the construction of the wall plays a crucial role in the ambit of the duty of non-recognition.⁷⁹ In this case, the illegality might not create rights for the violator but gives rise to a legitimate claim for the acceptance of the irreversible effects of the violation on the ground. Charles de Visscher, in 1967 stated that a prolonged tension between fact and law has to be ended for the benefit of effectiveness and the acceptance of the *fait accompli*.⁸⁰ Therefore, to avoid this situation, the enforcement of the obligation of non-recognition is crucial: States are under a duty to deny all the ordinary consequences that normally arise from such an international act. In this respect, the objective of the duty of non-recognition is to prevent the consolidation of an illegal

⁷⁶ J. Dugard, note 66 above, p. 132 and A. Orakhelashvili, note 21 above, p. 251.

⁷⁷ *Ibid.*

⁷⁸ I. Brownlie, *Principles of Public International Law*, 6th ed., (Oxford 2003), pp. 149-150 and S. Talmon, note 73 above, p. 107. For an opposite opinion - non-recognition removes the danger of having the violation of international law becoming a source of legal right, see H. Lauterpacht, *Recognition in International Law*, (Cambridge 1947), p. 427.

⁷⁹ *Advisory Opinion on the Legality of the Wall*, p. 184 (para. 121).

⁸⁰ C. de Visscher, *Les effectivités du droit international public*, (Paris 1967), pp. 25 and 37-38.

claim. It does not mean necessarily going back to the *status quo ante* because in certain cases, it is not desirable and would entail other international legal issues.⁸¹

3.3. An Obligation to Be Enforced Collectively?

The obligation not to recognise amounts to denying the legal claims arising from an illegal situation in order to counteract the effects brought about by this situation. For this reason, it is preferable to have a collective enforcement of the duty not to recognise because a collective non-recognition is more likely to nullify the illegal effects created by a violation of international law. It is the way it was envisaged originally during the Manchukuo crisis. In a note addressed to China and Japan on the 7th of February 1937, Stimson states:

“If all the other governments in the world would come to a similar decision and adopt the same position, it would result in a sanction for non-compliance for any similar act, sanction, that to our mind, would render impossible for the future the legality of any title and right that would have been obtained by means of pressure or violation of a treaty and as it was demonstrated in the past, would restore China in its rights and titles it had been deprived of”.⁸²

Although the rationale of the duty of non-recognition would demand a collective enforcement, it is to be noted that an individual enforcement is also crucial because the violation of the duty of non-recognition entails grave consequences for the non-

⁸¹ C. Talmon, note 73 above, pp. 146-147.

⁸² Cited in M. Radojkovic, *La non-reconnaissance des actes contraire au droit*, In *Mélanges offerts à Juraj Andraszy*, (The Hague 1968), pp. 225-236, p. 227, note 2.

complying State. As stated above, for the non-recognising entity, non-recognition operates as the denial of the legal claim or the refusal of the opposability of the rights and obligations arising from the violation of international law.⁸³

3.4. Scope of the Duty of Non Recognition.

The duty of non-recognition is enforced vis-à-vis situations which can be the object of recognition. However, recognition is usually conceived as applying to objective facts in international law that present legal claims such as for instance recognition of States and governments. The question remains whether the duty applies to these situations only and if it has to be enforced vis-à-vis any legal consequences arising from an unlawful situation.

3.4.1. Does the Duty Not to Recognise Apply to Any Violations of International Law?

Christakis and Talmon have questioned how the duty not to recognise is to be enforced in relation to a genocide or slavery, for instance, when these instances do not give rise to legal consequences which are capable of being denied by other States.⁸⁴ According to them, a serious violation of international law is not sufficient to trigger the duty of non-recognition and, practically, the situations which do so are the annexation of a territory, the establishment of a new government or new State pursuant an act of aggression or the

⁸³ J. Dugard, note 66 above, p. 135; V. Gollwand-Debbas, note 66 above, pp. 237-258 and A. Orakhelashvili, note 21 above, pp. 250-251.

⁸⁴ T. Christakis, L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales In Jean-Marc Thouvenin and C. Tomuschat (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, (Leiden, Boston 2005), pp. 126-166, p. 128 and S. Talmon, "The Constitutive versus the Declaratory Doctrine of Recognition: Tertium Non Datur?" (2004) 75 *British Yearbook of International Law* 101-181, p. 134.

violation of the right to self-determination.⁸⁵ In a similar vein, Judge Skubiszewski stated in his dissenting opinion in the *East Timor* case that the prohibition of the acquisition of territory by force and the respect for the right to self-determination have transformed the discretionary nature of the act of recognition of States and governments into an obligation not to recognise.⁸⁶ Interestingly, he took the view that the discretionary nature of the act of recognition is transformed into an obligation not to recognise when the situation which is the object of recognition has arisen pursuant a violation of international law.

It is true that formal recognition usually follows the creation of a new State, extra-constitutional changes of government, changes of territorial possession and claims of belligerent status by insurgent movements within a recognised State.⁸⁷ However, recognition can also be defined as the reception in one legal system of the consequences of any legal or illegal act. As such it does not necessarily apply to these situations only. The recent decision of the House of Lords on evidence obtained by torture is a case in point. In this decision, the Lords stated that evidence obtained under torture was inadmissible in UK courts.⁸⁸ Even if it was not expressly stated, one of the bases for taking this decision was the implementation of the duty of non-recognition to which Article 12 and 15 of the Torture Convention give effect.⁸⁹ Admitting evidence obtained under torture would amount to receiving in the UK legal system and accepting as legal the consequences of an unlawful act. As stated by Lord Bingham:

⁸⁵ T. Christakis, *Ibid.*

⁸⁶ *East Timor case*, Dissenting Opinion of Judge Skubiszewski, p. 264 (para 129).

⁸⁷ T. Grant, "East Timor, the UN system, and Enforcing Non-Recognition in International Law" (2000) 33 *Vanderbilt Journal of International Law* 273-310, p. 296, note 85.

⁸⁸ *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004) and *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals)*, [2005] UKHL 71.

⁸⁹ Article 15 of the Torture Convention: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made".

There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law.⁹⁰

If the breach of the duty of non-recognition amounts to the endorsement of the legal consequences arising from an illegal act, this dissertation takes the view that the scope of this duty extends to any violations of international law. The case-study presented in chapters six and seven of this dissertation will demonstrate this point.

3.4.2. The Exceptions to the Duty.

One legal issue remains concerning the implementation of the duty of non-recognition. Does it apply to any legal consequences arising from the illegal situation brought about by a violation of international law? The landmark case with regard to the scope of the duty of non-recognition is the Advisory Opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*. The ICJ stated that the existence of a general duty of non-recognition was a consequence of the non-compliance of South Africa with the terms of its mandate on Namibia. This duty entailed the obligation upon member States of the UN “to abstain from entering into economic and other forms of relationships or dealings with South Africa on behalf or concerning Namibia which may entrench its authority over the Territory”.⁹¹ However, as an exception to the principle, “the invalidity cannot be extended to those [official] acts, such as, for instance, the registration of births, deaths and marriages, the effects of which

⁹⁰ *Per Lord Bingham*, para. 33.

⁹¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, note 71 above, pp. 55-56 (para. 124).

can be ignored only to the detriment of the inhabitant of the territory”.⁹² The *raison d’être* of this exception is perfectly understandable. The scope of non-recognition was to prevent the legality of any South African claim and title over Namibia. The non-recognition of those acts referred to by the Court is removed from the ambit of the non-recognition duty. This is because it clashes with another competing imperative which is the respect and the acknowledgement of the existence and interests other than economic of the inhabitants of the territory.

When interpreting the exceptions to the duty of non-recognition, Talmon considers that any form of administrative cooperation does not fall into the scope of the principle of non-recognition. Only intergovernmental cooperation is relevant for the purpose of non-recognition, i.e. cooperation at ministerial level, as well as all form of cooperation that requires the existence of diplomatic relations.⁹³ However, when Talmon cites several examples taken from State practice to corroborate his argument, he does not differentiate between State practice in relation to the non-recognition of situations that have been brought about after a violation of international law and non-recognition as a political and discretionary act. If the enforcement of the duty of non-recognition is to prevent the legal consolidation of an unlawful claim, one has to look at any act that can help to consolidate the claim or render the situation opposable to third States outside the divide between intergovernmental and administrative cooperation.

In some instances, as in the *Namibia* case, other considerations or interests will over-ride the requirement for the enforcement of the duty. In this case, one has to look at what are the other international obligations at stake are and assess whether they prevail over the

⁹² *Ibid.* p. 56 (para. 125).

⁹³ S. Talmon, “The Cyprus Question Before the European Court of Justice” (2001) 12 EJIL 727-751, p. 749.

duty of non-recognition.⁹⁴ The case of Manchukuo can provide an interesting example to illustrate this argument. China was a party to the International Opium Conventions. Under these treaties, export authorisation for opium and other dangerous drugs may only be issued on receipt of an import certificate, issued by the “government” or the “competent authorities” of the importing countries. The question arose as to who should issue the required import certificates in case of export of narcotic drugs to Manchukuo. The Special Advisory Committee which was appointed by the Assembly of the League of Nations to advise its member States on all questions related to the non-recognition of Manchukuo was asked for advice on this issue. It recommended that import certificates should be issued in accordance with the Opium Convention in case of exports of narcotic drugs to Manchukuo. It thereby assumed that import certificates should be issued by the Manchukuo government. The Committee only added that governments should refrain from sending a second copy of the export authorisation to “Manchukuo” since this action might be interpreted as a *de facto* recognition of “Manchukuo”. This example has led Talmon to conclude that administrative cooperation with unrecognised governments does not imply international recognition.⁹⁵ This dissertation contends that the rationale of the decision of the Advisory Committee has to be looked for elsewhere. The object and purpose of the Opium Conventions was to combat international trafficking and abuse of dangerous drugs, i.e. objectives of public health. The Committee found that these considerations prevailed over the non-recognition duty.

The practical aspects entailed by the enforcement of this duty and the competing interests sometimes involved will be the object of chapter six and seven of this dissertation when the involvement of the attitude of the European Union towards the violations of international law entailed by the Israeli-Palestinian conflict will be assessed.

⁹⁴ For a similar argument, T. Christakis, note 84 above, p. 161.

⁹⁵ S. Talmon, note 93 above, p. 744-746.

4. The Obligation Not to Aid and Assist.

The obligation not to aid and assist a State in the commission and maintenance of a breach of a peremptory norm of general international law is the second negative obligation listed in Article 41 of the ILC Articles on State Responsibility after the duty not to recognise as lawful the breach of a peremptory norm. The enunciation of this obligation is redundant: the obligation not to aid and assist is already to be found in Article 16, under Chapter IV “Responsibility of a State in connection with the act of another State”.⁹⁶ According to the *rapporteur*, Articles 16 and 41 were the articles that were the most difficult to have accepted by the States to which they were submitted.⁹⁷ This controversy is mostly due to the fact that the “derived” nature of the responsibility which the breach of this obligation entails, places on States the risk of having their responsibility engaged because of the conduct of another State. The following sections describe in the first place, the components of the obligation not to aid and assist and, secondly, give an account of the nature of the intention requirement.

4.1. The Scope of the Obligation Not to Aid and Assist.

The ILC first mentioned the possibility for one State to have its responsibility engaged because of its participation in the commission of a violation of international law by another State in 1971.⁹⁸ In 1978, it offered its first findings.⁹⁹ At the time, the obligation

⁹⁶ “Article 16. *Aid or assistance in the Commission of an internationally wrongful act*

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act
(b) the act would be internationally wrongful if committed by that State”.

⁹⁷ J. Crawford, *Holding International Organisations and their Member States to Account Fifth Steinkrans-Cohen Lecture*, (School of Oriental and African Studies, London 2007). Available at www.law.cam.ac.uk/docs/view.php?doc=4135 (last visited 15 December 2008).

⁹⁸ “The Internationally Wrongful Act of the State, Source of International Responsibility”, *Yearbook of the International Law Commission 1971*, vol. II, part One, p. 203.

not to aid and assist had already been expressed in connection with aggression and genocide and according to the ILC, the obligation had already emerged as a customary norm.¹⁰⁰

The obligation not to aid and assist found in Article 16 (1) and Article 41 are cases of so-called “derived responsibility”. They cover a situation in which the responsibility of one State is engaged because of its participation in the violation of international law committed by another State. The result of the aid and assistance must be a violation of international law committed against a particular group of States, a subject of international law other than a State or the international community as a whole. Most of the time, the act of the assisting State will not be unlawful *per se* if carried out in other circumstances. The aid and assistance can be of any kind- e.g. it can be monetary or material, it can consist of a State offering the use of its own territory, or in the signing of a treaty in view of the commission of the violation of international law for instance.

Similar to the notion of complicity in any system of municipal law, the fundamental condition for the responsibility of the assisted State to engage the responsibility of the assisting State is the causal link between the aid and the violation of international law.¹⁰¹ The aid or assistance must be directly connected to the violation. This condition has been reiterated by the European Commission of Human Rights in the case *Tugar v. Italy*. In this case, the applicant, Tugar, had been severely injured by the explosion of an anti-personal minefield sold to Iraq by an Italian arms seller. He complained that Italy lacked

⁹⁹ *Report of the International Law Commission to the General Assembly, Thirtieth Session*, U.N. GAOR, 33d Sess., Supp. No 10, U.N. Doc., A/33/10 (1979), reprinted in “Report of the International Law Commission on its Thirtieth Session” Yearbook of the International Law Commission 1978, vol. II, Part One, p. 52-60. p. 52-60, [hereinafter *ILC Report 1978*].

¹⁰⁰ The GA resolution defining aggression stated in article that allowing its territory to be used by a State to violate the prohibition on aggression constituted aggression itself (see GA Resolution Defining Aggression, A/RES/3314 (XXIX)). The 1948 Convention on the Prevention and Punishment of the Crime of Genocide in its third article punishes the act of complicity of genocide.

¹⁰¹ J. Crawford, note 5 above, p. 147.

efficient procedures to issue licences, and hence had failed to ensure the protection of his right to life according to Article 2 of the European Convention of Human Rights. The Commission rejected his request. It ruled that:

“The applicant’s injury cannot be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible ‘indiscriminate’ use thereof in a third country, the latter’s action constituting the direct and decisive cause of the accident which the applicant suffered”.¹⁰²

The assisting State is only responsible to the extent that its conduct has directly contributed to the commission of the violation of international law by the assisted State.¹⁰³ The acting State remains primarily responsible. Therefore, the responsibilities of both States are differentiated and if engaged, they will entail different legal consequences, notably in matters of reparation and compensation. However, according to the commentaries on the ILC Articles on State Responsibility, for the responsibility of the assisting State to be engaged, the aid does not need to have been indispensable to the commission of the unlawful act, it just has to be substantial.¹⁰⁴ The commentaries remain silent on potential cases where one State has not contributed substantially to a violation of international law, but its own contribution cumulated with the aid and assistance of another or other States to allow the commission by another State(s) of a violation of international law. For instance, one can legitimately wonder whether the responsibility of

¹⁰² *Tugar v. Italy*, 18th October 1995, request n° 2869/93 (unpublished). Cited in A. Boivin, “Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons” (2005) International Committee of the Red Cross Review 467-496, p. 480.

¹⁰³ J. Crawford, note 5 above, p. 148.

¹⁰⁴ *Ibid.*, p. 147.

the States on whose territory *CIA aircrafts* stopped to refuel and connected to a rendition circuit in the affairs of the rendition flights of the United States, can be engaged on the basis of the prohibition not to aid and assist.¹⁰⁵

Finally, the responsibility of the assisting State cannot be engaged if it is not bound by the obligation breached by the assisted State. This exception to derived responsibility finds its *raison d'être* in the respect of the principle stated in Article 34 of the Vienna Convention on the Law of Treaties, according to which a treaty cannot create either rights or obligations for a third State without its consent.¹⁰⁶

The obligation not to aid and assist has been reiterated in Article 41. Tams questions whether there is a difference of content with the obligation not to aid and assist set in Article 16 and whether the distinction between categories of breaches in relation to the duty not to aid and assist is relevant.¹⁰⁷ For the *rapporteur*, the obligation extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach and applies whether or not the breach is a continuing one.¹⁰⁸ It would therefore mean that the simple assistance in the maintenance in the commission of a violation of international law would entail the responsibility of the aiding State. Furthermore, the *rapporteur* states that the knowledge requirement is not restated because it is difficult to conceive that a State would not have noticed the commission of a violation of a peremptory norm of international law.¹⁰⁹ Therefore, one can assume that the intention has to be presumed in case of a violation of a peremptory norm of

¹⁰⁵ See D. Marty, Alleged secret detentions and unlawful inter-State transfers involving Council of Europe member States (Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe), *AS/Jur* (2006) 16 Part II, (Strasbourg 7 June 2006).

¹⁰⁶ J. Crawford, note 5 above, p. 149.

¹⁰⁷ C. Tams, note 39 above, p. 774.

¹⁰⁸ J. Crawford, note 5 above, p. 252.

¹⁰⁹ *Ibid.*

international law. Interpretation of this area of international law is not straightforward, given the heated debate that surrounds the intention requirement in relation to Article 16 and will be developed in the next section. Furthermore, it is important to note that in the commentaries on the ILC work on State responsibility, the examples which illustrated the obligation not to aid and assist were about violations of a peremptory norm of international law, e.g. aggression.¹¹⁰

4.2. The Intention Requirement.

The element of intention represents the most troublesome aspect of the obligation not to aid and assist.¹¹¹ Article 16 only speaks about knowledge of the circumstances which equates to awareness. This reference, at first sight, marks an evolution of the work of the ILC in 1978 where the intention element was specified in Article 27-the article on derived responsibility at the time- and the commentaries made clear that an intention element was required, thus putting to the test the objective nature of State responsibility in international law.¹¹² The aid and assistance had to be rendered *with a view* to its use in committing the principal internationally wrongful act (emphasis added).¹¹³

¹¹⁰ For the prohibition of aggression to be considered as *jus cogens* norm, see: J. Crawford, note 5 above, p. 246 and *Military and Paramilitaries Activities In and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. (1986), pp. 100-101 (para. 190).

¹¹¹ K. Nahapetian, "Confronting State Complicity in International Law" (2002-2003) 99 UCLA J. Int'l Law & Foreign Affairs 99-127, p. 105.

¹¹² According to the theory of objective responsibility as opposed to the notion of subjective responsibility, the responsibility of a State is engaged when it has breached an international obligation. One does not need to prove a fault, negligence or intention on its part. The theory of objective responsibility has been endorsed by most authors, tribunals and the ILC in its work on State responsibility. I. Brownlie, *System of the Law of the Nations, State Responsibility, Part I*, (Oxford, 1983) and J. Crawford, S. Ollerson and J. Peel, note 18 above, p. 459.

¹¹³ *ILC Report 1978*, p. 104, para. 17.

In his commentaries, Crawford reiterates the intention element which is added to the necessity for the assisting State to have been aware of the circumstances.¹¹⁴ However, the relationship between awareness and intent appears questionable. Why are the two conditions specified independently when there cannot obviously be intent without awareness? Possibly the ILC intended to reassure some States which were eager to emphasise the intention requirement in the obligation not to aid and assist. However, for some authors, the combination of awareness and intent had the effect of increasing rather than decreasing confusion.¹¹⁵ Possibly the ILC intended to find a compromise on this issue because the range of opinions on the obligation not to aid and assist covered the non-existence of the obligation (Switzerland¹¹⁶) to its existence even in cases of mere negligence (Netherlands and Denmark¹¹⁷) with, in the middle, the supporters of the obligation with an intention requirement. Nonetheless, one can legitimately wonder whether State responsibility can still be engaged when the aiding State had no intention to contribute to the act but was only aware of the circumstances.

Nonetheless, the academic literature on the subject unanimously emphasises the irrelevance of the intention requirement. Quigley, who wrote the first article on complicity in relation to the work of the ILC on State responsibility, advocates the inappropriateness of a too stringent *culpa* requirement because it is often difficult to determine the state of mind of a State and furthermore, in most situations where a receiving State commits an international violation, the aiding State does not desire the illegal result.¹¹⁸ Contrary to Quigley, Graefrath argues that the intent requirement should be demonstrated for *plain* violations of international law whereas intention should be

¹¹⁴ J. Crawford, note 5 above, p. 149.

¹¹⁵ K. Nahapetian, note 111 above, p. 106.

¹¹⁶ *Comments and Observations Received From Governments: Report of the International Law Commission to the General Assembly, Fifty Third Session*, (1998), U.N. Doc. A/CN.4/488, p. 76.

¹¹⁷ *Comments and Observations received From Governments: Report of the International Law Commission to the General Assembly, Fifty Third Session*, (2001), U.N. Doc. A/CN.4/515, p. 27.

¹¹⁸ J. Quigley, "Complicity in International Law: A New Direction in the Law of State Responsibility" (1986) 57 *British Yearbook of International Law* 77-131, p. 111.

presumed in cases of commission of a *crime*. More precisely, when an organ of the international community, and principally an organ of the UN, has established that an act poses a danger to international peace, assistance to the perpetrators of this act is an act of complicity although the aiding State proves that it had not acted intentionally or that its assistance has been given for purely humanitarian reasons.¹¹⁹ Nahapetian advocates the incorporation of a rebuttable presumption of intent in the ILC Articles.¹²⁰ To corroborate her arguments, she cites the criticisms in the General Assembly Sixth Committee which noted that requiring “knowledge of the circumstances” in Article 16 seemed inappropriate because of the objective nature of State responsibility in international law; second, that the intent requirement is almost impossible to prove; and finally, that it does not make sense in cases of serious violations of international law when the international community is fully aware of the circumstances.¹²¹ Furthermore, she claims that States can still be held accountable for separate treaty violations of the International Covenant on Civil Political Rights, the 1949 Geneva Conventions, the UN Charter and the Genocide Convention not only because of the obligations of the States party to these treaties not to defeat the object and purposes of these conventions, but also because of specific provisions in these treaties requiring a positive conduct of States in the conduct of their foreign policies. Finally, Boivin dismisses the intention requirement stating that the objective of this requirement is to ensure that the aid had effectively contributed to the commission of the violation of international law.¹²² She rightly states that the formulation of an intention requirement is not realistic because it would fall foul of the fact that in the case of arms trade, the motivations of States are most of the time financial and not political.

¹¹⁹ B. Graefrath, “Complicity in the Law of International Responsibility” (1996) *Revue Belge de Droit International* 370-380, pp. 376-377.

¹²⁰ K. Nahapetian, note 111 above, p. 111.

¹²¹ *Ibid.*, p. 110.

¹²² A. Boivin, note 102 above, p. 467.

The replacement of the intent requirement with awareness is a realistic solution. With a too strident intention requirement, only a few cases could fall into the scope of aid and assistance i.e., straightforward cases where the intent requirement is inevitably present like the ones envisaged by the ILC in 1978 and then in 2001 (sale of arms and use of territory for an act of aggression). The increasing interdependence of States' relationships and actions with one another increases the likeliness of cases of derived responsibility. It is crucial to define correctly and realistically the obligation not to aid and assist and in general the concept of complicity in international law –as the next chapter demonstrates.

5. Conclusion.

This chapter has offered a detailed overview of the obligations spelled out in Article 41 of the ILC Articles on State Responsibility. While the existence of an obligation to cooperate is subject to progressive development, the obligation not to recognise and the obligation not to aid and assist form part of customary international law. The minimum obligation in the words of Crawford is that the obligation not to recognise aims at preventing the consolidation of an illegal situation. However, to be really efficient, the enforcement of the duty not to recognise must be accompanied by parallel initiatives in order to put an end to a violation of international law. In this respect, the obligation to cooperate finds its relevance. The combination of the two is an efficient means to put an end to an illegal act.

However the analysis of the content of the obligations set in Article 41 raises several questions. First of all, one can legitimately wonder whether the characterisation of an obligation as peremptory or *erga omnes* justifies the establishment of a differentiated

regime of responsibility. As seen in this chapter, the rationale of the obligation not to recognise is to bar the entrenchment of an illegal situation. The qualification of the nature of the violation does not have much importance. The obligation not to aid and assist in Article 41 is the replica of the obligation of Article 16 which applies to *plain* violations of international law. Finally, the difficulties surrounding the enforcement of the obligation to cooperate to put an end to a violation of an obligation arising from a peremptory norm of international law questions the feasibility of a differentiated regime of responsibility. It can be contended that the categorisation of the three obligations as a compulsory response to a violation of an obligation arising under a peremptory norm of international law is a way to emphasize priority in the respect of some legal obligations. The nature of the obligation is not necessarily the source of a differentiated regime of responsibility. *Erga omnes* and *jus cogens* are concepts that echo the use of the prescriptions of international law as a call for solidarity. They reflect a vision of what international law should be, of the world we should be living in because they place emphasis on some values.¹²³

Secondly, the conclusion of the second chapter questioned whether the prescription of the law of State responsibility could shed light on the content of common Article 1 of the Geneva Conventions. Undoubtedly, common Article 1 must be read in light of the three obligations listed in Article 41. The obligation to ensure respect entails an obligation not to aid and assist and not to recognize. The obligation set in Article 89 substantially poses the same issue as the obligation to cooperate. However, the study of the obligations set in Article 41 did not shed light on the obligation not to encourage the

¹²³ Criticisms on the existence of *erga omnes* or *jus cogens* obligations have been sometimes harsh. For instance, for Koskenniemi, *jus cogens* and *erga omnes* obligations are “two latin expressions which have no clear references in this world but evoke a nostalgia for such reference and create a community out of such a nostalgia”. M. Koskenniemi, “International Law in Europe: Between Tradition and Renewal” (2005) 16 EJIL 113-124, p. 122.

commission of a violation of humanitarian law. This obligation certainly does not equate with the obligation not to aid and assist which has been defined in very narrow terms. Incitement in the commission of a violation of international law was explicitly set aside from the study of the ILC.¹²⁴

This last remark leads to the final point. When the ILC intended to codify the obligation not to aid and assist, it delimited the scope of the obligation in very narrow terms. It wilfully left aside other cases of involvement of a State in the commission of a violation of international law by another State. The next chapter demonstrates that breaches of the obligation not to recognise and not to aid and assist are not the only instances where a State participates, reinforces and gives incentives for the commission and the perpetuation of an illegal act committed by another State. It offers an account of other situations of derived responsibility not covered by this article and as such tests the framework of third States obligations offered by the International Law Commission.

¹²⁴ *ILC Report 1978*, pp. 54-55.

Chapter Three
The Contribution of Third States to the Commission of a Violation of International Law or the Perpetuation of Other Violations of International Law: Going Beyond the Framework of the ILC.

The previous chapter established that from the obligations listed in Article 41 of the ILC Articles on State responsibility, both the duty not to recognise and the obligation not to aid and assist, are customary obligations. However, one can wonder whether the framework offered by Article 41 grasps the entire ranges of attitudes, actions and inactions of States to contribute to the commission or the perpetuation of violations of international law committed by another State. In the commentaries, as well as in the second report on State responsibility, the *rapporteur* lists other cases of derived responsibility, or participation of another State in the commission of a violation of international law which are not limited to issues of aid and assistance.¹ Some of these omissions have already been tackled by the Commission in the Articles, such as, for instance direction, control and coercion which are covered by Articles 17 and 18 of the ILC Articles on State Responsibility.² Furthermore, in his commentaries, the *rapporteur* mentions two cases of derived responsibility or participation of another State in the commission of a violation of international law which were not tackled in the draft. They are the duty of due diligence and the obligation emerging from the *Soering* case.³ The

¹ *Second report on State Responsibility, International Law Commission, Fifty First session, 1st April 1999, A/CN.4/498/Add.1, p. 3* (hereinafter *Second report on State Responsibility, Fifty First Session*) and J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, (Cambridge, New York 2002), pp. 145-146.

² "Article 17. *Direction and control exercised over the commission of an internationally wrongful act.*

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (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".

"Article 18. *Coercion of another State*

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act".

³ J. Crawford, note 1 above, p. 146 and *Soering v. United Kingdom*, judgment 7 July 1989, (1989) 11 EHRR 439.

present chapter gives an account of both and it investigates whether the non-inclusion of these situations in the draft leaves the door open to the possibility of the existence of other situations of *participative responsibility*. As such it offers an account of the emergence of the obligation, in the context of arms sales, to enquire about the human rights records of the addressee State. The chapter also raises the case of the controversy of the Dutch battalion at Srebrenica and questions whether any principle of international law can be inferred from this case. Finally, it offers a brief account of the content of the duty not to encourage the commission of a violation of international law as stated by the International Court of Justice in relation to Article 1 of the Geneva Conventions in the *Nicaragua* case. Finally, the present chapter intends to establish a link between these different cases by offering a central role to the concept of acquiescence in international law.

The object of the present chapter is not to offer a non-exhaustive list of cases of responsibility of States in the formal sense of the term, i.e., the legal relationship that arises under international law from the wrongful act of a State and which involves legal consequences such as cessation, non-repetition or the adoption of counter-measures.⁴ It is an invitation to envisage cases and situations where a State can contribute to the commission and the perpetuation of a violation of international law committed by another State.

1. Due Diligence in International Law.

Rapporteur Crawford considered the *Soering* and *Corfu Channel* cases to be connected as relating to participative responsibility and put these two cases under the same heading

⁴ J Crawford, *ibid.*, pp. 79-80.

“*Independently wrongful conduct involving another State*”.⁵ Both involve cases of due diligence in the sense that both relate to the obligation of a State to prevent a violation of international law or an act that would harm the interests of another State because it is in a position to do something. Its disregard for the illegal conduct of another State or for what can infringe the interests of another State might engage its own international responsibility. After having given an overview of the duty of due diligence in international, the present section analyses the *Soering* case in the light of the principle of due diligence and examines how an obligation of scrutiny of the human rights record of a third State is emerging in the context of arms trade.

1.1. Overview of the Duty of Due Diligence.

The duty of due diligence is the obligation to prevent the commission of a violation of international law or a lawful activity which harms the interests of another State. The breach of the duty of due diligence is established when a State fails to act against such a lawful or unlawful act when it is reasonably expected that this State could, in the words of Pisillo, have used its apparatus to prevent its commission from happening.⁶ The most cited case on due diligence is the *Corfu Channel* case. In this case, the ICJ decided that Albania was responsible for not taking action to prevent the damage caused to British ships by landmines that it did not lay itself.⁷ The same rationale is to be found in the *Hostages* case where it was adjudged that Iran had failed to take the requisite steps to prevent and stop an attack on the US embassy and the taking of 63 diplomats and three

⁵ Second report on State Responsibility, Fifty First Session, note 1 above, p. 4.

⁶ R. Pisillo-Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States” 35 *German Yearbook of International Law* 9-51, p. 27.

⁷ *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, ICJ Rep. (1949), p. 4.

additional U.S. citizens hostage inside the American diplomatic mission in Tehran by Iranian students.⁸

The ILC, at the time Garcia Amador was *rappporteur* (1956-1961), considered including the due diligence duty in the draft Articles on State responsibility. It was dealt with in relation to injuries caused to aliens. It was excised from the draft because it was considered to be a primary rule and the ILC decided to limit strictly the draft Articles to secondary rules.⁹ In 1978, Roberto Ago, the *rappporteur* at the time (1962-1979), stated explicitly that due diligence did not cover a case of complicity although it remained a case of participation of a State in the unlawful conduct of another State.¹⁰ The same statement is to be found in the 2001 commentaries with an indirect reference to the *Corfu channel* case.¹¹

The duty of due diligence is actually a hybrid obligation. It puts to the test the divide between primary and secondary obligations and hence, the methodology of the ILC as well as the objective nature of State responsibility as enshrined in the Articles.¹² In this respect, according to Garcia Amador, it is *per excellence* the expression of the theory of fault. The responsibility of one State will not be engaged unless proof of manifest negligence in not taking some measures which could reasonably have been expected to be taken in the same circumstances is demonstrated.¹³

⁸ *Case Concerning United States Diplomatic and Consular Staff in Tebran (United States of America v. Iran)*, ICJ Rep. (1980), p. 31 (para. 63). In this case, Iran was also held responsible because the students were considered agents of the State since Iran endorsed their actions *a posteriori*. *Ibid*, p. 35 (para. 74).

⁹ H. Blomeyer-Bartenstein, Due Diligence, In R. Bernhardt (ed.), *Encyclopedia of Public International Law*, (Amsterdam, London 1992), pp. 1110-1115, p. 1113. Primary norms regulate the behaviour of subjects of international law while secondary norms regulate the primary rules like the creation, modification, extinction, interpretation and operation of a norm. The distinction has its origin in Hart's legal theory. H.L.A. Hart, *The Concept of Law* (Oxford 1961). See A. Marschik, "Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System" (1998) 9 EJIL 1998 212-239, p. 212

¹⁰ Second report on State Responsibility, Fifty First Session, note 1 above, p. 53.

¹¹ J. Crawford, note 1 above, p. 146.

¹² For a definition of the objective theory of State responsibility, see Chapter Two of this dissertation, p. 90, note 112 above.

¹³ H. Blomeyer-Bartenstein, note 9 above, p. 1113.

Recently, the content of the duty of due diligence has been revisited by Pisillo who provides an analysis of the obligation outside the classic theoretical divides primary/secondary obligation, objective/subjective responsibility.¹⁴ According to Pisillo, the concept of diligence serves to establish an objective standard of behaviour required from the State in fulfilling its duty to protect.¹⁵ More precisely, it serves as a criterion for establishing the exact fulfilment of *a particular category of obligations* whose execution objectively presents an important risk for the obligator. In other words, the addressee of this obligation is not bound to guarantee a certain objective result but only to make a diligent effort to seek to reach the result.¹⁶ The concept of due diligence is to be measured according to several variables such as the degree of effectiveness of a State's control over certain areas of its territory, the importance of the interest to be protected, and the degree of predictability of the harm. Therefore, due diligence is naturally to be found in fields of international law such as environmental law, diplomatic law, the protection of the marine environment, and the treatment of aliens.¹⁷ They are areas of the law where States exercise a form of control but where this control is subject to limits which are outside its decision-making power.

1.2. The *Soering* Case or the Obligation to Refrain from Facilitating a Human Rights Abuse.

The second case of participative responsibility raised by the 2001 commentaries is the *Soering* case, judged before the European Court of Human Rights.

¹⁴ R. Pisillo, note 6 above.

¹⁵ *Ibid.*, p. 44.

¹⁶ *Ibid.*, p. 30.

¹⁷ M. Flemme, *Due Diligence in International Law*, Master Thesis, (Lund, 2004), p. 41.

Jens Soering, a German citizen was accused of having killed the parents of his girlfriend in their homes in Virginia (US) and was arrested and detained in the United Kingdom. Both the United States and the Federal Republic of Germany (F.R.G.) requested his extradition. In 1988, the British Secretary of State for the Home Department signed the order to extradite Soering to the United States where he risked being condemned to death. Jens Soering appealed this decision. The case was decided by the European Court of Human Rights on the 7th of July 1989.¹⁸

After having examined the rigour of the detention regime in the State of Virginia, the special regime of the “death row corridors”, the length of time between the condemnation and execution of the sentence, the circumstances of the case, notably the extradition request formulated by the F.R.G. and the age of the plaintiff, the European Court of Human Rights held that the UK would be in violation of Article 3 of the European Convention on Human Rights if it extradited Jens Soering.¹⁹ The Court considered that it was likely that when extradited and judged in the United States, Jens Soering would be condemned to death and hence exposed to the “death row phenomenon” i.e. spending several years waiting for his sentence to be carried out, which in his case, given his mental health condition would amount to a treatment going beyond the threshold set by Article 3, i.e. would constitute a cruel and inhumane treatment.²⁰

In this case, Article 3 of the ECHR was interpreted in the light of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment which expressly prohibits the extradition of a person where

¹⁸ *Soering*, note 3 above.

¹⁹ Article 3 of the European Convention of Human Rights: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

²⁰ *Soering*, para. 111.

there are substantial grounds for believing that he would face the danger of being subjected to torture (Article 3).²¹ Furthermore, the judgment of the Court is the result of a combined implementation of Articles 1 and 3 of the European Convention of Human Rights: the High Contracting Parties to the ECHR have the obligation to protect anyone within their jurisdiction from a predictable danger of inhuman or degrading treatment.²²

However, *Soering* can also be analysed in the light of the duty of due diligence. The obligation behind this case contains similar variables as the ones of due diligence: the exercise of control by a State over its territory and the jurisdiction it exercise over its citizens and residents, the importance of the interest to be protected and the likelihood of the commission of the human rights abuse. The extra-territorial nature of the commission of the violation of human rights highlights an important element in the obligation contained in this case: the exercise of scrutiny over the human rights record of an another State. According to the ILC *rapporteur*, *Soering* differs from an aid and assisting situation because there is no causal link between the extradition and the violation of human rights.²³ In *Soering*, the UK was under the obligation to refrain from an action which might have had, as a consequence, the violation of an obligation of international law. In this case, the violation of international law was not actual but potential and the UK authorities could not possibly ignore it. According to the *Soering* case and the following jurisprudence of the Court, State authorities have to anticipate possible violations of international law by scrutinising the human rights record of the State

²¹ *Soering*, para. 88.

²² Article 1 of the European Convention of Human Rights: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". E. Decaux, P.-H. Imbert and L.-E. Pettiti (eds.), *La Convention Européenne des Droits de l'Homme, Commentaire Article par Article*, 2d ed., (Paris 1999), p. 156 and F. Julien-Laferrrière, L'application par ricochet de l'article 3 CEDH. L'exemple des mesures d'éloignement des étrangers, In C.-A. Chassin (ed.), *La Portée de l'Article 3 de la Convention Européenne des Droits de l'Homme*, (Bruxelles 2006), pp. 141-155, p. 154.

²³ Second report on State Responsibility, Fifty First Session, note 1 above, p. 4, footnote 360.

requesting the extradition, its political regime and the personal situation of the plaintiff.²⁴ As such, these cases invite to envisage the obligation of due diligence as an obligation to refrain from facilitating the commission of human rights abuse.

In this respect, a similar obligation is emerging in the context of the arms trade. In this situation, one State is in the capacity to prevent the commission of an illegal act when it has reasonable grounds to believe that its failure to act would increase the likelihood of a violation of international law which will occur extra-territorially.

1.3. The Emergence of an Obligation of Due Diligence Entailing the Exercise of a Scrutiny over the Likelihood of the Commission of Human Rights Abuse by Another or Other States in the Context of the Arms Trade.

In 1998, the Council of the European Union adopted the EU Code of Conduct for Arms Exports which is a non-binding instrument.²⁵ The code invites member States of the EU to adopt a licensing regime for the arms trade that gives due regard to the level of respect for international law in the countries of destination. Under Criterion 2, a license application will be refused if there is a clear risk that the proposed export will be used for internal repression.²⁶ According to Criterion 4 of the EU Code, licence applications

²⁴ J.-F. Renucci, *Traité de Droit Européen des Droits de l'Homme*, (Paris, 2007), 131. The rationale of the *Soering* case have been extended to cases of expulsions (*Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, (1991) 14 EHRR 1) and *refoulement* (*Vilvarajah v. United Kingdom*, judgment of 30 October 1991, (1991) 14 EHRR 248) and this in line with Geneva Convention relating to the Status of Refugees, 28 July 1951 (Article 33 (1) of the Convention: "No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". However for the principle to apply, the plaintiff has to demonstrate that there exist substantial grounds to believing that the person in question, if expelled, would face a real risk of being subjected to a treatment contrary to Article 3 in the receiving country (*Chahal v. United Kingdom*, judgment 15 November 1996, (1996) 23 EHRR 413).

²⁵ Available at <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf> (last visited 15 December 2008). Hereinafter "the code".

²⁶ "CRITERION TWO. The respect of human rights in the country of final destination

should be refused where there exists a clear risk that the recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.²⁷ Therefore, the possibility of a potentially serious violation of international law exhorts member States of the EU to enquire into the final use of the weapons which they allow out of their territory.

The implementation of the code by EU countries varies from one country to another. Some countries have incorporated the prescriptions of the code in their own legislation.²⁸ However, the non-uniform implementation of the prescriptions of the code poses certain issues and several discrepancies in the enforcement of individual embargoes. The European Parliament called repeatedly for the code to be made legally binding but the Council never adopted the code as a Common Position that would have rendered its provisions obligatory, given the will of some member States to lift the arms ban on China.²⁹ At present, a confidential annual report on exports and implementation of the code is to be circulated by each EU member State to the other EU states. Following this, a public report on the basis of the individual States' submissions is produced. However,

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States will:

a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression.

b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU [...]"

²⁷ "CRITERION FOUR

Preservation of regional peace, security and stability

Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

When considering these risks, EU Member States will take into account inter alia:

a) the existence or likelihood of armed conflict between the recipient and another country;

b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;

c) whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient;

d) the need not to affect adversely regional stability in any significant way."

²⁸ For instance, the United Kingdom has given effect to the provisions of the Code through the Export Control Act 2002.

²⁹ See resolution of the European Parliament, 13 March 2008, P6_TA(2008)0101. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0101+0+DOC+XML+V0//EN> (last visited 15 December 2008).

this document does not disclose the complete details of actual arms exports made by EU States but only lists the values of licences issued and deliveries made. It does not mention what specific weapon sale was denied, nor to whom.

Nonetheless, it is interesting to note that the code encourages States to investigate the end-use of the weapons they transfer. In this sense, it is the expression of the exercise of a scrutiny for violations of international law occurring outside the boundaries of a State. The ICRC and several human rights non-governmental organisations are pressing States to adopt and enforce such an obligation of due diligence in the context of the arms trade.

Initially, the code inspired an initiative from the ICRC, which, in 1999, called for the development of national and international codes of conduct limiting arms transfers according to the level of respect for international humanitarian law by the recipient State.³⁰ The ICRC suggested that licensing States should assess the extent to which recipient States are committed to respecting norms of international humanitarian law. This obligation is said to derive from common Article 1 of the Geneva Conventions. Hence, it is an expression of the duty to ensure respect for the conventions in all circumstances. Therefore, according to the code, licensing States should deny the granting of a licence not only when they are destined for States that are responsible for serious violations of humanitarian law, but also for States that fail diligently to implement preventive and enforcement measures for the respect of humanitarian law within their jurisdiction.³¹

³⁰ Arms Availability and the Situation of Civilians in Armed Conflict, A Study Presented by the ICRC, (Geneva 1999), p. 65. Available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/p0734> (last visited 15 December 2008)

³¹ A. Boivin, "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons" (2005) International Committee of the Red Cross Review 467-496, p. 479.

Finally, in 2004 a coalition of non-governmental groups, namely Oxfam, Amnesty International and the International Action Network on Small Arms (IANSA), prepared a draft Framework Convention on International Arms Transfers which would, among other things, establish an international registry of small arms transfers and ban the transfer of arms to any countries likely to use those arms to violate human rights or international humanitarian law.³² In a briefing paper, Amnesty, Oxfam and the Control Arms campaign note that “the objective of such a treaty is to consolidate states’ existing and emerging obligations under international law into one framework convention. It is a simple, clear document, which does not contain new substantive legal obligations but provides an unambiguous universal standard for international arms transfers”. The treaty “defines the criteria against which any proposed cross-border transfer (export, import, transit, or transshipment) of conventional arms should be permitted” and “it requires states to incorporate these criteria into their national laws and to make regular public reports to an international registry of all arms transfers”.³³

Article 3 of the current version of the Draft Framework Convention is entitled “Limitations Based on Use” and reads as follows:

“A Contracting Party shall not authorise international transfers of arms in circumstances in which it has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be:

³² The text of the Draft Framework Convention is available at http://www.iansa.org/documents/2004/att_0504.pdf (last visited 15 December 2008).

³³ Towards an Armed Trade Treaty. Next Steps Towards the UN Programme for Action (Amnesty International, IANSA and Oxfam), (2005). Available at <http://www.amnesty.org/es/library/info/POL34/007/2005/en> (last visited 15 December 2008).

- a. used in breach of the United Nations Charter or corresponding rules of customary international law, in particular those on the prohibition on the threat or use of force in international relations;
- b. used in the commission of serious violations of human rights;
- c. used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict;
- d. used in the commission of genocide or crimes against humanity;
- e. diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this Article”.³⁴

In June and July 2005, the UK government tried to obtain the backing of the Draft Framework Convention from other G8 participants.³⁵ On 6 December 2006, the UN General Assembly adopted a resolution seeking an arms trade treaty establishing common international standards for the import, export and transfer of conventional arms.³⁶ Following the adoption of the resolution, the Secretary-General invited Member States to submit their views on an arms trade treaty (ATT). Over 90 States have provided submissions. The United Nations Institute for Disarmament Research (UNIDIR) has undertaken a two-part study involving an in-depth analysis of States’ views on an ATT.³⁷

The UNIDIR research found that most governments are urging respect for human rights

³⁴ Draft Framework Convention on International Arms Transfers, Control Arms Campaign, 25 May 2004, note 32.

³⁵ “The Foreign Secretary, Jack Straw, publicly confirmed the UK government’s commitment to work for an international Arms Trade Treaty and to ‘use its unique position, as the president of the G8 this July, to do everything in its power to get an international treaty on political agenda’”. “Campaigners Welcome Straw Commitment on Arms Trade Treaty and Urge Swift Action”, Press Communiqué, Amnesty International, 15 March 2005 cited in A. Boivin, note 31 above, p. 492, note 109.

³⁶ *Sixty-first General Assembly*, Resolution A/RES/61/89. 153 states voted in favour.

³⁷ S. Parker, *Analysis of States’ Views on an Arms Trade Treaty* (United Nations Institute for Disarmament Research), (Geneva 2007). See also S. Parker, *Implications of States’ Views on an Arms Trade Treaty*, (United Nations Institute for Disarmament Research), (Geneva 2008). Both available respectively at <http://www.unidir.ch/pdf/ouvrages/pdf-1-92-9045-008-A-en.pdf> and <http://www.unidir.org/pdf/activites/pdf3-act349.pdf> (last visited 15 December 2008).

when decisions are made about arms transfers. There is also strong support by a majority of governments for provisions to respect international humanitarian law such as the Geneva Conventions and Protocols and a ban on arming terrorist groups.³⁸ Other criteria cited by many governments for the new treaty include the prevention of arms transfers where there is a clear risk of diversion, such as to violate international arms embargoes, and if there is a danger that the arms will be used in serious crime or have a negative impact on sustainable development. In February 2008, a group of government experts coming from 28 countries started to weave the governments' submissions into a draft future ATT. Their work was presented before the UN General Assembly's First Committee in October 2008 where a total of 116 countries co-sponsored a resolution calling for further work in 2009 in the UN towards an ATT and 147 countries voted in favour (18 abstained and 2 voted against).³⁹

These three examples confirm the emergence of an obligation of due diligence for States for violations of international law occurring outside their own territory at least in the field of the arms trade. This obligation involves the exercise of a form of scrutiny over violations by foreign States of their commitments and obligations under international law and human rights. It corresponds to the necessity to adopt precautionary measures in order not to provide aid and assistance to the commission of grave violations of international law. Interestingly, in this case, the likelihood of the occurrence of the violation deprives the obligation not to aid and assist of the intention requirement. It is only because a violation of international law is likely to happen that States have a duty of vigilance. If they do not enquire into the level of respect for human rights and

³⁸ 62/70 States in favour of a human rights transfer criterion, 58/70 in favour of a humanitarian law transfer criterion and 51/70 in favour of a terrorism transfer criterion. S. Parker (2007), *ibid.*, p. 10.

³⁹ <http://www.fco.gov.uk/en/fco-in-action/counter-terrorism/weapons/arms-trade-treaty/> (last visited 15 December 2008). For the latest developments on this topic, visit www.controlarms.org (last visited 15 December 2008).

humanitarian law of the State where the arms are supposed to be sent, they increase the likelihood of the commission of violation of international law.

2. **“Non Assistance to an Endangered Population”: Dutchbat in Srebrenica.**

Can silence and inaction amount to complicity? The complex issue of the Dutch Peacekeeping forces in Srebrenica still resonates not only because of the unease it provokes but also because it raises the question whether complicity by abstention or an obligation of assistance to an endangered population exists in international law.

In July 1995, around eight thousand Muslim Bosnians were murdered while the city of Srebrenica was declared to be a “safe area” and protected by the Dutch battalion, Dutchbat, which operated under the egis of the United Nations Protection Force, UNPROFOR. The Netherlands Institute for War Documentation (NIWD) was instructed one year later by the Dutch government to release a report on the events that surrounded the fall of Srebrenica and the massacre. It concluded, among other things, that the mandate given to the troops was unclear, Dutchbat was insufficiently prepared, there was a failure in intelligence-sharing, and the air support requested by Dutchbat came too late.⁴⁰ After the report was released, in 2002, the Dutch government of Prime Minister Wim Kok resigned and a Parliamentary Committee of Inquiry was formed in June 2002 whose conclusive report is in line with the one of NIWD.⁴¹

⁴⁰ Available with Dutch and English versions at http://www.srebrenica.nl/en/a_index.htm (last visited 15 December 2008). For a summary of its content: N. Keijzer, “Netherlands Correspondents’ Reports” (2002) 5 Yearbook of International Humanitarian Law 574-575.

⁴¹ Available at www.overheid.nl/op/index.html (last visited 15 December 2008). For a summary of its content: N. Keijzer, “Netherlands Correspondents’ Reports” (2003) 6 Yearbook of International Humanitarian Law 547-549.

Parallel to these national inquiries, the Secretary General of the United Nations also published a report on the fall of Srebrenica.⁴² Its comments on the role of Dutch peacekeeping forces leave the issue unanswered. It states: “it is not possible to say with any certainty that stronger actions by the Dutch would have saved lives, and it is even possible that such efforts could have done more harm than good”.⁴³

Years after the massacre, the case remains a hotly-debated issue. In November 2003, families of the victims sued the Dutch government and the UN at the Court of First Instance of The Hague for failing to protect the enclave. The arguments revolved essentially on issues of attribution of responsibility between the United Nations and the Dutch forces. The Court finally rejected the appellant’s request by pointing out that a number of witnesses the claimants proposed to hear had already been heard in the context of the NIWD research.⁴⁴ On 16 June 2008, the District Court at The Hague heard another action brought against the Dutch State by relatives of the victims of genocide at Srebrenica. The plaintiffs’ lawyer Liesbeth Zegveld argued that the Dutch government and the Dutch command within UNPROFOR were responsible for the gross negligence shown by Dutch troops in protecting the population of Srebrenica.⁴⁵ The Hague District Court held that the Dutch peace-keeping forces were acting under the aegis of the United Nations and hence that it had no jurisdiction in a suit against the United Nations because of the principle of UN immunity from prosecution, even when genocide is involved.⁴⁶

⁴² “Report of the Secretary-General pursuant to GA Res. 53/35: the fall of Srebrenica”, UN Doc. A/54/549, 15 November 1999.

⁴³ *Ibid.*, p. 105.

⁴⁴ *Udruženja Gradana ‘Žene Srebrenice’ Tužila v. The Netherlands* (Court of First Instance of The Hague, 27 November 2003), LjN- No. N8978, Case No. 03.531. Available at www.rechtspraak.nl/flushed.asp (last visited 15 December 2008). For a summary of the case: E. V. Sliedregt, “Netherlands Correspondents’ Reports” (2003) 6 Yearbook of International Humanitarian Law 549-551.

⁴⁵ More details at <http://srebrenica-genocide.blogspot.com> (last visited 15 December 2008).

⁴⁶ *Association of Citizens ‘Mothers of Srebrenica’ et al. v. The State of the Netherlands and the United Nations* (District Court in The Hague, 10 July 2008), LjN BD6796, 295247 / HA ZA 07-2973. Judgment in the incidental

Apart from determining whether the UN or the Netherlands would be the legal entity responsible, the case presents several unresolved questions. Could Dutchbat have reasonably expected that the Serbs would commit such atrocities which amounted to an act of genocide?⁴⁷ If they had fought to defend Srebrenica, could they have prevented the wide-scale massacre?

Beyond these issues, the case of Dutchbat at Srebrenica still resonates today because it questions the existence for an international actor of a duty to intervene in circumstances where it has the capacity to prevent a major violation of international law. This case is controversial because it presupposes the responsibility of a State or an international actor which has the political and material means to intervene in a situation of serious breach of international law. More generally, this case addresses the necessity for the international community to protect any population under the threat of a wide-scale violation of human rights.⁴⁸

proceedings. The text of the judgment is available in English at <http://www.vandiepen.com/upload/file/srebrenica/Judgement.pdf> (last visited 15 December 2008).

⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Statement to the Press by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, 26 February 2007, point 7. Available at www.icj-cij.org/search/index.php?p2=2&pg=4p1&str=bosnia (last visited 15 December 2008).

⁴⁸ The massacre of Srebrenica - along with the tragedies of Rwanda, Kosovo and Somalia - revived the debate on "humanitarian intervention" by tragically highlighting the failures of the international community to intervene in cases of wide-scale violations of human rights. In an address to the 54th session of the UN General Assembly in September 1999, Secretary-General Kofi Annan reflected upon "the prospects for human security and intervention in the next century." Following this, in September 2000 the Government of Canada announced the establishment of an independent International Commission on Intervention and State Sovereignty (ICISS). It released its report in December 2001: *The Responsibility to Protect*, (ICISS), (2001). The report defined the existence of a new "norm", the responsibility to protect. It suggested an obligation for any State in cases of genocide, war crimes, crimes against humanity and ethnic cleansing to protect its own population. Should the State find itself unable or unwilling to do so, it would then be incumbent upon the international community to protect the population in danger, even if that meant resorting to the use of military force. The responsibility to protect enjoys wide recognition. It was endorsed by UNGA World Summit Outcome Document in 2005 (UNGA Resolution 60/1, 16 September 2005) and subsequent Security Council Resolutions (UNSC Resolution 1674, 28 April 2006 and UNSC Resolution 1706, 31 August 2006) reaffirmed the Outcome Document. It seems nonetheless that this "norm" has not yet passed the threshold necessary to become a customary international obligation. Much has been written about the responsibility to protect. See for instance: G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, (Washington, 2008); R. Thakur, *The United Nations, Peace and*

The role, or rather the non-involvement, of the Dutch peace-keeping forces raised many questions because they were stationed around Srebrenica at the time of the commission of the massacre. They had knowledge of the situation, they had the means to intervene and to stop the massacre: they were in a position to do something. Even if they had not engaged in combat, they could have alerted United Nations higher authorities of what was happening.

However, this is not to say that these types of circumstances are totally unknown in law. For instance, French law has criminalised silence when knowledge of a situation of maltreatment of a vulnerable person or a person under 18 is not reported to the relevant authorities.⁴⁹ The situation of the person convicted in this case is not one of an accomplice. It is not only the knowledge of the situation which offers the possibility to act to prevent harm to the victim but the proximity to the circumstances which includes him or her in the criminal *sphere*. A parallel can be made with the case of the Dutch peacekeeping forces at Srebrenica: because of their proximity to the violation of international law, their status was changed and they were not longer a mere third party to this violation of international law. Their presence on the ground created a form of involvement to the circumstances where mere silence and inaction had direct consequences. The same rationale is to be found behind *la loi du silence* and also in cases of non-assistance to an endangered person in general where there is a legitimate expectation that a person would have reacted.

Security: From Collective Security to the Responsibility to Protect, (Cambridge 2006). This dissertation is principally concerned with issues of active and passive complicity. Further research on the responsibility to protect is thus beyond its remit.

⁴⁹ The Act is known as *la loi du silence*. Article 434-3 of the French "Code Pénal": "Le fait pour quiconque ayant eu connaissance de mauvais traitements ou privations infligés à un mineur de quinze ans ou à une personne qui n'est pas en mesure de se protéger en raison de son âge, d'une maladie, d'une infirmité, d'une déficience physique ou psychique ou d'un état de grossesse, de ne pas en informer les autorités judiciaires ou administratives est puni de trois ans d'emprisonnement et de 45000 euros d'amende".

It is, however, still doubtful whether these situations, such as at Srebrenica constitute a ground for international responsibility. However, as they strike at our conscience, it is important to analyse them outside of the *a priori* divide between morals, politics and law, as well as outside the strict legal framework of international complicity, just by giving importance to the way they emerge and occur.

3. Encouraging the Commission of a Violation of International Law.

In 1978, when codifying the obligation not to aid and assist, the ILC set aside the case of incitement to commit a violation of international law.⁵⁰ According to the ILC, the decision of a sovereign State to adopt a certain course of conduct is its own decision, even if it has received suggestions and advice from another State, which it was at liberty not to follow.⁵¹ Nonetheless, between mere incitement, or advice and suggestions, and aid and assistance, there exist different degrees of participation in the violation of international law by another State. Encouragement is one of them. For Kessler, the term encouragement has never been defined in international law and is therefore rather vague.⁵² Nonetheless, even if the obligation not to encourage has never attracted the attention of academic writers, a few elements in the case-law of the International Court of Justice exist in order to draw the outlines of this obligation.

As stated in the first chapter of this dissertation, in its recent study on customary rules of international humanitarian law, the ICRC acknowledged the existence of an obligation of

⁵⁰ "We do not know of any cases in which, at the juridical level, a State has been alleged to be internationally responsible solely by reason of such incitement. Nor do we know of any cases in which States have agreed to absolve from its responsibility a State which, although it might have been incited by a third State, nevertheless, of its own free will, breached an international obligation binding it to another State". Yearbook of the International Law Commission 1978, vol. II, Part One, pp. 54-55.

⁵¹ *Ibid.*, p. 55.

⁵² B. Kessler, "The Duty to 'Ensure Respect' Under Common Article 1 of the Fourth Geneva Convention: Its Implications on International and Non-International Armed Conflict" (2001) 44 German Yearbook of International Law 498-516, p. 503.

States to ensure respect for rules of international humanitarian law.⁵³ This obligation entails a duty not to encourage violations of humanitarian law by parties to an armed conflict. The obligation not to encourage violations of humanitarian law was reiterated at the 30th Conference of the ICRC in 2007.⁵⁴ This obligation is to be found in UNGA resolution “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”.⁵⁵ It was formulated by the International Court of Justice in the *Nicaragua* case in relation to the publication and the diffusion by the United States of a manual on psychological warfare among the Nicaraguan guerrilla movement.⁵⁶ In this case, it was considered that encouragement is different from “aiding and assisting” because there did not exist any causal link between the publication of the military handbook and the commission of the violation of international law.⁵⁷ In this respect, encouragement does not contribute significantly to the commission of the violation of international law, as in the case of aid and assistance, but fosters or facilitates its accomplishment. It is not *material* to the commission of the violation of international law.

⁵³L. Doswald-Beck and J.-M. Heckaerts, *Customary International Humanitarian Law. Volume 1: Rules*, (Cambridge 2005), p. 509.

⁵⁴“Reaffirmation and Implementation of International Humanitarian Law. Preserving Human Life and Dignity in Armed Conflict”, 30th Conference of the ICRC, 26-30 November 2007.

⁵⁵ UN General Assembly Resolution 2625 (XXV), 24 October 1970, A/RES/25/2625. “Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State” and “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above [...]” The purpose for which the General Assembly adopted the declaration was the codification and progressive development of the major principles deemed to be part of the law of the United Nations as it was at the time of the coming into force of the Charter and as it had developed in the meantime. G. Arango-Ruiz, *The United Nations Declaration on Friendly Relations and the System of Sources of International Law*, (Alphe aan de Rijn, 1979), p. 89.

⁵⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. (1986), p. 114, (para. 220).

⁵⁷ N. Levrat, Les conséquences de l’engagement pris par les Hautes Parties Contractantes de “faire respecter” les Conventions humanitaires, In F. Kalshoven (ed.), *Implementation of Humanitarian Law*, (Dordrecht, London 1989), pp. 263-296, p. 263.

When the Court found the United States responsible for encouraging violations of international humanitarian law, it was material to consider “whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable”.⁵⁸ Therefore, the judgment of the Court leads to the view that the likelihood of the occurrence of the violations of international law and the awareness of the possible occurrence are factors to take into consideration in order to establish the responsibility of one State for encouraging a violation of international law. According to Chinkin, the tests of likelihood and foreseeability were applied subjectively to “those responsible” for the publication and dissemination of the Manual.⁵⁹ In this sense, it was the awareness of the United States of the impact of the publication on the conduct of the *Contras* that led to the decision of the judges to hold the US responsible for encouraging a conduct contrary to the laws of war. In the circumstances of the case, the aid provided to the *Contras* had the effect of fostering, giving incentives and facilitating the commission of a violation of humanitarian law.

Even if it is disputable whether the duty not to encourage has reached or not the status of a customary obligation, encouragement is undoubtedly counted as a significant contributing factor when a third State participates in the violation of an obligation of international law committed by another State or a non-State actor.

4. Giving Incentives to the Commission and the Perpetuation of a Violation of International Law: the Case of Acquiescence.

Encouragement involves the commission of a positive action from the State which encourages. However, can encouragement or incentive for the commission of a violation

⁵⁸ *Nicaragua case*, note 56 above, p. 130 (para 256).

⁵⁹ C. Chinkin, *Third Parties in International Law*, (Oxford 1993), p. 298.

of international law be induced from silence and inaction from a third party? This question is the object of the last investigation of this chapter. The analysis of the importance of silence and inaction in fostering and encouraging the development and entrenchment of illegal situations requires one to envisage international law not as a set of rules but in an empirical manner, i.e., by analyzing the process of creating rights and obligations in international law.⁶⁰ In such an analysis, the process of acquiescence is central to understanding the influence which States can exercise on the commission and entrenchment of illegal situations.

4.1. Approaching International Law as a Process not As a Set of Rules.

International law should not be seen as a set of prescriptions only, in the same way that learning music is not only about learning how to read a musical score and practice an instrument but is also about experiencing the interactions between the musicians of an orchestra or a smaller ensemble if it is performed collectively, as well as conveying emotions, interpreting a piece, understanding what the arrangement is, etc. In furtherance of that aim, situations which emerge from the international sphere should be viewed outside of the strict legal framework of international third State responsibility offered by the ILC, by giving importance to the way these situations emerge from the international sphere and by looking at the degree of contribution of third States to specific violations of international law.

When writing about the law of the sea, McDougal stated that it was a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation States unilaterally put forward claims of the most diverse and

⁶⁰ R. Higgins, *Problems and Process: International Law and How We Use It*, (Oxford 1994), p. 1.

conflicting character.⁶¹ A similar commentary could be applied to public international law which also has to do with competing claims formulated by its actors, whether they be assertions of rights or promises as well as claims for exceptional circumstances, i.e., claims to depart from international law. Such a claim for exceptionality is expected to be followed by a reaction. In this sense, Judge Higgins stated that international law is a system of normative conduct, that is to say, conduct which is regarded by each actor and by the group as a whole as being obligatory and for which violation carries a price.⁶² The reactions from States to a violation of international law by another State range from a countermeasure by the injured State, a collective or/and institutional response which may involve the use of force, and an adjudication to international justice, among many others. They all constitute means to restore legality but they all also amount to an objection to the acts or omission of the perpetrator as well as a process of shaming the violator of international law, especially when they take the form of a collective response. In international law, reputation has its importance and a bad reputation for violating international law carries a high cost in international politics.⁶³ Therefore, when it is impossible for the injured State to react to the violation of international law and ask for reparation, the absence of objection from third States constitutes a tacit assent to the claim of the responsible State of a departure from international law and a tacit incentive to commit more violations of international law.

⁶¹ M. McDougal, "The Hydrogen Bomb Test and the International Law of the Sea" (1955) 49 *American Journal of International Law* 356-361, p. 357. See also I. McGibbon, "Customary International Law and Acquiescence" (1957) 33 *British Yearbook of International Law* 115-145, p. 116.

⁶² R. Higgins, note 60 above, p. 1.

⁶³ Y. Onuma, "International Law In and With International Politics: The Functions of International Law in International Society" (2003) 14 *EJIL* 105-141, p. 128.

4.2. The Process of Acquiescence.

The statements made in the previous sections come from empirical observations and they are to be deduced by analogy to a concept well-grounded in international law, the notion of acquiescence “which is of the most delicate and of the greatest practical importance”.⁶⁴

Acquiescence has been described by McGibbon as follows:

“Acquiescence takes the form of silence or absence of protest in circumstances which generally call for a positive reaction”.⁶⁵

Acquiescence implies a tacit agreement and the disclaimer of rights. Although for McGibbon, the function of acquiescence may be equated with that of consent,⁶⁶ Byers claims that acquiescence does not constitute consent but rather ambivalence or apathy.⁶⁷ The domains of international law as to which acquiescence applied have been very diverse. The main field of application of the concept of acquiescence has been in territorial disputes.⁶⁸ The concept of acquiescence occupies also a major place in the law of treaties where it acts as an estoppel. Article 45.2 of the 1969 Vienna Convention of the Law of Treaties provides that a State may no longer invoke a ground for invalidating,

⁶⁴ V. D. Degan, *Opposable Situations in International Law*, In M. P. Gonzáles (ed.), *Hacia un nuevo orden internacional y europeo: estudios en homenaje al Profesor Don Manuel Díez de Velasco*, (Madrid 1993), pp. 231-243, p. 240.

⁶⁵ I. McGibbon, “The Scope of Acquiescence in International Law” (1954) 31 *British Yearbook of International Law* 143-186, p. 143.

⁶⁶ *Ibid.*, p. 145.

⁶⁷ M. Byers, *Custom, Power and the Power of Rules*, (1999), p. 106.

⁶⁸ See for instance, *Island of Palmas case (United States v. The Netherlands)*, 2 Reports of International Arbitration Awards (1928) p. 829; *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)*, ICJ Rep. (1951), p. 139; *Minquiers and Ecrehos case (France v. United Kingdom)*, ICJ Rep. (1953), p. 47; *Right of Passage over Indian Territory (Portugal v. India)*, ICJ Rep. (1960), p. 6 and *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Rep. (1962), p. 6.

terminating, withdrawing from or suspending the operation of a treaty if, by reason of its conduct, it must be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation. This is the case because subsequent practice in the application of the treaty counts as a means for its interpretation according to Article 31.3.c. However, from a theoretical point of view, it is difficult to assign the limits of the field of acquiescence as any rights of States can be affected by the phenomenon of acquiescence.⁶⁹

Acquiescence proceeds from the active or passive behaviour of a State. In the latter case, the silence or the failure to protest has to be prolonged in time, and the reaction to the consolidation of a right must be expressed after the elapse of a prolonged period of time. Acquiescence also necessarily entails knowledge of the facts by the acquiescing State.⁷⁰

Acquiescence by a State or States whose legal rights are at stake in the continuous assertion of a right by another State which endanger the legal rights of the other State(s) constitutes an admission of this claim. In this circumstance, the acquiescence in unilateral acts of others in any case creates opposable situations to the acquiescing State(s). In the *Anglo-Norwegian Fisheries case*, the ICJ decided that the system of straight baselines for measuring the breadth of the zone of exclusive fisheries rights applied by Norway along its Northern coast was in conformity with international law and had become opposable or constituted a legal claim against the United Kingdom because:

“The notoriety of the facts, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in

⁶⁹ J. Barale, “L’acquiescement dans la jurisprudence internationale” (1965) *Annuaire Français de Droit International* 389-427, pp. 406-407.

⁷⁰ *Ibid.*, pp. 393-406.

the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom".⁷¹

An application of the same principle is to be found in the case of the *Temple of Preah Vihear*.⁷² In this case, the International Court of Justice decided that Thailand (previously Siam) could not deny the validity of a 1907 Map, known as Annex 1, which was drawn up from a previous Franco-Siamese agreement, concerning the Temple of Preah Vihear, even if the map contained a substantial error. The attitude of Thailand, and particularly its failure to react to the practice which derived from the map, precluded her from objecting to the map on future occasions. As stated by the Court in one of the most important passages of the judgment:

"It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgement of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgement by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so either then or for many years, and then must be held to have acquiesced."⁷³

⁷¹ *Anglo-Norwegian Fisheries case*, note 68 above, p. 139.

⁷² *Case Concerning the Temple of Preah Vihear*, note 68 above, p. 6.

⁷³ *Ibid.*, p. 23.

The process of acquiescence is relevant to the analysis of the incentives which States not injured by a violation of international law can provide to the violator in order to avoid or facilitate the perpetuation of other violations of international law. What matters is not that through the passage of time and the acquiescence of third parties a practice becomes legal and thus opposable but the fact that the process of the enforcement of a claim has been permitted through the general tolerance and apathy of another or other States. It is the attitude of third States which has allowed the perpetuation and then led to the entrenchment of a claim. A new right, especially if the violation is one of a peremptory norm of international law, cannot be created. Nevertheless, some forms of continuous illegalities can be perpetuated to the extent that it is impossible to reverse their effects. The notion of *fait accompli* as formulated by the Court in relation to the construction of the wall and referred to in the previous chapter plays a crucial role in the definition of obligations of non-injured States.⁷⁴ With the passage of time combined with the apathy or acquiescence of the *interested* States, the situation created pursuant to the violation of international law might become irreversible. In this case, the illegality might not create rights for the violator but give rise to the creation of a legitimate claim when the effects of the violation are irreversible on the ground.

The process of acquiescence is very similar to that of recognition. As put by Brownlie, “the failure to protest, the pattern generally described as acquiescence, and admission against interest (for example in the forms of maps), are all juridical fellows with the group of questions referred to loosely as, ‘the problem of recognition’”.⁷⁵ Recognition can be the outcome of acquiescence. After the passage of time, a party that has acquiesced in the claims of a right can give *de facto* legal substance to this new claim, thus

⁷⁴ *Advisory Opinion of the Legality of the Wall*, p. 184 (para. 121).

⁷⁵ I. Brownlie, “Recognition in Theory and Practice” (1982) 53 *British Yearbook of International Law* 197-211, p. 201. See also, P. Chan, “Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited” (2004) 3 *Chinese Journal of International Law* 421-439, pp. 422-425.

recognising it as legal. However, acquiescence does not amount to recognition necessarily. There is a difference of degree between the two –the same as there is a difference of degree between positive encouragement and aid and assistance. By acquiescing, an international actor accepts a claim as legal but does not necessarily recognise it as such. It, thus, does not receive the “fruits” of the illegal act in its own legal system as if it had recognised it. However, its prolonged apathy to the claims of the other State helps to entrench this latter claim.

5. Conclusion.

The notion of obligation *erga omnes*, peremptory norms and previously crimes of States have characterised all States as constructively injured, and resulted in the fading of the notion of third party in the traditional sense and its replacement by the ideal of the international community.⁷⁶ The International Law Commission in this respect has adopted a framework of responsibility where the nature of the obligations violated determines the obligations and rights of non-injured States. In the case of an international crime and now a violation of an obligation arising from a peremptory norm of international law, *all* States are considered *ipso facto* injured on an equal basis with all the consequences that this entails in terms of reparation, countermeasures and so forth.⁷⁷ The obligations of States formulated by the ILC find their *raison d'être* in the restoration and the preservation of the international legal system. If implemented together, the obligation of non-recognition and the obligation to cooperate to put an end to a violation of an obligation arising from a peremptory norm of international law are efficient means to restore legality.

⁷⁶ C. Chinkin, note 59 above, p. 355.

⁷⁷ A. Gattini, “A Return Ticket to ‘Communautarisme’, Please” (2002) 13 EJIL 1181-1199, p. 1182.

However, apart from being negative obligations, aid and assistance and recognition are also two “attitudes” of States that can contribute to a violation of an international obligation or to the perpetuation of this violation. The present chapter has demonstrated that aside from recognition and aid and assistance, there exists a wide range of possible contributions for a State to the violation of international law by another State. Only three of them have acquired the status of an obligation in international law: the obligation not to aid and assist, the obligation not to recognise, and the obligation of due diligence when it entails the responsible State preventing the commission of a violation of international law on its own territory. In all the cases presented in this chapter, the degree of possible contribution depends upon whether the State is close to the “sphere of the violation”. In the case of arms trade and arms control, the contractual ties between the exporting State and the importing State is the connection between the exporting State and the sphere of violations of international law and thus places on it a duty of due diligence. In the *Soering* and *non-refoulement* cases, it is through the act of extradition and the “refoulement”. In the *Dutchbat* case, the proximity to the sphere of the violation of international law is the actual presence on the place where the massacre occurred. In the case of acquiescence, it is the legal interest which a State has in the situation and the risk which it faces of irreversible loss by the prolonged claim of another State which is of significance. This proximity to the violation of international law entails the expectation of a response to this violation or this claim to depart from international law. The formulation of a response to this claim is crucial for preventing its entrenchment and perpetuation. A State can be careless when faced with such a claim and assists it without intending to. It can endorse the claim and then recognise it. It can also endorse the claim to the extent that it provides the violator with aid and assistance for prolonging the violation. A State can protest the claim. It can employ means to stop the claim from becoming entrenched.

The European Union has set as one its objectives of its external relations the promotion of international law, humanitarian law and human rights. *A priori*, this gives the impression that the EU intends upon being vigilant in counteracting any claims of the right to depart from the rules of international law and would act as its guarantor. The following chapter offers an overview of this “ethical” aspect of EU external relations.

Chapter Four
The Objective of the European Union to Uphold International Law, Human Rights and Humanitarian Law and the Implementation of this “Ethical Policy” towards Israel and the Palestinians.

The European continent has achieved the longest period of peace and stability in its whole history. The “European project” is usually seen as the principal reason of this success. In the often-cited words of Robert Schuman, Europe has accomplished the historic task of making wars between its nations “not merely unthinkable but materially impossible”.¹ In general, the European political elite sees Europe as a *New Europe* which has learned from the experiences of its endless wars and which is freed from its past of internal violence amongst its peoples and against its minorities. In the historical narrative of the European Union, the Europeans have achieved the unthinkable, something that was a dream in the minds of humanistic philosophers and visionaries just a century ago – as typified by the peaceful “United States of Europe” imagined by Victor Hugo.² Europe has entered a new era which is perceived as ending hatred and rivalry. New structures have been created in Western Europe, based on shared interests and founded upon treaties guaranteeing the rule of law and equality between all countries and thus creating the conditions for a long and lasting peace among the European States.³ With the Treaty of Amsterdam, the member States of the European Union enshrined in the “constitutional instruments of the Union”⁴ the elements contributing to its stability

¹ See for instance the speech of José Manuel Barroso, President of the European Commission, *Fifty years of Europe: Honouring the Past, Inspiring the Future*, 23 March 2007, Italian Senate, Rome.

² See “Europe in 12 Lessons”, http://europa.eu/abc/12lessons/lesson_1/index_en.htm (last visited 15 December 2008).

³ *Ibid.*

⁴ Opinion 1/91 [1993] ECR I-01061. See also P. Manin, *L'influence du droit international sur la jurisprudence communautaire Droit international and droit communautaire: perspectives actuelles*, (Université Montesquieu - Bordeaux IV 2000), pp. 153-168, p. 160

which are the foundations of its own identity: freedom, democracy, respect for human rights and the rule of law.⁵

The European Union believes that its model can be applied to the rest of the world. It perceives itself as a model by means of which Europe can show internationally that it has broken away from its tradition of Euro-centrism, colonialism and imperialism whilst, at the same time, it is promoting a “counter-tradition of integrity and virtue” that is European in character.⁶ Europe sees itself as a force for good in the world, promoting its own values and the model of its own success. The respect for the rule of law and human rights which guides its internal policy is viewed in the sphere of the external actions of the EU as propagating respect and the promotion of international law as well as promotion of human rights and international humanitarian law. These elements are the essential components and objectives of the external policy of Europe.

This attachment to the respect of international law, human rights and humanitarian law is therefore inevitably to be found in EU’s declarative policy on the Israeli-Palestinian conflict. Furthermore, at first sight, notwithstanding their European character, the EU’s objectives to uphold respect for the rules of international law, human rights and humanitarian law seems to parallel the exercise of a scrutiny over the likelihood of the commission of a violation of international law by other States, the obligation to refrain from provoking a violation of international law and the obligation not to give incentives which lead to the commission of a violation of international law. This point is

⁵ Article 6.1 of the European Union: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. Article 2 of the Lisbon Treaty states: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

⁶ A. Williams, *EU Human Rights Policy. A Study in Irony*, (Oxford 2004), p. 199.

highlighted when the chapter examines the content of the obligations set out in the human rights clause of the EU-Israel Association Agreement and EC-PLO Interim Association Agreement.

This present chapter offers an overview of the European objective to promote international law (I). It contends that the “international law” to which the EU is referring to is international law viewed from its own perspective (II). It describes how this objective to promote international law has been devoted to the development of human rights external policy and more recently to the promotion of humanitarian law (III). It finally describes how the objective to promote international law, human rights and humanitarian law is interpreted vis-à-vis the Israeli-Palestinian issue by a belief that compliance with universal human rights standards and humanitarian law is a central element for the resolution of the Israeli Palestinian issue and by the inclusion of a human rights clause in the EU-Israel and EC-PLO Interim Association Agreement (IV).

1. **The EU and the Promotion of International Law: Europe, a Force for Good in the World.**

On 12 December 2003, the European Council published the European Security Strategy Instrument (ESS) which identifies the different new forms of threats posed to Europe in the post-Cold war context and details the strategies to be developed to respond to this new security environment.⁷ The ESS is not a binding document but an expression of Europe’s aspirations on how it should meet these new challenges. In this sense, the ESS is the European counterpart of the US National Security Strategy issued by the White

⁷ *A Secure Europe in a Better World, European Security Strategy Document*, 12 December 2003, Brussels.

House in 2002.⁸ It offers a valuable insight on Europe's international identity and vision of today's world.⁹

The ESS devotes two pages to the dependence of Europe's security and prosperity on an effective multilateral system. It states:

“The development of a stronger international society, well functioning international institutions and a rule-based international order is our objective. *We are committed to upholding and developing International Law.* The fundamental framework for international relations is the United Nations”.¹⁰

The upholding of the rules of international law has been reiterated in the Constitution for Europe (Article I-3, para. 4) and in the Treaty of Lisbon. Although it is not clear whether the treaty of Lisbon will enter into force or not, *most of its provisions embody* previous practice of EU institutions.

Article 21 of the treaty of Lisbon states:

1. “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world:

⁸ *National Security Strategy of the United States of America*, White House, September 2002. Hereinafter “NSS”.

⁹ For a detailed analysis and critics of the ESS: A. Bailes, *The European Security Strategy: An Evolutionary History* (SIPRI policy paper N. 10), (Stockholm 2005). Available at <http://books.sipri.org/files/PP/SIPRI10.pdf> (last visited 15 December 2008); S. Biscop, *The European Strategy: A Global Agenda For Positive Power*, (Aldershot, Burlington 2005); A. Joje, “The European Security Strategy: A Critical Appraisal” (2005) 10 *European Foreign Affairs Review* 117-133; For a comparison between the ESS and the US NSS and G. Quille, “The European Security Strategy: Framework for EU Security Interests” (2004) 11 *International Peacekeeping* 422-438.

¹⁰ Emphasis added. ESS, p. 9.

democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

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

The upholding of international rules in the conduct of its external relations is a feature of Europe’s identity on the international sphere. The EU sees itself as a positive force in world politics. This identity has been described as a “normative power”. European officials tend to see Europe as a “force for good” whose aims are linked to universal goods rather than being narrowly defined self-interests and which does not rely on military power to set the agenda and standards of international politics.¹¹ The EU realizes its objectives in the framework of its external relations by defining what should be accepted as “normative standards” which are determined by its constitutional norms: democracy, rule of law, and respect for human rights and fundamental freedoms.¹² The EU is founded on these norms and hence it has their consolidation as its foreign and

¹¹ See Iain Manners’ seminal article on the topic: I. Manners, “Normative Power Europe: A Contradiction in Terms?” (2002) 40 *Journal of Common Market Studies* 235-258. For a response and critics of the article: T. Diez, “Constructing the Self and Changing Others: Reconsidering ‘Normative Power Europe’” (2005) 33 *Millennium Journal of International Studies* 613-636. For an analysis of the relationship between the EU self conception of a normative power and Europe’s ability to transform conflicts, see T. Diez and M. Pace, *Normative Power Europe and Conflict Transformation*, 6th *Pan European Conference on International Relations*, (Turin 2007). Available at <http://archive.sgir.eu/uploads/Diez-Normative%20Power%20Europe%20and%20Conflict%20Transformation%20SGIR%2020070830.pdf> (last visited 15 December 2008).

¹² I. Manners, *Ibid.*, p. 241.

development policy objectives. As a consequence of Europe's claim to be a force for good, the self-representation of the EU as a normative power is facilitated and guided by the norms of international law which are supposed to set universal standards of behaviour and carry universal values.¹³ In a similar line, in the oft-cited article "Power and Weakness", Kagan describes Europe as turning away from power, or "moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation". For Kagan:

"[Europe is entering] ... a post-historical paradise of peace and relative prosperity, the realization of Kant's 'Perpetual Peace'. Hence, Europeans generally favour peaceful responses to problems, preferring negotiation, diplomacy, and persuasion to coercion. They are quicker to appeal to international law, international conventions, and international opinion to adjudicate disputes. They try to use commercial and economic ties to bind nations together. They often emphasize process over result, believing that ultimately process can become substance".¹⁴

1.1. European International Law.

If the upholding of rules of international law has become a central element of the EU's external policy, international law in this respect is a European perception of universal values and a guarantee for respectability on the international plane. It is therefore, European international law. On a more formal aspect, this point is exemplified by

¹³ M. Pace, "The Construction of EU Normative Power" (2007) 45 *Journal of Common Market Studies* 1041-1064, p. 1051.

¹⁴ R. Kagan, "Power and Weakness" (2002) 113 *Policy Review* 1-21, pp. 1-2 and 6. Kagan controversially asserts in this article that if Europeans oppose unilateralism it is in part because they have no capacity for unilateralism whereas when Europe was "powerful" on the international scene, it would have recourse to unilateralism and violence.

looking at the invocation and implementation of international law in the case-law of the European Court of Justice and the Court of First Instance. International law is always subject to the constraints of European law. In this case, it is also European international law or European law with international origins.

1.1.1. International Law and the European Union: the Language of Universality.

One can easily acknowledge the natural predisposition of Europe to promote the respect of international law when its own *modus operandi* is based on collective-law making and respect for supranational laws. The legal constituencies of the Member States of the EU possess constraining supranational elements through their obedience to the EC legal order as well as their subscription to the binding nature of the decisions of the European Court of Human Rights.¹⁵

However, some might say also that it is easier for Europe to uphold rules of international law when European States have written most of them themselves and have retained a massive influence on the international law making process throughout their history.¹⁶ This statement echoes Koskenniemi's argument which contends that, when Europe speaks the language of universal international law, international law is then seen by Europe at the image of its own domestic legalism: multilateral treaties as legislation, international courts as an independent judiciary and the Security Council as the police. In turn, international law itself is merely a European language which is incapable of

¹⁵ E. Guild, *Security and European Human Rights: Protecting Individual Rights in Times of Exception and Military Actions*, (2007), p. 56.

¹⁶ A. Bayles, *Beyond Europe, New Means, New Resources, New Faces seminar on ESDP Seven Years On: Back to the Future*, (Turin 2007), unpublished.

expressing something universal.¹⁷ According to Koskenniemi, for a long time, Europe's use of international law was implemented from its position as an overwhelming power. Today, for Koskenniemi, Europe no longer speaks from such a position but it still speaks the language of international law.¹⁸ Whether one believes or not that Europe is not anymore in a position of being an "overwhelming power", one cannot but acknowledge that Europe is still endowed with a sense of responsibility to promote its values across the globe.¹⁹ The articles of the treaty mentioned above are illustrative of the new mission Europe has set for itself and which is directed to the rest of the world. The use of international law gives Europe a sense of respectability and a guarantee to the rest of the world that its ambitions are devoid of hegemonic objectives.

1.1.2. International Law in the Case-Law of the European Court of Justice or International Law Subject to the Constraints of European Law.

Aside from the rhetoric of international law in the conduct of the EU's external relations, the case-law of the European Court of Justice (ECJ) is exemplary of the fact that international law referred to by the European institutions is international law with European origins. The European Court of Justice has referred in many instances to international law and has implemented some of its principles and rules. However, when the judges of Luxembourg apply or refer to international law, it is only because the

¹⁷ M. Koskenniemi, "International Law in Europe: Between Tradition and Renewal" (2005) 16 EJIL 113-124, pp. 115 and 117. For a counterargument, to Koskenniemi's thesis and on the universal nature of international law: P.-M. Dupuy, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi" (2005) 16 EJIL 137-141; O. Gerstenberg, "What International Law Should (Not) Become. A Comment on Koskenniemi" (2005) 16 EJIL 130-136 and A. Orakhelashvili, "The Idea of European International Law" (2006) 17 EJIL 315-347.

¹⁸ M. Koskenniemi, *Ibid.*, p. 117.

¹⁹ B. Delcourt, La séduction du concept d'impérialisme libéral auprès des élites européennes : vers une redéfinition de la politique étrangère de l'Union européenne, *Impérialisme et droit international en Europe et aux Etats-Unis*, (Société de législation comparée, UMR de droit comparé de Paris 2007), pp. 73-114.

treaties from which they gain their authority and jurisdiction allow them to do so. They do so as judges of European law. Therefore, when they implement or refer to international law, it is European law with international origins which guide their judgement.

The European Court of Justice, in its early case-law, emphasised the autonomy of European law vis-à-vis international law. In the foundational decision of *Costa v. ENEL*²⁰, the ECJ qualified the European Communities as constituting a separate legal system integrated within the legal systems of the member States. In doing so, the Court tried to ensure the protection of the autonomy of European Community law both vis-à-vis national law and international law. It has refused to let the status of Community law be determined by the sovereign decision of individual member States courts, as would have been the case under a classic international law approach.²¹ However, given the increase of external actions of the European Communities, international law could not be ignored. The ECJ has thus, in its further case-law, integrated rules of international law and detailed the rules which govern the relationships between international law and Community Law. It stated expressly that treaties which bind the Communities are superior to secondary Community legislation.²² More importantly, the Court expressly ruled that the Community must respect international law in the exercise of its power.²³ The Tribunal of First Instance of the European Communities referred to the principle of good faith codified by Article 18 of the First Vienna Convention and qualified it as “a

²⁰ Case 6/64, *Costa v. Enel*, [1964] ECR 1141.

²¹ C. Timmermans, “The EU and Public International Law” (1999) 4 *European Foreign Affairs Review* 181-194, pp. 182-183.

²² 21-24/72 *International Fruit Company* [1972] ECR 1219 and 181/73 *Haegeman* [1974] ECR 449.

²³ Case C-286/90 *Poulsen* [1992] ECR I-6048. See also Case C-162/96 *Racke* [1998] ECR I-3655.

rule of customary international law whose existence has been recognised by the International Court of Justice and is therefore binding on the Community”.²⁴

However, even if European judges are inclined to apply and refer to rules of customary international law and the general principles of international law as an external source of European law, they remain subsidiary to the principles and rules of Community law.²⁵ International law cannot take precedence over the provisions of the EU’s *constitutional* treaty. As stated by Advocate General Poiares Maduro in his opinion in the *Kadi* case, the ECJ, like the Tribunal of First Instance, determines the effect of international obligations within the Community legal order by reference to conditions set by Community law.²⁶ In this respect, the ECJ has verified, on occasion, whether acts adopted by the Community for the purpose of giving municipal effect to international commitments were in compliance with general principles of Community law.²⁷ The Advocate General concluded that the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.²⁸ Therefore, the integration of international law into Community law is only possible to the extent that the prescription of community law allows this integration. As stated by Gautron and Grard, the use of external sources of Community law is

²⁴ Case T-115/94 *Opel Austria v. Council* [1997] ECR II-39.

²⁵ J.-C. Gautron and L. Grard, *Le droit international dans la construction de l'Union européenne, Droit international and droit communautaire, perspectives actuelles*, (Université Montesquieu - Bordeaux IV 2000) pp. 11-152, p. 118.

²⁶ Opinion of Advocate General Poiares Maduro delivered on 16 January 2008, Case C-402/05 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, para. 23, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05> (last visited 15 December 2008).

²⁷ Case C-122/95 *Germany v. Council* [1998] ECR I-973.

²⁸ Opinion of Advocate General Poiares Maduro, note 26 above, para. 23.

dependent on their adequacy or coherence with the exigencies of the EU structure and objectives.²⁹

The European Court of Justice followed the Advocate General's opinion in its judgement of 3 of September 2008. It set aside the judgments of the Court of First Instance of the European Communities of 21 September 2005 in *Yusuf and Kadi*³⁰ which decided that according to Article 103 of the UN Charter which is binding upon the member States of the EU³¹, it was barred from reviewing the compatibility of EC regulation giving effect to Security resolutions with the applicants' fundamental rights as protected by the EC legal order. The Court of First Instance however admitted that Article 103 could not override the operations of norms with peremptory status. In this landmark judgement on the relationship between EU law and international law, the European Court of Justice ruled that the obligations imposed by an international legal instrument cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, "that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty".³² Therefore, the Court decided that the lawfulness of any legislation adopted by the Community institutions in order to give effect to a Security Council resolution remains subject, to full review by the Court, regardless of its origin. Any judicial review

²⁹ J.-C. Gautron and L. Grard, note 25 above, p. 25.

³⁰ Case T-306/01 *Abmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2005] ECR II-3533 and case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, [2005] ECR II-3649.

³¹ Article 103 of the UN Charter: "In the event of a conflict between the obligations of the member States of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

³² Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, para. 285. (Not yet published, available at <http://eur-lex.europa.eu/Notice.do?val=478012:cs&lang=ro&list=463008:cp,478012:cs,463008:cs.&pos=2&page=1&nbl=3&pgs=10&hwords=&checktext=&checkbox=&visu=> (last visited 15 December 2008).

exercised by the Community judicature would not entail any challenge to the primacy of that resolution in international law.³³

1.2 The Promotion of Humanitarian Law and Human Rights in EU's External Policy.

The promotion of international law in the external actions of the European Union finds one of its expressions in its reliance on international humanitarian law in its declarative policy but above all in the development of its external human rights policy. This external human rights policy is the major “ethical” aspect of EU’s diplomacy and external relations. Initiated in the beginning of the 1990s, the promotion of human rights supposedly encompasses all the aspects of the EU external actions. It is only recently that the EU incorporated international humanitarian law into its declaratory policy independently from human rights.

1.2.1. The EU Human Rights External Policy.

The declarations of the European Community, under the aegis of the European Political Cooperation, have reiterated that the EC commitment to human rights and democracy is a principle which guides its foreign policy.³⁴ The promotion of human rights as an objective of the external policy of EU was adopted by the beginning of the 1990s.³⁵ In 1992, human rights were placed at heart of the new Common and Foreign Security

³³ *Ibid.* para. 288.

³⁴ For an overview of the place of human rights in the European Political Cooperation, see T. King, “Human Rights in European Foreign Policy: Success or Failure of Post-Modern Diplomacy?” (1999) 10 *EJIL* 313-337, pp. 316-324.

³⁵ Conclusion of the Luxembourg European Council, 28 and 29 June 1991.

Policy in the Maastricht treaty.³⁶ For some authors, the collapse of the communist block and the triumph of liberal democracy set the scene for a new world order where human rights had a major role to play.³⁷ The language of human rights had become the guarantee for authentication of any political institution. The objective of the promotion of human rights was to offer a seal for credibility and ethos for the European Union on the international scene.³⁸ Furthermore, the promotion of human rights and democracy is seen from Europe's point of view as a moral obligation. For European decision-makers the universality of human rights is a fact which has become unquestionable.³⁹ The member States of the EU believe they are in a position to spread and promote these values to the rest of the world. In this respect, the 2001 communication of the Commission on the promotion of human rights and democratisation stated:

“The European Union is well placed to promote democracy and human rights. It is continually seeking to improve its own democratic governance [...]. Uniquely amongst international actors, all fifteen Member States of the Union are democracies espousing the same Treaty-based principles in their internal and external policies. This gives the EU substantial political and moral weight”.⁴⁰

³⁶ Article J.1.2. provided that one of the objectives of the European Union is “to develop and consolidate democracy, the rule of law, and respect for human rights and fundamental freedoms”.

³⁷ T. King, “Human Rights in European Foreign Policy: Success or Failure of Post-Modern Diplomacy?” (1999) 10 EJIL 313-337, p. 324 and K. Smith, *The European Union, Human Rights and Relations with Third Countries: “Foreign Policy” with an Ethical Dimension*, In M. Light and K. Smith (eds.), *Ethics and Foreign Policy*, (Cambridge 2001), pp. 185-203, pp. 187-188.

³⁸ A. Williams, note 6 above, p. 135.

³⁹ See World Conference on Human Rights, Vienna 14-25 June 1993. Vienna Declaration and Programme of Action, Para 1.1 “The universal nature of these rights and freedoms is beyond question”. The universalist approach to human rights is supported in many academic circles. See for instance, J. Donnelly, *Universal Human Rights in Theory and Practice*, (New York 2003). For “relativist” human rights perspective, see among others: M. Mutua, “Savages, Victims, and Saviours: the Metaphor of Human Rights” (2001) 42 *Harvard International Law Journal*, p. 201-245.

⁴⁰ “The European Union’s Role in Promoting Human Rights and Democratization in Third Countries”, Commission Communication, 8 May 2001 COM (2001) 252 final, p. 3.

Hence, the insertion of human rights into foreign relations has been understood as an assertion of public mind and public morals into a sphere once reserved for diplomacy alone.⁴¹ Naturally, the insertion of these objectives did not escape the accusation of being the imposition of a universal view when it is the product of Western domination and of being an emanation of neo-colonialism.⁴² Be that as it may, the EU human rights external policy is the quintessence of Europe's ambition to act as a force for good in the world.

1.2.1.1. Human Rights, a Central Element of the EU External Policy.

Human rights have become a *mainstay* of EU external policy which is deployed by several means.⁴³ Concretely, the EU adopted the commitment to mainstream human rights in all its cooperation and assistance programmes but also to ensure that in the formulation of other aspects of its external policies, such as for instance, in the domain of justice and home affairs, immigration and asylum and the environment, any negative effect on human rights and democratisation is always avoided. Wherever possible, policies are adapted to have a positive human rights impact.⁴⁴ Furthermore, the EU has defined a series of priorities for action in several guidelines in areas on which the EU places particular importance. These guidelines concern the fight against the death penalty, the fight against torture and other cruel, inhuman or degrading treatment or punishment,

⁴¹ E. Paasivirta, Human Rights, Diplomacy and Sanctions: Aspects to "Human Rights Clauses" in the External Agreements of the European Union, In J. Klabbers and J. Petman (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*, (Leiden 2003), pp. 155-180, p. 169.

⁴² M. Koskenniemi, note 17 above, p. 115 and A. Williams, note 6 above, p. 135 and 200.

⁴³ B. Brandter and A. Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 EJJIL 468-490, p. 472.

⁴⁴ "The European Union's Role in Promoting Human Rights and Democratisation", COM 2001, p. 7-8. "Commission Staff Working Document, Implementation of the Commission Communication on the EU's Role in Promoting Human Rights and Democratisation in Third Countries", 30 July 2004, SEC(2004) 1041, p. 3-12 and Council conclusions on the European Union's role in promoting Human Rights & Democratisation in third countries, Luxembourg, 25 June 2001.

support for children in armed conflicts, human rights defenders and the rights of the child.⁴⁵

The principal instruments deployed for the promotion of human rights and democracy are instruments of traditional diplomacy and foreign policy, such as declarations, démarches and political dialogue under the Common Foreign and Security Policy. Member States of the EU also intervene within international organisations such as the UN General Assembly, the UN Human Rights Council, Council of Europe and the Organisation for Cooperation and Security in Europe.⁴⁶ The adoption of resolutions is carried out after close coordination between the member States of the EU. Furthermore, EU diplomacy has initiated regular and institutionalised dialogues exclusively on human rights with China and Iran where it expresses its concerns on specific human rights issues and where interlocutors seek to bring about practical steps to improve the human rights situation on the ground.⁴⁷ Finally, civil society and human rights defenders based in its partner countries are considered by the EU as major actors in the implementation of its human rights policy. The EU supports financially the actions and projects of human rights organisations in its partner countries since 1996 through the European Instrument for Democracy and Human Rights (EIDHR) -previously called the European Initiative for Democracy and Human Rights until 2006.

⁴⁵ EU Human Rights Guidelines. Available at http://ec.europa.eu/external_relations/human_rights/guidelines/index.htm (last visited 15 December 2008).

⁴⁶ "The External Dimension of the EU's Human Rights Policy: From Rome to Maastricht and Beyond", Commission Communication, 22 November 1995 COM (95) 567, p. 3-5.

⁴⁷ EU Human Rights Report 2007, pp. 21-22. Available at http://ec.europa.eu/external_relations/human_rights/doc/report07_en.pdf (last visited 15 December 2008).

1.2.1.2. The Human Rights Clause.

The major instrument of the EU human rights external policy is the human rights clause which has been inserted systematically in all the cooperation and association agreements which the European Union has signed since 1995.

- Merging Human Rights and Trade.

The insertion of the human rights clause in all trade and cooperation agreement results in the merging of two different worlds: human rights and trade.⁴⁸ The human rights clause is the principal basis upon which dialogue is conducted with third countries. It is said to be an essential element of each individual agreement.

The origin of the human rights clause is to be found in the Balkan crisis in the beginning of the 1990s. In 1991, the EU found itself in the uncomfortable position of having to suspend its agreement with Yugoslavia in response to grave human rights violations in spite of the fact that the Vienna Convention on the Law of Treaties does not provide for the automatic termination or suspension of treaties purely on the basis of human rights violations. It relied however on the Vienna Convention articles on termination based upon “fundamental change of circumstance” (Article 62) and invoked UNSC resolution 713 (1991).⁴⁹ The objective of the insertion of the human rights clause therefore was to offer a proper legal basis for suspending a cooperation agreement in the case of violation of human rights. This was confirmed by the European Court of Justice in *Portugal v. Council* which ruled that an important function of the clause is to secure to right to

⁴⁸ E. Paasivirta, note 41 above, p. 159.

⁴⁹ Brandter and Rosas (1998), note 43 above, p. 474, note 24 and J. Rideau, Le concept d’association dans les accords passés par la Communauté : essai de clarification, *Actes du colloque organisé par le Centre de Droit Européen et Comparé*, (Université René Descartes – Paris V 1999), pp. 139-195, p. 157.

suspend or terminate an agreement if the other party to the agreement has not respected human rights.⁵⁰

Apart from providing a basis for suspending its Association Agreements, the human rights clause allows the EU to raise issues of human rights violations with its partners without this amounting to an inadmissible interference in the internal affairs of the State concerned.⁵¹ Nonetheless, the initiation of bilateral dialogue on human rights issues based on the human rights clause reflects parameters of power between the EU and its partners. Third countries are less likely to refuse to discuss human rights-related issues and retaliate against a Union that has considerable economic power.⁵² As put by Fierro, the insertion of a human rights clause is an “EC initiative for internal use” – in the sense that given the imbalance of power between the EU and its partners it can only be activated by the EU institutions.⁵³

However, the Commission does not envisage it this way:

“The proposed system [the human rights clause] will promote positive actions, with human rights and democratic principles included as an ‘essential element’ of the agreements, a subject of shared interest and an integral part of the dialogue between the parties. This approach should be seen not as imposing conditions, but in the spirit of a joint undertaking to respect and promote universal values”.⁵⁴

⁵⁰ Case C-298/94 *Portugal v. Council* [1996] ECR I-6177, para. 27.

⁵¹ Nonetheless this assertion has been criticised by several countries and notably Mexico which rejected the inclusion of the clause in its trade agreement with the EC. See E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague 2003), pp. 304-305.

⁵² E. Paasivirta, note 41 above, pp. 170-171 and T. King, note 37 above, p. 336.

⁵³ E. Fierro, note 51 above, p. 379.

⁵⁴ “The External Dimension of the EU's Human Rights Policy” COM (1995), p. 11.

- **The Structure of the Human Rights Clause.**

The human rights clause is actually an aggregation of different clauses in the Association Agreement which are as follows:

- The “essential element” clause which states that respect for the principles of human rights and democracy are essential element of the Agreement. The point of reference is the Universal Declaration of Human Rights proclaimed by the UN General Assembly in 1948.⁵⁵
- The “non-execution” clause which provides that “appropriate measures” may be taken in cases of a failure to fulfil the obligations in the Agreement, following consultation with the other party.
- A provision defining these special cases and confirming that in all cases the “appropriate measures” must be “taken in accordance with international law”.⁵⁶

Therefore, by a combined application of these three provisions clauses, the EU is able to suspend the Association Agreement in case of a violation of human rights by its partner. Nevertheless, the language used in the non-execution clause encourages the parties to adopt “measures that least disturb the functioning of the Agreement” in order to avoid a full suspension or termination.

⁵⁵ B. Brandter and A. Rosas, note 43 above, p. 475.

⁵⁶ On a detailed analysis of the clause see L. Bartels, *A Legal Analysis of Human Rights Clauses in the EU's Euro-Mediterranean Associations Agreements, Economic and Social Rights in the Euro-Mediterranean Area and the Impact of the Euro-Mediterranean Free Trade Area*, (European University Institute, Florence 2004). See also D.-C. Horng “The Human Rights Clause in the European Union’s External Trade and Development Agreements” (2003) 9 *European Law Journal* 677-701, p. 679.

- **A Basis for Dialogue.**

Although the suspension of the agreement or the financial assistance involved is possible in theory in case of a breach of principles of human rights and democratic principles by a partner country, the EU has had recourse to such measures only in exceptional circumstances. So far, most of the time, cases of suspension have been directed to ACP countries (African-Caribbean-Pacific) and this only when flagrant disregard of democratic principles and the rule of law have occurred, such as a *coup d'état* or electoral irregularities.⁵⁷ Contrary to ongoing violations of human rights, *coups* and electoral frauds are a clear step back from the situation which existed before and the cost factors for the EU in taking the decision to suspend its aid or agreements is very low.⁵⁸ In general, the EU is very reluctant to impose negative measures and sanctions. Most of the time commercial interests are at stake and individual member States have their own sphere of influence. Furthermore, such measures might harm those States which need the aid most and generate instability. For this latter reason, there is a general feeling of scepticism about the effectiveness of sanctions.⁵⁹ As a consequence, positive measures and dialogue are preferred to sanctions. Riedel and Will have argued that the human rights clause has lost its point if it has to be applied by way of treaty suspension⁶⁰ and this theme is actually recurrent in EU official documents. For instance, the 2001 communication of the Commission on the European Union's Role in Promoting Human Rights and Democratisation in Third Countries states:

⁵⁷ A. Paasivirta, note 41 above, p. 173 and E. Fierro, note 51 above, p. 309-310.

⁵⁸ E. Paasivirta, *Ibid.*

⁵⁹ K. Smith, "The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?" (1998) *European Foreign Affairs Review* 253-274, p. 272-273 and Karen Smith, note 37 above, p. 196.

⁶⁰ E. Riedel and M. Will, Human Rights Clause and External Agreements of the European Union, In P. Alston (ed.), *The European Union and Human Rights*, (1999), pp. 721-754, p. 743.

“The most effective way of achieving change is therefore a positive and constructive partnership with governments, based on dialogue, support and encouragement. This should aim to improve mutual understanding and respect, and promote sustainable reform [...]. All avenues for progress are explored before the EU resorts to sanctions. [...] In many cases, the basis for a dialogue on human rights and democracy is the ‘essential elements’ clause included in all third country Community agreements since 1992”.⁶¹

Furthermore, as will be detailed in the next chapter, the frameworks of external relations of the EU, the Euromed Partnership and the European Neighbourhood Policy also contain strong human rights components aiming at favouring dialogue based on human rights and the promotion of respect of human rights and democratic principles.⁶²

1.2.2. The Growing Concern for the Respect of Rules of International Humanitarian Law.

The progressive inclusion of humanitarian law in the declaratory policy of the European Union dates from the beginning of the 1990s. It started to develop in the context of the first Gulf war⁶³ and the Balkans crisis.⁶⁴ This late reference to this branch of law can be

⁶¹ “The principal rationale for the clause is to form a positive basis for advancing human rights in third countries through dialogue and persuasion. In other words, the preference is to use positive action rather than penalties” in *Furthering Democracy and Human Rights Across the Globe*. European Communities, 2007, p. 9. See also the specific EU guidelines on Human Rights Dialogue “Guidelines on Human Rights Dialogue”, Annex 15 to the EU Annual Report on Human Rights 2000, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/2000en.pdf> (last visited 15 December 2008).

⁶² See pp. 185-193 of this dissertation below.

⁶³ See for instance Declaration of the European Council in Rome 14-15 December 1990.

⁶⁴ The declarations on the ex-Yugoslavia crisis were subject to numerous references to humanitarian law. For an account, see Bulletin of the European Communities and the European Union from 1991 to 1995.

understood by the long-term preference of the EU for the body of human rights law.⁶⁵ However, due to the rise of customary international humanitarian law and the “advent” of the interdependence of the various instruments for the protection of the individual, notably the complementarity between international humanitarian law and human rights⁶⁶, humanitarian law began to penetrate the declaratory policy of the European Union.⁶⁷ When the EU issues a statement on a situation of conflict, almost systematically it refers to humanitarian law. This takes place through general references to the laws of war⁶⁸ and, more specifically highlights certain obligations of humanitarian law.⁶⁹ Notably at the occasion of the 50th Anniversary of the four Geneva Conventions, in a declaration, the European Union recalled “the primary importance that it attaches to the four Geneva Conventions as the basic treaties of international humanitarian law” and its member States reaffirm “their commitment to respect and promote international humanitarian law”.⁷⁰ The EU stressed the importance of full compliance with the provisions of the Conventions and stated that “the implementation of the Conventions is of paramount

⁶⁵ Actually, international humanitarian law has been considered for long under the heading of human rights. For instance Council Regulation 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objectives of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms (OJEC L 120/1, 8 May 1999) stated in its preamble that references to human rights in article 177 of the TCE (ex-130u) in relation to development and cooperation is to be understood as encompassing “respect for international humanitarian law, also taking into account the 1949 Geneva Conventions and the 1977 Additional Protocols”.

⁶⁶ In 1995, the International Court of Justice stated in its advisory opinion on the use of nuclear weapons that the applicability of human rights law and specifically the international covenant for civil and political rights did not cease in times of war *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. (1996), p. 240 (para. 25). This principle has been restated in two more recent decisions and opinions of the Court. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. (2004), p. 177-178 (para. 105-106) and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Rep. (2005), pp. 66-68 (para. 206-211). R. Degagne, *European Union Practice in the Field of International Humanitarian Law: an Overview*, In V. Kronenberg (ed.), *The EU and the International Legal Order: Discord or Harmony?*, (The Hague 2001), pp. 455-477, p. 477.

⁶⁷ T. Ferraro, “Le droit international humanitaire dans la politique étrangère et de sécurité commune de l’Union européenne” (2002) 84 *International Review of the Red Cross* 435-461, p. 436.

⁶⁸ See for instance the Declaration on Croatia which calls on the parties to respect all the provisions of humanitarian law set in the Geneva Conventions, Declaration of the Council in Brussels 4 August 1995.

⁶⁹ The prosecution of the perpetrator of grave violations of IHL (Declaration of the Council in Berlin on Kosovo, 25 March 1999), the principle of proportionality and distinction between civilians and combatants (Declaration of the Council in Helsinki on Chechnya, 11 December 1999), the prohibition of reprisals against civilians (Declaration of the Council in Brussels on Croatia, 4 May 1995). See T. Ferraro, note 67 above, p. 442.

⁷⁰ Declaration by the Presidency on behalf of the European Union on the occasion of the 50th Anniversary of the Four Geneva Conventions, 12 August 1999.

importance” and that “bridging the widening gap between existing international norms and respect for them should be the main objective and the issue should be put more forcefully on the agenda of the international community”.

Nonetheless, reliance on IHL is not limited to the declaratory policy of the EU. It has also penetrated obligatory acts of the Common and Foreign Security Policy, such as Common Positions and Joint Actions. According to Article 14 of the Treaty of the European Union, Joint Actions address specific situations where operational action by the Union is deemed to be required. They lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation. Common Positions define the approach of the Union to a particular matter of a geographical or thematic nature. According to Article 15 of the Treaty of the European Union, member States shall ensure that their national policies conform to the Common Positions. Hence, for instance, Common Positions on Afghanistan before September 2001 expressly refer to the importance the EU attaches to international humanitarian law and call on the parties to respect their obligations under IHL.⁷¹ In June 2001, the Council adopted a Common Position on the International Criminal Court (ICC) where it stated that it was convinced that respect for rules of IHL is necessary to preserve peace and consolidate the rule of law and affirmed that the creation of the ICC constituted an essential means to promote respect for international humanitarian law.⁷²

Finally, EU’s commitment to IHL culminated in the European Union Guidelines on promoting compliance with international humanitarian law.⁷³ The purpose of the Guidelines is “to set out operational tools for the European Union and its institutions

⁷¹ See for instance Common Position 2000/55/CFSP, 24 January 2000, OJEC L 021, 26 January 2000.

⁷² Common Position 2001/443/CFSP, 11 June 2001, OJEC L 155, 12 June 2001.

⁷³ OJEU C327/4 of 23 December 2005. Hereinafter “Guidelines”.

and bodies to promote compliance with international humanitarian law. They are addressed to “all those taking action within the framework of the European Union to the extent that the matters raised fall within their areas of responsibility and competence”. Importantly, they state that the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law and that this includes the goal of promoting compliance with IHL. The Guidelines call for the responsible EU bodies to identify and to monitor situations where international humanitarian law applies. For instance whenever relevant, EU Heads of Mission, and other appropriate EU representatives such as the EU Special Representatives, should include an assessment of the IHL situation in their reports about a given State or conflict. The guidelines list different measures to ensure respect and compliance with rules of IHL. These include dialogue, public statements on issues related to IHL which should “whenever appropriate, emphasise the need to ensure compliance with IHL” and demarches. Restrictive measures and sanctions are also envisaged as a means of action. The guidelines state that “the use of restrictive measures (sanctions) may be an effective means of promoting compliance with IHL. Such measures should therefore be considered against State and non-state parties to a conflict, as well as individuals, when they are appropriate and in accordance with international law”.⁷⁴ The guidelines also mention, as a means to promote compliance with IHL, the collecting of information which may be of use for the International Criminal Court or in other investigations of war crimes, prosecutions of war criminals and training in IHL and, in relation to arms transfer, ensuring that the importing country complies with IHL before granting licenses to export to that country.⁷⁵

⁷⁴ Guidelines, p. 6.

⁷⁵ As mentioned in the previous chapter, the Code of conduct on arms transfer is mostly concerned with violations of human rights, not humanitarian law.

The EU has placed respect for international law, human rights and humanitarian law as a central element of its external policy. Although it is a European objective that has to be seen from a European perspective, it seems to represent a commitment from the EU to address violations of human rights and thus, *a fortiori*, not to allow the interference of violations of human rights and humanitarian law in its relation with its partners. This commitment is exemplified with respect to the human rights policy of the EU vis-à-vis Israel and the Palestinians.

2. EU's "Ethical" Foreign Policy and the Israeli-Palestinian Issue.

The European Union sees respect for the rules of international law as an element of stability in the world order and sets out to act as a guarantor for its respect. Its objective to promote rules of human rights and democracy and rules of international humanitarian law has the same purpose. These aspirations are features of Europe's identity in the international scene and their elements are to be found in the EU's approach to the Israeli-Palestinian issue. The EU has long urged the parties to this particular conflict to respect the rules of international law, humanitarian law and human rights through its regular Council declarations taken under the Common Foreign and Security Policy. However, as will be seen, this aspiration is not shared by one of the principal actors, the State of Israel. Notwithstanding any disagreement over respect for human rights in the context of the Israeli-Palestinian conflict, the EU has inserted a human rights clause in the EU-Israel Association Agreement. Such a clause is also to be found in the EC-PLO Interim Association Agreement.

2.1. The Calls for Respect for International Law in the EU Declaratory Policy vis-à-vis the Israeli-Palestinian Conflict.

In its 2003 communication on “Reinvigorating human rights in the Mediterranean Area”, the Commission stated that:

“ There is an urgent need to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli-Palestinian conflict as a central factor in the efforts to put the Middle-East peace process back on track”.⁷⁶

The EU’s belief that respect for international law is a crucial step towards the resolution of the Israeli-Palestinian conflict is apparent from the beginning of the formulation of its diplomatic declarations on this issue. The EC actually distinguished itself in the 1970s and 1980s by its position of support for the national claims of the Palestinian people and the call for the respect for international law. By taking international law based positions, which emphasise the right to self-determination of the Palestinians and typify the Israeli settlement policy as illegal and in contravention to the IVth Geneva Convention, the EU made the “unspeakable speakable”⁷⁷, thus allowing some to say that the EU was the guardian of international legality of the Middle-East Peace Process.⁷⁸

The Venice Declaration of 1980 is the keystone of Europe’s position on the Israeli-Palestinian conflict. It marks the foundation of EU’s stance on the Israeli-Palestinian

⁷⁶ Commission Communication, 21 May 2003, COM (2003) 294 final, p. 5.

⁷⁷ E. Aoun, “European Foreign Policy and the Arab-Israeli Dispute: Much Ado about Nothing” (2003) 8 *European Foreign Affairs Review* 289-312, p. 293.

⁷⁸ V. Yorke, *The European Union and the Israeli-Palestinian Peace-Process: The Need for a New Approach*, (London 1999), p. 13.

issue which has remained broadly unchanged despite the successive member States accessions that took place afterwards. Through this Declaration, the EC was the first third party to acknowledge that the Palestinian people was entitled to exercise its right to self-determination and that the Palestinian problem was “not simply a refugee one”.⁷⁹ It called for the inclusion of the PLO in any negotiation settlements, therefore, helping to legitimise its claims and help it achieve an international status. The Declaration went on to qualify settlements as illegal under international law and stressed that the Nine member States of the EC would not accept any unilateral initiative designed to change the status of Jerusalem. The document provoked the ire of Israel who qualified the Declaration “a Munich surrender”.⁸⁰ The Venice Declaration was a reaction to the US-sponsored Egypt-Israel Peace Treaty that the EU lukewarmly endorsed and which contained no mention of Palestinian self-determination and made no mention of Jerusalem.⁸¹

Since then, the position of the EU has always revolved around two aspects: the call for a two-state solution and within the framework of international law. However, the advocacy for respect of international legality decreased at the time of the Peace Process when the parties were at the negotiating table in order not “interfere in the conduct of the negotiations”.⁸² At this time, the declarations of the EU were thus limited to supporting the negotiation process.

With the beginning of what can retrospectively be as seen as the collapse of the Peace Process, the EU insisted on what the foundations for peace and its attainable objectives

⁷⁹ Declaration by the European Council in Venice on the Situation in the Middle-East, 12-13 June 1980.

⁸⁰ R. Miller, “The PLO Factor in Euro-Israeli Relations, 1964-1992” (2004) 10 *Israel Affairs* 123-155, p. 137.

⁸¹ V. Yorke, note 78 above, p. 7.

⁸² N. Tocci, *The Widening Gap between Rhetoric and Reality in EU Policy towards the Israeli-Palestinian Conflict* (Centre for European Policy Studies), (Brussels 2005), p. 3.

should be. The Amsterdam Declaration of 1997, although it mentions a cautious “recognition of the Palestinian people to self-determination, without excluding the option of a State” and details what are in Europe’s view the ground rules for the attainment of an agreed and fair solution: namely the respect for the legitimate right of the Palestinians to decide their own future, exchange of land for peace, non acceptance of annexation of territory by force, respect for human rights, rejection of terrorism, good relations between neighbours, compliance with existing agreements and rejection of counterproductive unilateral initiatives.⁸³ In the Berlin Declaration of the 24th and 25th of March 1999, the EU reiterated, explicitly this time, its support for Palestinian Statehood and stated that “the creation of a viable and peaceful Palestinian State on the basis of existing agreements and through negotiations would be the guarantee of Israel’s security and that it was ready to consider the recognition of a Palestinian State in due course”.⁸⁴ At the same time, it should be noted that the Declaration was designed to counteract an attempt by the Palestinian Authority to declare unilaterally the creation of a Palestinian State and was drafted in close coordination with the US.⁸⁵

Since the start of the Second Intifada, the EU has continued to advocate a two-State solution, the return to the negotiating table and the reaching of an agreement within the framework of SC resolutions 242 and 338.⁸⁶ Furthermore, since EU’s participation in the Quartet, the implementation of the Road Map constitutes a recurrent call in any

⁸³ Declaration of the European Council in Amsterdam, 16 and 17 June 1997, Annex III, “European Union Call for Peace in the Middle-East”.

⁸⁴ Declaration of the European Council in Berlin, 24-25 March 1999.

⁸⁵ J. Peters, Europe and the Arab-Israeli Process: The Declaration of Berlin and Beyond, In S. Behrendt and C. Hanelt (eds.), *Security in the Middle-East*, (Munich 1999), pp. 25-41, p. 158.

⁸⁶ See for instance: Declaration of the European Council in Goteborg, 15-16 June 2001, para. 73: “A ‘cooling-off period’ should start as soon as possible in order to allow the implementation of additional confidence measures leading to resumption of full and meaningful negotiations for the Final Status Agreement on the basis of United Nations Security Council Resolutions 242 and 338” and Declaration of the European Council in Barcelona, 15-16 March 2002, para. 9: “The European Union is determined to play its role together with the parties, the countries in the region, the US, the UN and Russia in the pursuit of a solution, based on UNSC Resolutions 242, 338 and 1397 and on the principles of the Madrid Conference, Oslo and subsequent agreements, which would allow two states, Israel and Palestine, to live in peace and security and play their full part in the region”.

declaration of the European Council.⁸⁷ The Road Map is mentioned since December 2002 without exception in every declaration and this even after 2005 which was the deadline for the creation of Palestinian State as scheduled in this planned course of actions.

Finally, the EU's policy towards the Middle East has always been characterised by a concern for equidistance or a concern for treating the parties to the conflict on an equal footing. This concern is more obvious in EU declarations delivered since the beginning of the second Intifada in September 2000 and more specifically since October 2003.⁸⁸ This concern has led the EU to operate a parallel condemnation of the violations of international law by the Israeli Defence Force and by the Palestinian militant groups. The declarations are designed in a symmetrical manner: a condemnation of the settlement policy or of the wall parallels a call to the Palestinian Authority to take its responsibility for the resumption of violence and to condemn terrorism. On the one hand, references to international law are formulated in the form of calls for its respect directed at Israel in the exercise of the right to self defence⁸⁹, a condemnation of Israel's settlement policy⁹⁰ and criticisms of the construction of the wall in the West Bank.⁹¹ On the other hand, the

⁸⁷ For a definition of the Quartet and the Road Map, see p. 14 note 10 of this dissertation above.

⁸⁸ It is to be found in a very visible manner in Declaration of the European Council in Brussels, 16-17 June 2005 or in Declaration of the European Council in Brussels, 15-16 December 2005.

⁸⁹ See for instance, Declaration of the European Council in Brussels, 17 and 18 June 2004: "While recognising Israel's legitimate right to self-defence, it recalls the obligation on Israel to exercise this right within the parameters of international law. It [...] calls on the Israeli government, in line with international law and UN Security Council Resolution 1544, to cease demolitions and to take urgent action to alleviate the suffering of Palestinians".

⁹⁰ See for instance, Declaration of the European Council in Copenhagen, 12-13 December 2002: "The expansion of settlements... violates international law, inflames an already volatile situation, and reinforces the fear of Palestinians that Israel is not genuinely committed to ending the occupation"; Declaration of the European Council in Brussels, 13-14 March 2008, (Declaration by the Presidency on behalf of the European Union on the Middle East): "The EU reiterates that settlement building anywhere in the occupied Palestinian Territories, including East Jerusalem, is illegal under international law. Settlement activity prejudices the outcome of final status negotiations and threatens the viability of an agreed two-state solution."

⁹¹ Among other declarations and statements, in September 2003, the General Affairs Council urged Israel to "to freeze the construction of the separation fence, which results in confiscation of Palestinian land, restricts the movement of people and goods and hinders a just political solution to the conflict", Conclusions of the Council of Ministers on the Middle East, 29 September 2003. While having expressed

EU has regularly urged the Palestinians and the Palestinian Authority to combat terrorism and to fully implement reforms.⁹²

The victory of Hamas at the Palestinian Legislative Council election in January 2006 and the resulting EU decision to suspend any direct aid to the Palestinian Authority have transformed the calls directed at the Palestinians. The demands for reform and the condemnations of Palestinian terrorism have been replaced by the three conditions which the elected Hamas government needs to meet in order to restart the provision of the aid: non-violence, recognition of Israel's right to exist and acceptance of existing agreements and obligations.⁹³ After the takeover of Gaza by Hamas and the "nomination" of the Fayaad government in the West Bank, the EU resumed its contacts with the latter and since then, as it will be detailed in the last chapter of this dissertation, the calls for respect of international law are limited to a condemnation of the settlements policy and the firing of rockets from Gaza.

its scepticism about the procedure of requesting the ICJ to deliver an advisory opinion on the topic, the EU went on with its condemnation of the wall. See for instance, Declaration of the European Council in Brussels, 16-17 June 2005: "The European Council, while recognising the right of Israel to protect its citizens from attacks, remains concerned by the continuing construction of the barrier in the Occupied Palestinian territory, including in and around Jerusalem, which is contrary to the relevant provisions of international law".

⁹² See for instance Declaration of the European Council in Seville, 21 and 22 June 2002: "The reform of the Palestinian authority is essential. The European Council expects the Palestinian Authority to make good its commitments to security reform, early elections and political and administrative reform. The European union reaffirms its willingness to continue to assist in these reforms"; and Declaration of the European Council in Brussels, 16-17 June 2005: "The Palestinian Authority must in particular demonstrate its complete determination to combat terrorism and to continue with the reorganisation of all security services. The European Council calls on the Palestinian Authority to continue with the ongoing reform process, to intensify consolidation of the institutions and to set as soon as possible a date for the organisation of free and fair legislative elections".

⁹³ Declaration of the European Council in Brussels, 15-16 June 2006 and Declaration of the European Council in Brussels, 14-15 December 2006.

2.2. Competing Claims Regarding the Primary Importance for Respect for International Law vis-à-vis the Israeli-Palestinian Issue.

The EU's approach in relation to the need for respect of international law is espoused by the Palestinian Authority and the Palestinian Liberation Organisation. Although there is no official and articulated line by the PA and the PLO on international law and humanitarian law, this can be deduced from the position of the PLO during the Peace Process. When both parties articulated the principles which they consider should provide the basis for an evaluation of their prospective deals, the actual principles urged by the Palestinians tended to be defined in relation to international legal norms and notably Security Council resolutions and principles of humanitarian law.⁹⁴

Respect for international law is however considered by most officials in Israel as a European misconception. It does not concern Israel because abiding by rules of international law would endanger Israel's security and fundamental values and, further, the rules of international law are in a state of severe crisis and lag behind reality and need severe reforms.⁹⁵ Therefore, Europe's claim that Israel should abide by rules of international law is considered by many in Israeli policy circles to be irrelevant and naïve. It ignores the political dynamics in the Middle East as well as the new global security dangers post-9/11 stemming from the proliferation of fundamentalism and the capacity of a few individuals to commit widespread and heinous acts of violence—which require radical shifts of international norms.⁹⁶ To the EU's claims that Israel is breaching

⁹⁴ See "Permanent Status Issues and Palestinian Positions". Available at http://www.nad-plo.org/listing.php?view=nego_permanent (last visited 15 December 2008). See also, O. Dajani, "The Role of International Law in Palestinian-Israeli Peace Talks" (2007) 32 *Yale Journal of International Law* 62-124, p. 92.

⁹⁵ Y. Dror and S. Pardo, "Approaches and Principles for an Israeli Grand Strategy towards the European Union" (2006) 11 *European Foreign Affairs Review* 17-44, pp. 37-38.

⁹⁶ G. Steinberg, European NGOs against Israel, In M. Gerstenfeld (ed.), *Israel and Europe: An Expanding Abyss*, (Jerusalem 2005), pp. 111-123, p. 112.

international law, Israel has replied that the EU was breaching “international terror law” - by maintaining contacts with Hamas and Hizbollah.⁹⁷ However, as seen in the first chapter of this dissertation, Israel’s claim that it needs to depart from rules of international law predates the “War on Terror”. Since the beginning of its occupation of the West Bank, Gaza and Jerusalem, Israel has refused to implement *de jure* the provisions of the Fourth Geneva Convention because it considers the Fourth Geneva Convention to apply only to territories that were sovereign prior to their occupation. Israel has claimed to be willing to conform to the humanitarian provisions of the Fourth Geneva Convention, but has never specified which provisions it considers to be of humanitarian character.⁹⁸ This scepticism about international law has been accompanied by a long distrust for the organisation of the United Nations in which the State of Israel is constantly stigmatised, isolated and singled out.⁹⁹ Bayefsky, in an article in the Israel Law Journal, has interestingly articulated the widespread resentment for the United Nations in Israel.¹⁰⁰ According to her, for Israel’s foes, human rights are the rhetorical weapons of choice and the forum for their campaign is the United Nations.

2.3. The Inclusion of Human Rights Clauses in the EU-Israel and EC-PLO Association Agreements.

As seen previously, the EU has included in all its external agreements a clause specifying that respect for human rights is an essential element of its relations with its partners and of the agreement itself. Such provision was included in the Association Agreements it signed with Israel and the Palestinian Liberation Organisation.

⁹⁷ S. Devi, Israel says EU is breaching international terror law, *Financial Times*, (13 December 2005).

⁹⁸ On this issue, see chapter one of this dissertation, p. 33-34 above.

⁹⁹ See *One-Sided: The Relentless Campaign against Israel in the United Nations* (The American Jewish Committee), (2004).

¹⁰⁰ A. Bayefsky, “Israel and the United Nations’ Human Rights Agenda: The Inequality of Nations Large and Small” (1995) 29 *Israel Law Review* 424-458, pp. 424-425.

Article 2 of the EU-Israel Association Agreement reads as follows:

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

Article 2 of the EC-PLO Interim Association Agreement is written in the same format but is slightly different since it makes reference to the Universal Declaration of Human Rights:

“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”.

Much attention has been devoted to the human rights clause of the EU-Israel Association Agreement. At the time of the ratification of the Association Agreement in the national parliaments, Palestinian and European non-governmental organizations worked together to obtain clarification of the content of the obligations set in the human rights clause of the Association Agreement. Almost eight years after the ratification of the EU-Israel Association Agreement and more than ten years after the entry into force of the EC-PLO Interim Association Agreement, it is possible to delineate with more precision the content of the obligations set in the human rights clause.

2.3.1. Attempts to Clarify the Content of the Human Rights Clause in the EU-Israel Association Agreement During the Parliamentary Debates Surrounding the Ratification of the Agreement.

The EU-Israel Association Agreement was signed on 20 November 1995. It entered into force on 1 June 2000. During this period of nearly five years, the EU and Israel implemented an Interim Association Agreement.

After it had been signed, the Association Agreement was ratified by the Finnish, Swedish, Austrian and Italian parliaments. Before it reached the agenda of other parliaments, Palestinian NGOs, notably the Centre for International Human Rights Enforcement and the Mattin Group with the collaboration of several other European human rights organizations such as Human Rights Watch, ICCO, Save the Children the French Platform of NGOs working on Palestine and Pax Christi Belgium launched a campaign inside the French, Belgian, UK, Dutch and Greek parliaments in order to place emphasis on Israel's human rights practices at the time and to obtain some clarifications on several points regarding the functioning and implementation of the human rights clause. Several points needed to be specified. The following paragraphs give an account of the parliamentary questions that were posed to the EU member States governments at the initiative of Palestinian and European NGOs.

- **Does Article 2 imply that respect for human rights and democratic principles by both parties is an established fact? Would the ratification of the EU-Israel Association Agreement imply acceptance of Israel's current standard of human rights practice?**

The human rights clause makes the assumption that the parties currently comply *in toto* with the human rights norms set out in the Universal Declaration of Human Rights.¹⁰¹ Therefore, “routine” ratification without establishing that the present human rights standards of Europe’s partner does not respond to the human rights standards of the clause would entail the implicit legitimization of the current human rights practice. It would send the signal to Israel that it can expect the expansion of its relation with the EU while continuing its human rights violations inside Israel and inside the Palestinian Occupied Territories.

- **Can the implementation of the human rights clause be expected to be subordinated to Article 79 of the Association Agreement?**

Article 79 mandates either party to “take appropriate measures” if it considers that the other party has failed to fulfil an obligation under the Agreement and mandates unilateral action in cases of special urgency. After the signing of all the Association Agreements with Mediterranean countries subsequent to the EU-Israel and EU-Tunisia Association Agreements, the EU and its partners issued a joint declaration in which they agreed that a case of special urgency included a material breach of the Agreement by one party which could consist in a violation of the essential elements agreed in the human rights clause.¹⁰² The EU and Israel did not issue an equivalent document. It was thus necessary to clarify whether a violation of the human rights and democratic principles set out in the human rights clause by one party could entitle the other party to take unilateral measures, i.e. to suspend the Association Agreement, without seeking to resolve the matter first to the

¹⁰¹ L. Bartels, note 56 above, p. 17. According to Fierro, The human rights clause seems to be conceived as a tool aimed at keeping the status quo, or at improving it. E. Fierro, note 51 above, p. 97.

¹⁰² L. Bartels, *Ibid.*, p. 8.

Association Council.¹⁰³ If this was not the case, the matters had to be brought before the Association Council in accordance with Article 79 para. 2 of the Association Agreement which provides:

“If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties”.

- **Was a breach of the essential element clause a material breach that will have to be handled under Article 76 (c) of the Association Agreement?**

Article 76 (c) entitles the parties to subordinate their undertakings under the Agreement to national security imperatives. At first, Article 76 could render the duty to respect human rights under Article 2 derogable, i.e. subject to the appreciation of one party of its security imperatives. It was thus important to clarify that the obligation under Article 2 took precedence over Article 76.

- **Does the human rights clause embrace respect for provisions of international humanitarian law?**

¹⁰³ The Association Council is a body set up at Ministerial level in charge of monitoring the implementation of the Association Agreement, making the main policy decisions and settling disputes on the implementation of the Agreement.

The denial of the human rights of the Palestinian people does not arise from a mere issue of bad governance or poor human rights culture within the confine of a viable independent State. It is the product of an ongoing occupation which fails to respect the rule of law and thus prejudices the exercise and protection of human rights. It is therefore important to specify that respect for humanitarian law is also included in the human rights clause.

The members of the Palestinian and European organisations cited above developed contacts with parliamentarians where they addressed these issues, initiated parliamentary debates, drafted parliamentary questions, and addressed the national executives. This campaign revolving around the ratification of the Association Agreement in national parliaments was the opportunity to place the issue of human rights and the responsibility of third parties into the debate on the Israeli-Palestinian issue and the Middle-East Peace Process.

Several documents have been collected which can identify the opinions which were expressed during this campaign.¹⁰⁴ In a plenary debate on 5 March 1997 in the Dutch parliament, the Dutch Minister of Foreign Affairs, Van Mierlo stated that the human rights clause was not subordinated to the security clause (Article 76) in the sense that a party to the treaty could not invoke its security imperatives in order to derogate from Article 2 of the Association Agreement. He also stated that the human rights clause does not refer to violations of human rights arising from the conduct of trade and other types of bilateral cooperation provided for in the Agreement only but to the human rights

¹⁰⁴ Thanks to the courtesy of the Mattin group and Lynn Welchman, I have been able to go through several internal and public Mattin and CIHRE documents and exchanges of faxes which all relate to this work. Unfortunately most of the relevant documents related to this advocacy work have disappeared or were destroyed as a result of a military incursion conducted inside the premises of the Mattin group in Ramallah in April 2002.

practices of the parties in general.¹⁰⁵ In the United Kingdom, during the course of the Agreement's passage through Parliament, the government clarified that assent to the EU-Israel Association Agreement did not imply acceptance by the Government or by Parliament of Israel's current standard of human rights practice and that article 76 was subordinated to the enforcement of the human rights clause. Furthermore, the then Foreign Office Minister, Jeremy Hanley, stated that a breach of human rights would be a material breach of the Association Agreement and as such could involve a decision to suspend or withdraw from the Agreement which would have to be taken by the unanimity of the member States. However, it was not clarified whether respect for human rights included humanitarian law.¹⁰⁶ In Belgium, the government specified that the breach of the human rights clause by one party could lead the other party to take "appropriate measures" under Article 79 of the Agreement and that the human rights clause only referred to human rights and not human rights and humanitarian law.¹⁰⁷

Both France and Belgium delayed the ratification of the Agreement because they wished to make its ratification conditional upon progress in the furtherance of the Peace Process and in this respect were not satisfied with the policy of the government headed by Benjamin Netanyahu. They saw the election of the Labour Prime Minister Ehud Barak as a signal that the Peace Process would be back on track.¹⁰⁸

¹⁰⁵ Country Report: The Netherlands, 14 May 1997 prepared by Deena Hurwitz (CIHRE project coordinator), Charles Shamas (CIHRE advocate) and Joe Stork (Human Rights Watch/Middle-East Advocacy Director). Interview with Charles Shamas, Ramallah, August 2006.

¹⁰⁶ Second Standing Committee on Delegated Legislation, Wednesday 19 February 1997, c.22 Cited in Appendix 7, Foreign Affairs Committee, First Report, "Foreign Policy and Human Rights", 10 December 1998, 1998-99, Memorandum submitted by the Centre for International Human Rights Enforcement. Available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmcaff/100/100ap08.htm> (last visited 15 December 2008).

¹⁰⁷ Question n. 205 de M. Moreels du 9 Décembre 1999 au Vice-premier ministre et ministre des Affaires étrangères, Sénat de Belgique, Bulletin 2-7, session de 1999-2000.

¹⁰⁸ R. Miller, "Troubled Neighbours: The EU and Israel" (2006) 12 Israel affairs 642-664, p. 657.

2.3.2. Obligations contained in the Human Rights Clause of the EU-Israel Association Agreement and EC-PLO Interim Association Agreement.

Much attention has been devoted to the possibility of the EU taking sanctions against Israel or suspending the Association Agreement on the basis of the human rights clause. The European Parliament on April 2002 adopted a resolution calling on the Commission and the Council to suspend the Association Agreement by 269 votes to 208.¹⁰⁹ The basis for the demand to suspend the Agreement was not specified in the resolution and no reference was made to the human rights clause. In its fifth paragraph, the resolution states that the “insulting” treatment offered to the European diplomatic mission wishing to meet with President Arafat by the Israeli government marked a turning point in the relationship between the EU and Israel.¹¹⁰ Several NGOs across Europe seized the Parliament’s initiative and launched a campaign demanding the suspension of the Association Agreement.¹¹¹ Nonetheless, the Commission and the Council never gave effect to the parliamentary resolution. The Commission does not support sanctions against Israel:

¹⁰⁹ Resolution of the European Parliament on the Middle-East, 10 April 2002, (P5 TA (2002) 173).

¹¹⁰ The resolution was referring to the denial of access of the Spanish Foreign Minister Josep Piqué, and the High Representative of the Common Foreign and Security Policy, Javier Solana to Arafat’s headquarters in Ramallah in April 2002. See chapter seven, p. 239.

¹¹¹ See the “Common Declaration of NGOs” at the hearing at the European Parliament, 20 June 2002 on the theme: *EU-Israel Bilateral Relations in the Framework of International and European Law. The case of the European Community-Israel Association Agreement*, signed by APRODEV -Association of World Council of Churches related Development Organisations in Europe, AVOCATS SANS FRONTIERES, CIDSE - International Cooperation for Development and Solidarity, ECCP -European Coordinating Committees of NGOs on the Question of Palestine, FIDH -International Federation for Human Rights, OMCT – Organisation Mondiale Contre la Torture, SOLIDAR and WCC -World Council of Churches. Available at <http://www.aprodev.net/palestine-israel/Files/Statements%20to%20the%20EU/NGOs%20common%20at%20the%20European%20Parliament%2020.06.02%20.pdf> (last visited 15 December 2008); “Occupation : pas d’Accords ! L’Europe peut agir pour la paix au Proche-Orient”, Oxfam France/Agir Ici, 2002. Available at http://www.oxfamfrance.org/php/actions_camp_voir.php?IdCampagne=3 (last visited 15 December 2008) and “NGO Open Letter for the EU Concerning the EU-Israel Association Council”, Euro-Mediterranean Human Rights Network (EMHRN) Press Release, 18 October 2002. Available at <http://www.euromedrights.net/pages/307/news/focus/8618> (last visited 15 December 2008).

“EU policy is based on partnership and cooperation, not exclusion. It is the EU's view that maintaining relations with Israel is an important contribution to the Middle East peace process and that suspending the Association Agreement, which is the contractual basis for EU-Israeli relations, including political dialogue, trade relations and cooperation activities, would not make the Israeli authorities more responsive to EU concerns. Keeping the lines of communication open and trying to convince our interlocutors is a better way forward”.¹¹²

Emmanuele Giaufret, the then Deputy Director of the European Commission's Delegation in Israel explained that all the Mediterranean partners of the EU experience serious human rights issues, and that the EU does not want to create a precedent in suspending an Association Agreement with one of them on the basis of the human rights clause. If they suspend one, they will have to suspend them all. Furthermore, such an initiative would not have any impact on Israel and would ruin all the efforts of the EU to ameliorate its relations with Israel.¹¹³ Against the tide of the declarations of the different national governments and parliaments at the time of the ratification, Esa Paasivirta, former member of the Legal Service of the European Commission, states that a unilateral suspension against Israel could pose difficult issues since it would involve a complicated balancing act between security and human rights aspects as the invocation of security interests under Article 76 of the Agreement could come into play. On a political angle, he argues that EU sanctions targeting only one party (Israel or the Palestinian Authority) would simply fall out of tune with the collective management

¹¹² “The EU and the Middle East Peace Process - Frequently Asked Questions”, updated 17 April 2008. Available at http://ec.europa.eu/external_relations/mepp/faq/mepp_faq_en.pdf (last visited 15 December 2008).

¹¹³ Interview with Emmanuele Giaufret, Tel Aviv, July 2008.

efforts the EU has deployed.¹¹⁴ Therefore sanctions against Israel, -as well as against the Palestinian Authority-, are politically excluded from the European agenda.

The practice in relation to the implementation of the human rights clause of the Association Agreement with Israel and the Palestinian Authority is not different compared to the practice of any human rights clause in general. Negative measures are generally excluded and the human rights clause is essentially the basis for dialogue between the EU and its partners. It thus means that the human rights clause of the Association Agreement establishes a right for both parties to examine and address the human rights violations by its partner in the course of the political dialogue they have established. Furthermore, the human rights clause sets the basis for taking positive measures, i.e., conditioning the development of the relations between the parties to the improvement of compliance with human rights obligations. The fact that negative measures in theory can be taken does not mean that the EU has to take sanctions when confronted with violations of human rights by its partner country. Such an action is only a possibility and this possibility highlights the concern the EU has placed in the respect of human rights by its partner country. Respect for human rights has become an issue of European interest. It is an essential element of the Agreement which means that the parties have undertaken a commitment that their relations as well as the implementation of the Agreement shall be based on respect for human rights and democratic principles and that respect for human rights guides their internal and external policies.¹¹⁵

Therefore, this suggests that the human rights clause lays down several expectations. First of all, if the EU made the commitment that its relation with its partner will be based

¹¹⁴ E. Paasivirta, note 41 above, p. 179.

¹¹⁵ S. Rockwell and C. Shamas, A Human Rights Review of the EU and Israel – Relating Commitments to Actions, 2003-2004 (Euro-Mediterranean Human Rights Network) (2004), p. 19.

on respect for human rights and that it will exercise a scrutiny over the human rights records of its partner country, a fortiori with the human rights clause, the EU made the commitment to act with diligence in its relations with its partner and refrain from actions or inactions that could give incentives to the commission of violations of human rights. Furthermore, the human rights clause and the political dialogue it sets up becomes the specific environment where the claims of the partners on the importance of respect for human rights compete. Hence the importance for the EU to state at the time of the ratification that Israeli human rights practice did not correspond to what is expected by the EU. Finally, if the human rights clause places respect for human rights at the centre of the relations between the parties, the furthering of the relations between the parties without addressing the human rights violations of its partner is an infringement of the commitments taken initially.

As such, the commitments taken by the EU in including a human rights clause in its trade agreements with its partners call for the exercise of a scrutiny over the likelihood of the commission of a violation of international law by another States, the obligation to refrain from provoking a violation of international law and the obligation not to give incentives to the commission of a violation of international law detailed in the previous chapter.

3. Conclusion.

The present chapter has demonstrated that the European Union sees respect for rules of international law, human rights and humanitarian law as an element of stability in the world order and wants to act as a guarantor for its respect. Its objective to promote rules of human rights and democracy and rules of international humanitarian law are

illustrative of this belief. These are features of Europe's identity in the international scene and these features are to be found as well in its approach to the Israeli-Palestinian issue. The EU has included in its Association Agreements with Israel and the PLO a clause which states that their relations are based on respect for human rights. As such, the EU not only granted itself the right to address the issues of human rights compliance with its partners but also undertook a commitment to do so. As the next chapter details, the EU has intended to export another feature of its identity between Israel and the Palestinians: the exportation of its own peace-building model, i.e. economic cooperation and exchange between former enemies.

Chapter Five
Overall Account of the Involvement of the European Union in the Resolution of the Israeli-Palestinian Issue.

The resolution of the Israeli-Palestinian conflict is an issue of primary importance for the external policy of the European Union. The European Security Strategy document stated that Resolution of the Arab Israeli conflict is a strategic priority for Europe.¹ The study of the involvement of the EU in the resolution of this conflict represents also a “test case for the CFSP” in the sense that it constitutes the ideal topic for the study of the problems of political integration of the EU and the adequacy and the effective deployment of the instruments of European foreign policy.² Furthermore, it is an interesting case study which illustrates the deployment of the “European identity” (Article 2 of the Treaty of the European Union) on the international scene. As the previous chapter has demonstrated, the European Union with its objectives to promote international law and human rights, not only wants to present itself as a credible and legitimate international actor but it also wishes to export its own model of collective-law making and respect for supranational laws and its own foundational values. With respect to the Israeli-Palestinian issue, its strategy is *a priori* the same and it is coupled with the wish to implement in own peace-building model by fostering economic exchanges and cooperation between the parties. The present chapter aims at giving a broad account of the EU’s involvement with Israel and the Palestinians through a summary or compilation of the academic literature on the topic and with reference to the relevant official EU documents. First of all, it offers an overview of what can be described as the major constraints which prevent the EU from playing a prominent diplomatic role in the

¹ *A Secure Europe in a Better World, European Security Strategy Document*, 12 December 2003, Brussels, p. 8.

² S. Everts, *The EU and the Middle East: A Call for Action*, (Centre for European Reform), (London 2003). p. 1 and B. Soetendrop, “The EU’s Involvement in the Israeli-Peace Process: The Building of a Visible International Identity” (2002) 7 EFA Rev. 283-295.

resolution of this conflict. Then, it offers a description of the involvement of the EU vis-à-vis Israel and the Palestinians at several levels: its diplomatic declarations, its diplomatic and financial involvement and through its regional or Mediterranean policy. Finally, it offers a critical account of the diverse solutions proposed in the academic literature in order to foster the involvement of the EU in the region.

1. The EU Relegated to a Secondary Role on the Middle-East

Diplomatic Scene.

There exists a general consensus on the causes of the limited political role of the EU in the Middle-East. The first section of this chapter “sets the scene” which could be described in a nutshell in the following way: first of all, the EU is the sum of its member States and each one of them has different sensibilities vis-à-vis the Israeli-Palestinian issue; second, the Middle-East is the privileged domain of the United States which is the only credible third party for Israel and the Palestinians and; finally, despite all the efforts it can deploy, the EU will likely never gain the confidence of Israel. It does not tackle the general strengths and weaknesses of the EU as an international actor such as its lack of military power and the relevance of European diplomatic “soft instruments”, although these must obviously constitute a hidden sub-plot.³

³ For an analysis of the role of the EU as a “civilian power” vis-à-vis the Israeli-Palestinian issue, see E. Aoun, “European Foreign Policy and the Arab-Israeli Dispute: Much Ado about Nothing” (2003) 8 EFA Rev. 289-312. For Aoun, the Israeli-Palestinian conflict confronts the EU with the enduring realities of the international relations that are still characterised by possible use of force and by issues of might and power and it questions the role of the EU as an international actor which is characterised by the choice of peace and persuasion and a positive repertoire of actions. Her argument is presented in more detail at the end of this chapter.

1.1. The Divergence of Positions Among the Member States of the EU.

At the time of the European Political Cooperation in the early 1970s, the member States of the European Community never managed to reach unanimity on a strategy to adopt vis-à-vis the Middle-East conflict because each one of them had its own views on the issue. Today, the European Union numbers 27 member States and thus this phenomenon is amplified. Naturally, the divergences between member States of the EU vis-à-vis the Israeli-Palestinian conflict have affected the EU's diplomatic actions in the Middle-East. The position of the individual member States of the EU can be evaluated according to different factors which stem from their history as a colonial power or as an occupied nation, their participation or direct involvement in the genocide of the Jewish people during the Second World War and their degree of proximity with the United States. This last factor is reinforced with respect to the ex-communist countries which joined the EU in 2004 and, broadly speaking, see the PLO as an ancient ally of the former USSR and have operated a very close rapprochement to the United States.⁴

These discrepancies are also to be found among the most powerful member States of the EU which constitute the decision-making heartland of the Union: France, Germany and the United Kingdom. France has always distinguished itself by a pro-Arab stance and a will to mark some form of independence from American politics. This has prompted France to undertake some "free-riding" diplomatic initiatives such as, for instance, Chirac's tour in the region in 1996 which became world famous after his altercation with

⁴ Interview with Jana Hybaskova, Member of the European Parliament, chair of the European Parliament Delegation for relations with Israel, Brussels, August 2006.

the Israeli security services in the Old City of Jerusalem.⁵ However, this traditional *Gaullist* position of France has changed with the election of Nicolas Sarkozy as president in May 2007 who is much more sensitive than his predecessor to Israeli concerns.⁶ Further, regarding Germany, any German initiative and position in the region is reflective of the burden of national guilt it carries as the source of the main perpetrators of the genocide of the Jews from Europe. This inhibits Germany from exerting its diplomatic influence especially against Israel when, at the same time, Germany uses the EU as a platform which allows it to formulate stances that it would not adopt on its own.⁷ Finally, the close ties between the United States and the United Kingdom constrain the latter from pushing for a more independent European stance and diplomacy. Obviously, the UK cannot envisage a European policy towards the Middle-East without any form of coordination with the US.⁸ At the same time, the UK uses its close connection with the US to influence its foreign policy agenda on this issue, as Tony Blair did after the invasion of Iraq in March 2003 when he praised the US for a re- engagement in Israel and Palestine.

Consequently, there is no proper *European position* on the Israeli-Palestinian conflict. The European diplomatic statements on this issue are always the result of a compromise reached among the different member States. The result of this process has been

⁵ J. Peters, Europe and the Middle-East Peace Process: Emerging from the Sidelines, In S. Stavridis et al. (ed.), *The Foreign Policy of the European Union's Mediterranean States and Applicant Countries in the 1990's*, (1999), pp. 295-316, pp. 308-310.

⁶ For an illustration of this change, see the speech of President Sarkozy before the Knesset on 23 June 2008. Available at http://www.diplomatic.gouv.fr/fr/pays-zones-geo_833/israel-territoires-palestiniens_413/france-israel_1160/visites_8647/discours-prononce-par-m.-nicolas-sarkozy-devant-knesset-23-juin-2008_63849.html (last visited 15 December 2008).

⁷ Interview with Hannes Swoboda, Member of the European Parliament, Brussels, August 2006.

⁸ See for instance C. Musu, *EU Foreign Policy and the Middle-East Peace-Process 1991-2002*, PhD thesis, (London 2004), pp. 84-83 and pp. 94-97 and V. Yorke, *The European Union and the Israeli-Palestinian Peace-Process: The Need for a New Approach*, (London 1999), p. 15. On the individual positions of France, Ireland, Italy, The Netherlands, Britain, Belgium, Denmark, Germany and Greece: D. Allen and A. Pijpers (eds.), *European foreign policy-making and the Arab-Israeli conflict*, (The Hague, Lancaster 1984).

described as the “smallest common denominator phenomenon”⁹ in the European declarative policy or the “policy of converging parallels”. Musu’s reference to this geometrically-impossible figure illustrates how the attainment of a real convergence, capable of producing a truly collective policy has been constantly hampered by the persistence of differences in the individual member States’ preferences, which remain clearly distinct from, and occasionally similar to, those of other member States.¹⁰ Furthermore, these divergences among member States result in a kind of “sluggishness of reactions” when EU member States have to elaborate political initiatives.¹¹

1.2. European Dependency on American Politics.

The EU and the US share the same interests vis-à-vis the Middle-East: the necessity of bringing about stabilisation of the region, the non-proliferation of weapons of mass destruction, energy supply and the fight against international terrorism.¹² Nevertheless, the perceptions of these different threats and their methods in tackling them differ greatly between the two political entities.¹³ Given its geographical proximity to the region, the EU would seem to have even more interest in its stabilisation than the US but it will never take the risk of endangering its relations with its ally. This is the predicament faced by the EU in its policy towards the Middle-East as this is already the privileged domain of the US for strategic, economic and notably energy reasons.¹⁴

⁹ E. Aoun, note 3 above, pp. 295-296.

¹⁰ C. Musu, note 8 above, p. 109.

¹¹ E. Aoun, note 3 above, p. 296 and M. Ortega, “La paix est entre leurs mains” (2003) 62 Cahiers de Chaillot 55-67, p 58.

¹² C. Musu, note 8 above, p. 179.

¹³ On this aspect, see K. Archick, European Views and Policies Towards the Middle East, *Congressional Research Service (The Library of Congress)*, (Washington 2005).

¹⁴ V. Yorke, note 8 above, p. 6.

Being in the heart of the internal American political life, the Middle East, and with it the Israeli-Palestinian issue, is not an international concern but an *internal issue*. The electoral calculations of American politicians are always combined with a certain “familiarity” with Israel. The allegiance to Israel is coupled in American political life and among the American population with a total ignorance of the Palestinian grievance.¹⁵ American support for Israel has increased with time, but has also been counterbalanced by variable preoccupations related to the perceptions and stability of the Arab world given the necessity to guarantee energy supplies and the protection of the regimes standing against the USSR at the time of the Cold War.¹⁶ This alliance between Israel and the United States has all appearance of permanence and it is being displayed principally through the American financial aid to Israel, the numerous US vetoes to any Security Council resolutions *condemning* Israel’s actions towards the Palestinians and, at the time of the Peace Process, the close coordination between the US and Israel on the positions to adopt even before submitting them to negotiations.¹⁷ These ties have become deeper with Israel having successfully persuaded the US that its fight in the Palestinian Occupied Territories was part of the overall “War on Terror”. These ties have become deeper with Israel having successfully persuaded the US that its fight in the Palestinian Occupied Territories was part of the overall “War on Terror”. This alliance has given more credit to “derogative interpretations” of international rules like for instance the perceived legitimacy of pre-emptive defensive action such as targeted assassinations. It has also contributed to the re-conceptualising of counter-terrorism as a new species of international armed conflict with, as one consequence, the substitution of foggier rules than those of human rights and international criminal law. Not only that, but the presentation by Israel of its actions in the OPT in the context of the War in Terror has

¹⁵ G. Nonneman, “Le rôle des Etats-Unis dans le conflit israélo-palestinien: un point de vue européen” (2003) 62 Cahiers de Chaillot 36-49, p. 39

¹⁶ *Ibid.*, p. 40.

¹⁷ *Ibid.*, p. 42.

led to an increased polarisation of UN political bodies concerned with human rights around the Israeli-Palestinian issue.¹⁸

For the Palestinians and the Arab States, the US is therefore part of the problem and of the solution. It still represents the only credible peace-broker because of its supposed leverage on Israel.¹⁹ This remains the case even after American invasion of Iraq which has tremendously destabilised the region. The time when the EU was considered by some as a possible counterpower to American hegemonic position in the region after the end of the Cold War is gone.²⁰

The diplomatic pre-eminence of the US in the region and its close ties with Israel is coupled with American and Israel fear of greater EU involvement other than its usual financial assistance and its support to any American initiatives. After the First Gulf War, the US annihilated the EU's long-term idea of holding an international conference under the aegis of the UN in order to resolve the Arab-Israeli and Israeli-Palestinian conflict. They set up their own framework of negotiations in which the European Community was confined to being an observer but was nonetheless invited to play a participatory role in the multilateral talks that emerged from Madrid²¹ and to assume a role of depositary of the progress made at the conclusion of the Taba talks in 2001. The participation of the EU in the Quartet officially on an equal status with the US does not negate European dependency on American external politics.²²

¹⁸ J. Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights", (2003) 14 EJIL 241-264.

¹⁹ J. Peters, Europe and the Arab-Israeli Process: The Declaration of Berlin and Beyond, In S. Behrendt and C. Hanelt (eds.), *Bound to Cooperate – Europe and the Middle East*, (Gutersloh 2000), pp. 151-170, p. 168.

²⁰ See for instance F. Charillon, *La stratégie européenne dans le processus de paix au Moyen Orient*, In M.-F. Durand and A. de Vasconcelos (eds.), *La P.E.S.C., Ouvrir l'Europe au Monde* (Paris 1998), pp. 195-225.

²¹ P. Patokallio, *European Union Policy on the Arab-Israeli Conflict: from Payer to Player*, (Durham 2004), pp. 8-9 and J. Peters, note 5 above, p. 158.

²² For a definition of the Quartet, see p. 14 note 10 of this dissertation above.

For European decision-makers, this American supremacy is internalised.²³ The EU has never dared to get into a confrontation with the US and is ultra-sensitive to any pressure from it. One of the blatant examples of this was the decision by the EU to suspend aid to the Palestinian Authority following the victory of Hamas at the elections of the Palestinian Legislative Council in January 2006 -even though it organised and funded these elections. This has had, as a consequence, the direct loss of influence of Europe in the region and the immediate undermining of a long-term institution building and a loss of the earlier confidence which existed between the EU and the Palestinians. It has allowed some commentators to state that the EU is following American interests in the region even though it is not in Europe's own interests.²⁴

1.3. Tense Relationships between the EU and Israel.

Israel's allegiance to the US is counterbalanced by a widely acknowledged distrust for the EU.²⁵ In many instances, Israel has interpreted EU's position and action as constantly biased in favour of the Palestinians and the Arab States²⁶ and will dismiss most of its initiatives or the initiatives coming from its member States out of hand. This is the case despite the belief of some Europeans that the position of the EU is objective and impartial and as such constitutes an asset for EU's political involvement in the resolution

²³ E. Aoun, note 3 above, p. 306.

²⁴ Interview with Véronique de Keyser, Member of the European Parliament, Brussels, August 2006.

²⁵ See for instance: M. Asseburg, "De la rhétorique à la pratique? Les trois dimensions de la politique européenne à l'égard du conflit" (2003) 62 Cahiers de Chaillot 11-26, p. 24; M. Ortega, note 11 above pp. 63-67; E. Aoun note 3 above, p. 302; P. Patokallio, note 21 above, p. 18 ; J. Peters, note 5 above, p. 301 and G. Steinberg, The European Union and the Middle-East Peace Process, *Jerusalem Letter*, (15 November 1999).

²⁶ For a good illustration of this position see for instance J. Alpher, "The Political Role of the European Union in the Arab-Israeli Peace Process: An Israeli Perspective" (1998) 33 *The International Spectator* 77-86; S. Avineri, Europe in the Eyes of Israelis: The Memory of Europe as Heritage and Trauma, In I. Greilsammer and J. Weiler (eds.), *Europe and Israel: Troubled Neighbours*, (Berlin, New York 1988), pp. 31-39; A. Carmi and J. Carmi, *The War of Western Europe Against Israel*, (Jerusalem, New York 2003); M. Gerstenfeld, "The EU Constitutional Crisis, the Middle East, and Israel" (26 June 2005) 4 *Jerusalem Issue Brief*; R. Lapidoth, The EU, Jerusalem and the Peace Process, (Munich Centrum für Angewandte Politikforschung 2000), available at www.cap.lmu.de/download/2000/lapidoth.doc (last visited 15 December 2008) and G. Steinberg, *Ibid.*

of the conflict.²⁷ Indeed, Europe's attitude has always been characterised, from its own point of view, by a desire for objectivity which has been translated by an equidistant stance which has set out to put the parties' responsibility in the resolution of the conflict on the same foot, therefore preventing itself from stigmatising either one of them. The parcel of this supposedly-balanced attitude which sympathises with and supports the plea of the Palestinians is seen by official voices in Israel as an intolerable bias –inasmuch as the declaration of sympathy for Israeli grievance is seen as a European bias from the Palestinian side.²⁸ In this respect, Europe's position on the conflict is considered by Israel as full of misconceptions such as when, for instance, Europe views the conflict as a major cause of Islamist terrorism and considers that Israel should withdraw from nearly all the Occupied Territories in which a Palestinian State would then be established, or that Israel must abide by international law and it is a *normal* Western State.²⁹

Furthermore, most European countries adopt a low-profile attitude vis-à-vis Israel because they fear that any criticism against this State will be considered as reminiscent of anti-Semitism³⁰ and Israel, with good or bad faith, has used this argument as a sword several times associating any criticisms against its policy as a manifestation of anti-Semitism.³¹

²⁷ M. Ortega, note 11 above, p. 62.

²⁸ See video "Israel/Palestine: Initiating dialogue and reconciliation", May 2005, Films on European Union external relations policies. Available at http://ec.europa.eu/external_relations/library/video/video_12_israel_palestine.htm (last visited 15 December 2008).

²⁹ Y. Dror and S. Pardo, "Approaches and Principles for an Israeli Grand Strategy towards the European Union" (2006) 11 EFA Rev. 17-44, p. 35-41.

³⁰ E. Aoun, note 3 above, p. 309-310 and N. Tocci, 'The Widening Gap between Rhetoric and Reality in EU Policy towards the Israeli-Palestinian Conflict (Centre for European Policy Studies), (Brussels 2005), pp. 22- 23.

³¹ For instance, Prime Minister Netanyahu' statement after the release of the EU Berlin declaration in 1999: "It is a shame that Europe, where a third of the Jewish people was killed, should take a stand which puts Israel at risk and goes against our interest". Cited in J. Peters, note 5 above, p. 158.

The interviews conducted for this research have shown that after 2004, there exists a will to ameliorate and deepen the relationships between the two parties and this from both the Israeli and European sides.³² This shift is mostly due to the influence of new member States from Central and Eastern Europe and the will to improve relationships between the US and the EU after the Iraqi crisis. However, even if their relations deepen, it remains debatable whether the EU can influence Israel. It is more probable that Israel influences the role of the EU in Middle-Eastern affairs, in particular in respect to the Israeli-Palestinian relationships, which as it is acknowledged in Israeli circles have in turn an impact on the global and regional standing of the EU.³³

The nature and the transformation of the relationship between the EU and Israel is further developed in chapter seven and eight of this dissertation.

2. What Role for Europe ?

Despite these constraints, the EU has managed to increase its visibility and actions as a third party to the Israeli-Palestinian conflict. Its involvement has revolved around several axes. As detailed in the previous chapter, as part of its diplomatic arsenal, the EU has developed a declarative policy on the topic that has remained more-or-less constant throughout the years. The following section analyses other aspects of its diplomatic involvement. First of all, the EU has managed to develop diplomatic actions through the interstices left by the United States. Secondly, it has deployed huge financial efforts directed to the PA and the Palestinian Occupied Territories. Finally, in parallel to the Middle-East Peace Process, the EU has built a regional framework of relationships in

³² See pp. 248-9 of this dissertation below.

³³ Y. Dror and S. Pardo, note 29 above, p. 24.

order to increase collaboration and exchanges not only between Israel and the Palestinians but also with the different countries of the Mediterranean basin.

2.1. The Diplomatic Involvement of the EU in the Bilateral and Multilateral Talks.

On the diplomatic level, the EU has worked its way through the gaps left by the United States by deploying all sorts of efforts in order to increase its visibility on the ground. Consequently, its diplomacy has resulted in selective diplomatic initiatives or interventions in order to solve crisis between the parties through the Special Envoy to the Middle-East, Miguel Moratinos and then Marc Otte, and the High Representative for the Common Foreign and Security Policy, Javier Solana, as well as other European officials.

The appointment of the EU Special Envoy in 1996 was a response to a desire to increase political involvement and visibility. The terms of his mandate were detailed in the conclusion of the presidency of the European Council in Dublin, 5 October 1996 and were decided through a Joint Action.³⁴ The first Special Envoy, Ambassador Miguel Moratinos was replaced by Ambassador Marc Otte who took up this position in July 2003. His task was founded upon six broad objectives: to establish contacts with the parties, to provide them with advice and good offices, to contribute to the implementation of agreements, to promote compliance with the basic norms of democracy, including respect for human rights and the rule of law and to monitor actions by either side which might prejudice the outcome of permanent status negotiations. The

³⁴ 96/676/CFSP, Joint Action of 25 November 1996 adopted by the Council on the basis of Article J.3 of the Treaty on European Union in relation to the nomination of an EU special envoy for the Middle East Peace Process (OJEC L 315 of 4 December 1996).

Special Envoy fulfils his task in coordination with all the other institutional actors involved on the ground: the European Commission and the High Representative of the Common Foreign and Security Policy, Javier Solana.

The Special Envoy's efforts in offering EU support, encouragement and ideas have been constant although his accomplishments have always been at the margins, thus mirroring EU's diplomatic involvement on the ground. Nevertheless, the Special Envoy, notably Miguel Angel Moratinos, still managed to undertake some practical measures to help building confidence among the parties. One of the most cited example of his successes is his mediation efforts with the US for the signing of the Hebron Protocol of 17 January 1997 which provided for the partial redeployment of Israeli troops from the city and a timetable for future redeployments in the West Bank.³⁵ The Special Envoy obtained from Arafat a letter stating that he would use all his political and moral weight to ensure that the agreement would be implemented. He also proposed a code of conduct in 1997 in order to help the parties to resume negotiations which received a positive welcome but was never implemented because of the lack of final agreement.³⁶

Furthermore, the EU was given an important role in the organisation of the multilateral track of the Middle East Peace Process which was launched in January 1992. The EU was the gavel holder of the Regional Economic Development Working Group and the co-organiser of three of the five working groups on water, environment and regional economic development. However, the more political groups on refugees and security and armaments escaped its control.³⁷

³⁵ See for instance P. Patokallio, note 21 above, p. 10 and J. Peters, note 5 above, p. 160.

³⁶ A. Diaz-Martin, *The Middle-East Peace Process and the European Union* (Directorate General for Research, European Parliament) (Brussels 1998), pp. 44-45.

³⁷ F. Charillon, note 20 above, p. 204 and A. Diaz-Martin, *Ibid.*, pp. 29-30.

Since the beginning of the second Intifada, European diplomatic efforts have been concentrated upon the tasks of conflict management, notably the initiation of dialogues with Palestinian militant groups, to convince them to renounce attacks against Israeli civilians. For instance, Alistair Crooke, the Middle-East adviser of Javier Solana, the High Representative of the Common and Foreign Security Policy, successfully offered his mediation services to resolve the crisis of the siege of the Church of the Nativity in Bethlehem in April 2002.³⁸ Further, after the implementation of the Gaza disengagement plan and the signature of the Agreement on Movement and Access, in November 2005, the EU provided, in agreement with Israel and the Palestinian Authority, border assistance monitors who were entrusted with reinforcing Palestinian border management capacities at the Rafah border checkpoint between Egypt and the Gaza Strip. This latter aspect will be detailed in the next chapter of this dissertation.³⁹

Finally, the EU along with the US, Russia and the UN is a member of the Quartet. In this respect, the EU was the main initiator of the Road Map, a peace plan for the region which was officially presented by the Quartet in April 2003.⁴⁰ Although, the Quartet could represent a crucial policy vehicle in which the EU could play an important political role, it remains a channel for the US to control and pre-empt any other diplomatic initiatives of other third parties.⁴¹ As put by Alvaro de Soto, the former UN Middle East Envoy, in his confidential report when he left his office: “the Quartet is pretty much a ‘group of friends’ of the US and the US doesn’t feel the need to consult closely with the Quartet except when it suits it”.⁴²

³⁸ C. McGreal, UK Recalls MI6 Link to Palestinian Militants, *The Guardian*, (24 September 2003).

³⁹ See page 208-211 of this dissertation below.

⁴⁰ S. Everts, note 2 above, p. 27.

⁴¹ P. Patokallio, note 21 above, p. 8.

⁴² A. de Soto, “End of Mission Report (confidential report)”, published by the Guardian, (13 June 2007), para. 63, p. 24.

2.2. The First Donor of the Palestinian Authority and to the Palestinian Occupied Territories.

The European Union and its member States have been by far the most important financial supporter of the Palestinian Occupied Territories and the construction of a Palestinian State. In April 2006, following the election of Hamas at the legislative elections in January of the same year, the EU decided to suspend its direct aid to the PA. This decision marks an important shift in the relationship between the EU and the Palestinians.

2.2.1. A Progressive Financial Involvement.

Europe's assistance and involvement with the Palestinian people date from the early 1970s when the EC started contributing to the UNRWA budget. After it issued the Venice declaration, and thus recognised the right of the Palestinian people to self-determination, Europe started to enact and enforce instruments in line with its political stance. It enacted in 1986 Regulation 3363/86 related to the tariff arrangements applicable to imports into the Community of products originating in the Occupied Territories.⁴³ The regulation allowed Palestinian products to be exported to the EC under the label "Made in West Bank and Gaza" thus being a concrete measure that dissociated the Occupied Territories from the State of Israel.

After the signing of the Declaration of Principles in September 1993 in Washington, the EU decided to increase its involvement in the Peace Process through economic and

⁴³ Council Regulation 3363/86 of 27 October 1986, OJCE L 306, 1st November 1986.

financial means by supporting the nascent Palestinian Authority and to set the Palestinian economy on a course for development for the future. The commitment of the EU in its financial support of the Palestinian Authority and in aid and development programs directed to the Palestinian population was concretised through a Joint Action decided at the Council's level in December 1993 after the Washington Donors' conference in October 1993.⁴⁴ From 1994 to the end of 2005, the European Union committed approximately €2,3 billion in assistance to the Palestinians which makes it so far the most important donor of the PA and the Palestinian Occupied Territories. On top of that, bilateral EU Member States' assistance is estimated at a somewhat greater amount.⁴⁵ The EU, for instance, financed the construction of infrastructure such as the Gaza airport and seaport. Finally, the EU is the chair of the Ad Hoc Liaison Committee whose task is to coordinate the international aid to the PA and Palestinian Occupied Territories.

As it will be developed in the next chapter, the aid to the Palestinian population so far has helped to maintain the short-term survival of the PA and has prevented the Palestinian Occupied Territories from collapsing. It has had little impact on their development as a result of the lasting occupation of these territories by Israel.

2.2.2. The Suspension of the Direct Assistance to the Palestinian Authority in April 2006.

After the victory of Hamas at the legislative elections in January, the EU suspended its direct budget contribution to the PA – even though the elections were fully supported by the European Commission through its assistance to the Central Election Commission

⁴⁴ Declaration of the European Council in Brussels, "Middle-East Peace Process: Framework for Joint Action", 10-11 December 1993.

⁴⁵ Source EC Technical Assistance Office for the West Bank and Gaza. Available at http://www.delwbg.ccc.eu.int/en/eu_and_palestine/overview.htm#2 (last visited 15 December 2008).

and monitored by a European Union Election Observation Mission supervised by Veronique de Keyser (MEP).⁴⁶ Most of the State-building and development programs whose funds went through the Palestinian Authority were suspended except for those which were conducted under the auspices of the Office of the President.⁴⁷ The programmes whose funds were channelled through NGOs or through the private sector remained in place. In June 2006, the EU put in place a mechanism of emergency assistance, the Temporary International Mechanism (TIM), whose ambit was to provide essential services and financial support to vulnerable Palestinians, to help cover running costs, consumables and equipment for hospitals and schools and also to contribute to the continued supply of essential public utilities, including access to electricity, water and sanitation for the 1.3 million people in the Gaza Strip.⁴⁸ TIM was based on three windows: Window I helped cover running costs, consumables and equipment for hospitals and schools; Window II contributed to the continued supply of essential public utilities, including access to electricity, water and sanitation for the 1.3 million people in the Gaza Strip; and Window III supported the provision of essential services and financial support to vulnerable Palestinians. The suspension of aid to the PA was actually accompanied by an increase in the humanitarian assistance to the Palestinian Occupied Territories.⁴⁹

⁴⁶ "European Union launches 172-strong Election Observation Mission for the 2006 parliamentary elections in the West Bank and Gaza Strip", European Union Election Observation Mission for the West Bank and Gaza - Media Centre, 21 December 2005. Available at <http://domino.un.org/UNISPAL.NSF/3d14c9e5cdaa296d85256cbf005aa3eb/b3b8295ec1d54fea852570de00621275!OpenDocument> (last visited 15 December 2008).

⁴⁷ Interview with Mark Gallagher, Head of the Financial Cooperation and Institutional Reform Section, EC Assistance Technical Office for the West Bank and the Gaza Strip, Jerusalem, July 2007.

⁴⁸ Source: www.delwbg.ec.europa.eu (last visited 15 December 2008).

⁴⁹ The EC assistance amounted to €340 million for the year 2006. By the end of June 2007, the Commission had already committed €320 million for aid to the Palestinian Territories. For the year 2005, it provided € 260 million. Sources EC Technical Assistance Office for the West Bank and the Gaza Strip. Available at www.delwbg.ec.europa.eu (last visited 15 December 2008).

The decision to suspend direct assistance to the PA was far from unanimous in European decision-making circles. Actually, it was at first decided as a temporary measure by EuropeAid, the European Commission External Cooperation Programmes soon after the declaration of the results of the Palestinian legislative election. It then climbed up the EU hierarchy and was endorsed officially by the Council in Luxembourg on the 10th of April 2006.⁵⁰

The disagreements which revolve around this decision are the continuation of an ongoing debate on whether the EU ought to engage or not with Hamas. Already in 2004, the decision to put Hamas on the “terrorist list” had been the result of a heated debate and the EU has failed to develop a consistent approach towards the Islamist group. For instance, secret talks between Hamas leaders and EU officials were ongoing while Hamas was put on the terrorist list.⁵¹ The EU faced a predicament in January 2006. On the one hand, since 2004, the EU had set out to improve substantially its relationships with the State of Israel. The EU believes that it can fulfil its role as a third party only if it is on good-terms with all the parties to the conflict. It considered that the acceptance by Israel of European monitor borders at the Rafah crossing after the negotiation of the Agreement on Movement and Access in November 2005 was the demonstration that Israel was ready to welcome the EU on the diplomatic scene of the Peace Process and the EU wanted to maintain this momentum. Additionally, the EU did not want to take the risk of endangering its relationships with its US ally which had already been suffering during the Iraqi crisis.⁵² On the other hand, some voices inside the EU alerted that inasmuch as this decision could provoke a humanitarian crisis, it would have as a

⁵⁰ Interview with Alban Biaussat, Political Advisor at the EC Technical Office for the West Bank and Gaza, Jerusalem, August 2006.

⁵¹ R. Miller, “Troubled Neighbours: The EU and Israel” (2006) 12 *Israel affairs* 642-664, p. 653.

⁵² Interview with Emmanuele Giaufret, Deputy Director of the EC Delegation for Israel, Head of the Political and Economic Section, Tel Aviv, July 2007.

consequence the direct loss of influence of Europe in the region and the immediate undermining of long-term institutional building and the relationship of confidence which existed between the EU and the Palestinians.⁵³

Nonetheless, despite the assertions of Solana and Ferrero-Waldner, the Commissioner responsible for External Relations, that the EU is not letting down the Palestinians⁵⁴, the decision has been perceived as a sanction by the Palestinian population on the ground, and is not understood by them given the fact that the EU financed the 2006 elections and acknowledged and praised their democratic character. John Dugard, the UN special *rappporteur* for the Occupied Territories summed up these feelings in his 2006 report: “They [Palestinians] are ... subject to economic penalties designed to compel the Hamas government to change the ideological stance on which it was elected -the first time an occupied people have been so treated”.⁵⁵

In March 2007, the EU also refused to recognise the entirety of the national unity government formed by Hamas and Fatah leaders. Following the events that took place in Gaza in June 2007 and the establishment of a new interim government in the West Bank in June 2007, the EU renewed contacts, cooperation, and assistance to the Palestinian Authority represented by this new interim government. At the Paris conference in December 2007, the international donor community decided to set up a new international support mechanism, PEGASE (*Mécanisme Palestino-Européen de Gestion de*

⁵³ Interview with Véronique de Keyser, Member of the European Parliament, Brussels, August 2006.

⁵⁴ “Summary of Remarks to the Press by Javier SOLANA, EU High Representative for the CFSP, on the situation on the Middle East and Iran, 20 February 2006”. Available at http://ue.eu.int/uedocs/cms_Data/docs/pressdata/en/declarations/88466.pdf (last visited 15 December 2008). See also D. Gow and C. McGreal, The EU Plans to Go it Alone with Aid to the Palestinians, *The Guardian*, (8 May 2006).

⁵⁵ “Question of the Violations of Human Rights in the Occupied Arab Territories Including Palestine, Report of the Special Rapporteur of the Commission of Human Rights, John Dugard, on the Situation of Human Rights in the Occupied Territories Occupied Since 1967”. U.N. Doc. A/HRC/2/5, 5 September 2006, p. 3.

l'Aide Socio-Economique) which would replace TIM and work in collaboration with the Palestinian Authority in implementing the Palestinian Reform and Development Plan (PRDP) presented at the Paris Donor Conference. PEGASE began to be enforced in March 2008. PEGASE's scope is broader than that of TIM. It aims to support improvements in governance and areas such as health, education and infrastructure. It channels funds directly to an account controlled by Palestinian Prime Minister Salaam Fayyad and bypasses Hamas in the Gaza Strip.⁵⁶

On June 24, 2008, foreign ministers and representatives of over forty countries and international organizations met in Berlin for the "Berlin Conference in Support of Palestinian Civil Security & the Rule of Law". They pledged US\$242 million that will be channelled to the Palestinian Authority (PA) over the next three years to finance development of the Palestinian security and judicial systems in the West Bank.⁵⁷

2.3. Independent Strategies: the Euromed Partnership and the European Neighbourhood Policy.

The EU has been willing to implement its own model of peace-building between former enemies through cooperation and economical exchanges. The EU established several "People-to-People" projects whose objectives were to instigate cooperation between the Israeli and the Palestinian civil societies in the fields of environmental protection, water, economy and trade.⁵⁸ However, the most ambitious scheme in this respect stems in the framework of external relations the EU has designed with his Mediterranean neighbours

⁵⁶ Source: http://www.delwbg.ec.europa.eu/en/funding/pegas_documents.htm (last visited 15 December 2008).

⁵⁷ See the website of the German Federal Foreign Office, <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/RegionaleSchwerpunkte/NaherUndMittlererOsten/palsec.html> (last visited 15 December 2008).

⁵⁸ M. Asseburg, note 25 above, p. 15.

and was supposed to accompany the efforts of the Peace Process: the Barcelona Process or Euromed Partnership (EMP). The European Neighbourhood Policy which was decided after the EMP, responds to the needs to redesign the framework of relations with the EU after the enlargement of 2004. It embraces all the countries at EU's periphery and must be read in connection with the European Security Strategy document in the sense that it is seen as the framework instrument which will allow the EU to be involved in crisis management at its borders.

2.3.1. The Euromed Partnership.

The Euro Mediterranean Partnership was launched in 1995 at a time when the chances for stability in the Middle East were seen as high. Its main objectives are to encourage the development of a partnership between the States of the two banks of the Mediterranean in three domains which constitute the three pillars of the EMP: political, economic and cultural. The EMP was an initiative complementary to but separate from the Middle-East Peace Process. With the EMP, the EU has been willing to implement its own model of peace-building between former enemies through cooperation and economical exchanges. The EMP was supposed to create a climate of confidence among these parties and institutionalise their relationships in order to boost the efforts towards peace.⁵⁹ It is based upon the assumption that economic development can only be achieved with functioning democratic institutions and accountable governments respecting basic standards of human rights. The rationale of the EMP was thus to make a link between the socio-economic challenges and the political and security issues of the region. Its outcome was supposed to be the generation in the long run of a well-policed

⁵⁹ E. Aoun, note 3 above, p. 292; A. Diaz-Martin, note 36 above, p. 18; F. Hutchence, The Middle East Peace Process and the Barcelona Process, In F. Attina and S. Stavridis (eds.), *The Barcelona Process and Euro-Mediterranean Issues from Stuttgart to Marseille*, (Milan 2001), pp. 171-198, p. 174 and P. Patokallio, note 21 above, p. 14.

zone of regional security and prosperity.⁶⁰ Therefore, a central theme of the EMP was the promotion of respect for human rights and democratic norms through a constant dialogue between the EU and its Mediterranean partners in order to examine the most appropriate means and methods for implementing the principles adopted by the Barcelona Declaration.⁶¹ In terms of structure, the EMP is based on the one hand, on a regional dimension which consists in the regular convening of multilateral talks on the three pillars of the EMP, and on the other hand, on a dense network of bilateral agreements between the EU and its Mediterranean partners.⁶² Each Euro-Mediterranean Association Agreement contains a human rights clause stating that the relationships between the parties is based on respect for human rights and democratic principles constitutes an *essential element* of the agreement.

Under the Barcelona Process, the EU established a contractual framework with Israel and the Palestinians which was complementary to the Paris Protocol (“economical protocol” or “Annex V of the PLO-Israel Interim Agreement”). The EU signed with Israel and the PLO two separate Association Agreements - the EC-PLO Association Agreement was signed by the PLO on behalf of the Palestinian Authority. Israel and the Palestinians were thus embraced with the EU into an economic triangular relationship as well as being integrated in the whole process of regional community building designed by the Euromed Partnership. The objectives of the EU-Israel Association Agreement are the promotion of free-trade, political dialogue and economic cooperation. The scope of the EC-PLO is narrower: it does not contain any provision for political dialogue or any

⁶⁰ F. Volpi, “Regional Community Building and the Transformation of International Relations: The Case of the Euro-Mediterranean Partnership” (2004) 9 Mediterranean Politics 145-164, p. 151.

⁶¹ “Reinvigorating Human Rights in the Mediterranean Area”, Commission Communication, 21 May 2003, COM (2003) 294 final.

⁶² On the Euro-Mediterranean Partnership: http://ec.europa.eu/external_relations/euromed/index_en.htm (last visited 15 December 2008).

obligations on establishment and services.⁶³ This is due to the limited structure of the PA as well as the *limited* capacity of the PLO to negotiate on behalf of the PA.⁶⁴ However, the initiative of the EU to give the PA the privileges it granted to any State at its periphery corresponded at the time with a will to enhance the prospects of the creation of a Palestinian State. As detailed in the previous chapter, both agreements contain a human rights clause.⁶⁵

Nevertheless, while the implementation of the series of bilateral agreements have continued, the failures of the Peace Process have, in the words of the European Commission, “contaminated” the implementation of the Barcelona process in its multilateral facet.⁶⁶ Certain parties cancelled their participation in the multilateral fora, issues related to the forum on politics and security spread inside other fora and some Arab States refused to hold meetings in some countries because of the presence of Israeli officials. This combined series of events has prevented the proper implementation of the EMP.⁶⁷ The sensitivity of the EMP to the “seismic tremors” of the Middle East Peace Process has showed the incapability of the EMP to act on the Peace Process and the

⁶³ E. Paasivirta, “EU Trading with Israel and Palestine: Parallel Legal Frameworks and Triangular Issues” (1999) 4 EFA Rev. 305-326, p. 310.

⁶⁴ According to article VI of the Palestinian-Israeli Interim Agreement of 28 September 1995, the PLO could negotiate on behalf of the Palestinian Authority on specific fields defined by the agreement.

Article VI. Powers and Responsibilities of the Palestinian Authority

“b. [...] the P.L.O. may conduct negotiations and sign agreements with states or international organizations for the benefit of the Palestinian authority in the following cases only:

- (1) economic agreements, as specifically provided in Annex IV of this agreement;
- (2) agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Palestinian authority;
- (3) agreements for the purpose of implementing the regional development plans detailed in Annex IV of the Declaration of Principles or in agreements entered into in the framework of the multilateral negotiations; and
- (4) cultural, scientific and educational agreements”.

⁶⁵ See Chapter 4 of the dissertation pp. 155-166 above.

⁶⁶ “The Role of the European Union in the Middle East Peace Process and its Future Assistance”, Commission Communication, 16 January 1998, COM (1997), 715 final, p. 2.

⁶⁷ F. Hutchence, note 59 above, pp. 174-181 and J. Peters, Practices and Failures: Arab-Israeli Relations and the Barcelona Process, (Berkeley 2004), pp. 15-25.

necessity for the resolution of the MEPP for the creation of an area of peace and stability in the Mediterranean environment.

At the initiative of President Sarkozy, EU member States and their Mediterranean counterparts launched in July 2008 the “Union for the Mediterranean” which aimed at upgrading the EU's relations with its neighbours from North Africa and the Middle East. The “Union for the Mediterranean” is not a EU initiative. The major focus of this project will be on improving energy supply; fighting pollution in the Mediterranean; strengthening the surveillance of maritime traffic and “civil security cooperation”; setting up a Mediterranean Erasmus exchange programme for students; and creating a scientific community between Europe and its southern neighbours. The Union for the Mediterranean is supposed to strengthen and support the Barcelona Process.⁶⁸

2.3.2. The European Neighbourhood Policy.

The EMP has been upgraded by a new framework, the European Neighbourhood Policy which is expected to offer a new dynamic to the Euromed relations.⁶⁹ The ENP was designed by the EU during the enlargement process of 2004 as a framework of external relations to manage its new external borders. It must be viewed from the logic of enlargement. In this sense, it represents a reassessment of EU's external relations with its new neighbouring States and of the EU's qualities and capabilities in the light of the tremendous changes which have taken place within the EU itself following the

⁶⁸ On the Union for the Mediterranean, see the website of the French Ministry of Foreign Affairs: http://www.diplomatic.gouv.fr/fr/europe_828/union-europeenne-monde_13399/relations-externes_853/union-pour-mediterranee_17975/index.html (last visited 15 December 2008).

⁶⁹ E. Johansson-Nogues, “A 'Ring of Friends'? The Implications of the European Neighbourhood Policy for the Mediterranean” (2004) 9 *Mediterranean Politics* 240-247, p. 243.

enlargement in 2004.⁷⁰ Its main objective is to expand the zone of prosperity, stability and security beyond EU's borders with the creation of a "ring of friends" from Morocco to Ukraine.⁷¹ The objectives of the ENP are not specifically about tackling the socio-economic issues of EU's new neighbours, as it was with the EMP, but rather stabilising and securing the borders around the EU's periphery by means of cooperative agreements in order to avoid new dividing lines in Europe. The strategy of the ENP is no longer regional: the ENP embraces all the countries at the EU's periphery thus encompassing two distinctive regions, the Mediterranean and the Eastern European areas. Furthermore, the ENP's approach is bilateral and differentiated. The EU offers concrete benefits and preferential relations within a framework, the Action Plan, which is tailored according to the economic development, rate of progress and democratic record of the partner country. Technically, the partner countries are supposed to be offered in the long run a very similar status to the members of the European Economic Area.⁷² The mechanisms of implementation of the ENP are:

- The establishment of a dialogue between the EU and the partner country within the existing framework of the relationship.
- The design of an Action Plan containing benchmarks and common objectives.
- An annual review of progress in implementing the Action Plan.⁷³

The ENP is based on a double assumption. First of all, as with the EMP, democracy, respect for human rights, civil liberties and the rule of law are all essential prerequisites

⁷⁰ R. del Sarto and T. Schumacher, "From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?" (2005) 10 EFA Rev. 17-38, p. 26.

⁷¹ B. Ferrero-Waldner, "The European Neighbourhood Policy: The EU's Newest Foreign Policy Instrument" (2006) 11 EFARev. 139-142, p. 139.

⁷² R. Aliboni, "The Geopolitical implications of the European Neighbourhood Policy" (2005) 10 EFARev. 1-16, p. 2.

⁷³ "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", Commission Communication, 11 March 2003, COM (2003) 104 final, p. 18.

for political stability, as well as for peaceful and sustained social and economic development.⁷⁴ Second, the EU and its new neighbours possess shared values, which are the values codified in the Universal Declaration on Human Rights, the Organisation for Security and Cooperation in Europe and Council of Europe standards.⁷⁵ Thus, the deepening of relationships with the EU and the prospect for closer economic integration is subject to the demonstration of a commitment to respect democratic principles and human rights, and concrete progress in the implementation of political, economic and institutional reforms, including aligning legislation with the *acquis communautaire*.⁷⁶ The human rights dimension of the ENP is thus encapsulated in a system of positive conditionality according to which the achievement of reforms and progress in the field of human rights and democracy identified in each individual action plan are supposed to be reviewed annually and conditioned to the furthering of cooperation and extension of the privileges granted by the EU.

The ENP corresponded entirely with Israel's expectations. From the onset, Israel expressed its unhappiness with the EMP. Israel has always been willing to be offered a different treatment from the other Mediterranean partner countries due to its socio-economic characteristics. However, the EMP was seeking to forge a Mediterranean identity for its Southern participants with which Israel has never identified itself.⁷⁷ Furthermore, Israel has always sought a detachment of the EMP from the Middle East Peace Process (MEPP) and the ENP has no connection with the MEPP. The ENP follows the logic expressed in the Essen declaration of December 1994 which stated that

⁷⁴ *Ibid.*, p. 7.

⁷⁵ *Ibid.*, p. 16.

⁷⁶ *Ibid.*, p. 9.

⁷⁷ On this topic, see R. del Sarto, "Israel's Contested Identity in the Mediterranean" (2003) 8 *Mediterranean Politics* 27-58.

Israel should enjoy special status in its relations with the EU on the basis of reciprocity and common interest.⁷⁸

Being the most developed country at the EU's periphery, the ENP makes Israel the frontrunner in this new framework.⁷⁹ The EU-Israel Action Plan is tailor-made to reflect Israel's political and economic situation. It has, as an objective, the deepening of Israel's integration into the European market and the boosting of cooperation in scientific and cultural relations.⁸⁰ The ENP may thus expose the Israeli market to European competition through further integration of Israel's economy into that of the EU and may slowly change the nature of Israeli law to bring it closer to that of the EU's *acquis*.⁸¹

The EU and the PA have also agreed on an Action Plan in which the EU asserts its intention to transform its relationships with the PA from mere cooperation to integration.⁸² The EU-PA Action Plan should be read in combination with the Communication of the Commission "EU-Palestinian Cooperation Beyond Disengagement: Towards a Two-State Solution".⁸³ The EU viewed the Gaza disengagement plan as an opportunity for boosting its involvement in the State-building capacities of the future Palestinian State. It thus committed itself to promote the reform of the PA, to help improve the condition of trade and investments in the Palestinian economy and to reconstruct the infrastructure of the West Bank and the Gaza Strip. It also sent a mission of observers, the EU Border Assistance Mission (EU BAM) to reinforce Palestinian border management capabilities at the Rafah border checkpoint

⁷⁸ Declaration of the European Council in Essen, 9 and 10 December 1994.

⁷⁹ G. Harpaz, "Enhanced Relations between the European Union and the State of Israel under the European Neighbourhood Policy: Some Legal and Economic Implications" (2004) 31 *Legal Issues of Economic Integration* 257-274, p. 265. Israel: €19578 GDP per capita -with Lebanon second richest (€5284), in "Wider Europe" COM (2003), p. 7

⁸⁰ "Proposed EU-Israel Action Plan", European Commission, Brussels, 9 December 2004.

⁸¹ G. Harpaz, note 79 above, pp. 267-270.

⁸² "Proposed EU-PA Action Plan", European Commission, Brussels, 9 December 2004.

⁸³ Commission Communication, 5 October 2005, COM (2005) 458 final.

between Egypt and the Gaza Strip.⁸⁴ However, the perspective of integration and the implementation of EU strategy post-disengagement were completely annihilated by the decision to suspend its aid to the Palestinian Authority in January 2006. Direct aid and contacts with the PA were resumed in June 2007. On 19 May 2008, The Palestinian Authority and the European Union (EU) officially re-launched the European Neighbourhood Policy (ENP) process between the PA and the EU on the occasion of the meeting of the “Joint Committee”.⁸⁵

Despite the evolution of the EU structural framework of external relations and the developments on the ground and the EU’s responses to them, the EU-Israel and EC-PLO Association Agreement remain the main legal ties which link the EU with Israel and the Palestinians. They are the two instruments for the implementation of the EU-Israel and EU-PA Action Plans. As such, they provide the legal basis for the development of further contractual relations.

3. Academic and Political Responses to the European “Weak” Involvement in the Resolution of the Israeli-Palestinian Issue.

The overall picture of the involvement of the EU in the resolution of the Israeli-Palestinian conflict gives rise to a general feeling of frustration. On the one hand, as has been shown in this chapter, the Israeli-Palestinian issue is an arena where the EU has deployed huge diplomatic and financial efforts. There is a general acknowledgement that the EU’s diplomatic involvement has been growing during these last fifteen years and that it has increased its visibility, particularly since the beginning of the Second Intifada at

⁸⁴ This aspect is developed in the next chapter of this dissertation, pp. 208-211 below.

⁸⁵ Source EC Technical Office for the West Bank and Gaza. Available at <http://www.delwbg.ec.europa.eu> (last visited 15 December 2008).

the end of the year 2000.⁸⁶ The sending of the first EU Special Envoy, EU's participation—along with the United States, the United Nations and Russia—in the Quartet, and its considerable financial involvement in the Occupied Territories are signs of the importance the EU places in the resolution of this issue. However, on the other hand, many regret that the EU is not playing a political role proportionate to its economic involvement in the resolution of this conflict and that it has been relegated to a secondary but nonetheless crucial role: the “donor of the Peace-Process”.⁸⁷

These general feelings of frustration provoked by the political incapacities of the European Union have given rise to a series of proposals and calls designed by European think tanks to establish a constructive strategy to the Middle East. These recommendations remain very dependent upon the contemporary political context at the time they were formulated, whether it was before or after the start of the second Intifada and the Second Gulf War. They all offer responses to the internal and external constraints which the EU is facing in order to exercise leverage on the situation. Therefore, unsurprisingly, the need to expand cooperation with the United States is a recurrent theme. It is now agreed, as expressed by Everts, that experience has demonstrated that when the EU and the US have pulled in the same direction, they are successful.⁸⁸ However, in light of the failure of American policy in the region after the invasion of Iraq, some have concluded that European dependency upon any American initiative cannot remain a reality.⁸⁹ Furthermore, the deployment of a EU peacekeeping force to police a final settlement is also an idea which is regularly submitted. In connection with the Maastricht Treaty, in 1992, the Western European Union which

⁸⁶ M. Ortega, note 11 above, pp. 55-56. and J. Peters, note 5 above, p. 158.

⁸⁷ See on this aspect, for instance, P. Patokallio, note 21 above.

⁸⁸ S. Everts, note 2 above, pp. 3 and 51. See also M. Asseburg, note 25 above, pp. 26-28 and V. Yorke, note 8 above, pp. 43-46.

⁸⁹ G. Nonneman, note 15 above, p. 48.

constitutes an integral part of the EU elaborated its future tasks, known as the “Petersberg tasks” which comprises peacekeeping, humanitarian interventions and crisis management. Under such a framework, the EU could deploy a force to secure a negotiated peace after possible Israeli withdrawals from the Occupied Territories.⁹⁰ Nevertheless, this proposition does not take into account the constant refusal by Israel of any international peacekeeping force involved in this region as this would mean an “internationalisation” of the conflict.⁹¹

Demands such as the need for the member States to overcome their differing approaches have been formulated.⁹² Regarding the attitude of the EU towards the parties to the conflict, some authors have urged the EU to put pressure on the parties to the conflict to implement the Road Map⁹³ or, in its relations with the parties, to “punish extremists and support moderates”.⁹⁴ Regarding this latter aspect, the relationships with the Palestinians raises much less controversy than the ones with Israel. Given the considerable aid the EU provides to the Palestinian Authority and to the Occupied Territories, its leverage on the Palestinian leadership in attempts to reform the Palestinian political system or to prevent terrorist attacks on Israel is acknowledged.⁹⁵ The attitudes the EU should adopt towards Israel range through several possibilities which stem from the exercise of positive conditionality⁹⁶ to the accession of Israel to the European Union. This latter strategy was seen by some as offering the possibility of exercising a strong policy of

⁹⁰ A. Dieckhoff, “The European Union and the Israeli-Palestinian Conflict” (2005) *Inroads*. Available at http://inroadsjournal.ca/archives/inroads_16/Inroads_16_front_matter.pdf (last visited 15 December 2008); S. Everts, note 2 above, pp. 28 and 51 and B. Møller, *A Cooperative Structure for Israeli-Palestinian Relations. The Contour of a Post-Conflict Peace Order* (Centre for European Policy Studies), (Brussels 2002), pp. 42-44.

⁹¹ J. Choprat, “Third Party Monitoring in the Israeli-Palestinian Conflict” (2003) *The International Spectator* 33-45, p. 35.

⁹² M. Asseburg, note 255 above, pp. 26-28.

⁹³ *Ibid.* and S. Everts, note 2 above, p. 51.

⁹⁴ S. Everts, *ibid.*

⁹⁵ See for instance, M. Asseburg, note 255 above, pp. 26-28 and B. Møller, note 903 above, p. 46.

⁹⁶ N. Tocci, note 30 above, pp. 28-29.

conditionality on human rights and democratic standards and obliging Israel to abide by the Copenhagen principles.⁹⁷ The more developed the level of integration with the EU, the more influence it can exercise on this partner. Accession of Israel to the EU also corresponded to a political desire in some Israeli political circles.⁹⁸ It is however not in today's European agenda. Finally, none has raised the possibility of using sanctions as a realistic course of action. Some authors have adopted on this issue the official European position which states that sanctions against Israel would be detrimental to its political credibility as a legitimate interlocutor.⁹⁹

On the academic front, authors have analyzed how the Israeli-Palestinian issue actually tests EU's international personality. For Aoun, the EU is acting outside the realm of power politics. Europe is a civilizing power using "mild tools" of international relations: it prefers using a positive repertoire of actions (official statement, agreements of economic cooperation and financial aid) rather than negative measures.¹⁰⁰ However, as the EU attempts to export its own standards by way of negotiations and pledges of assistance, it speaks a language of responsibility, of law and of reason, this language does not always make sense to the actors involved in lethal conflicts and who are not as "rational" as Europe would like them to be.¹⁰¹ Therefore, in relation to Israel and Palestine, as the Peace Process started to stumble, Europe's good will has been repeatedly tested. Europe has been cautious not to use any symbolic violence but its attitude has weakened its credibility in the eyes of the parties. Therefore, for Aoun, the EU would require a painful metamorphosis in order to contribute effectively to the

⁹⁷ B. Møller, note 903 above, p. 46 and R. Aliboni, note 724 above, p. 8.

⁹⁸ Y. Dror and S. Pardo, note 299 above, p. 30.

⁹⁹ A. Dieckhoff, note 903 above. See also the official position of the EU on this issue: Frequently Asked Question on the European Union and the Middle East Peace Process. Available at http://ec.europa.eu/external_relations/mepp/faq/mepp_faq_en.pdf (last visited 15 December 2008).

¹⁰⁰ E. Aoun, note 3 above, pp. 299-300.

¹⁰¹ *Ibid.*, p. 311.

Middle-East Peace Process –one that it does not seem ready to undergo- and the Iraqi and Israeli-Palestinian crisis are perfect opportunities for observing eventual changes in European attitudes and policies which could hint at any future transformation of the EU's identity as an international actor.¹⁰²

In a similar vein, Pace tests the constructions of Europe as a normative power, its process, environment, mechanisms and goals, against its limits in the context of its involvement in the resolution of the Israeli-Palestinian conflict.¹⁰³ Pace describes normative power as a self-construction establishing a European Union identity against the “others” (international actors) rather than an objective analytical concept.¹⁰⁴ For Pace, the EU's discursive practices act as compelling ideas which it seeks to export to conflict areas –adherence to human rights, democracy, rule of law, good governance, social and economic development as the routes out of poverty, violence and conflict and to which the parties of the conflict can subscribe.¹⁰⁵ Therefore, in relation to conflict transformation the EU's chances of acting as a mediator or transforming conflicts through economic cooperation and other forms of partnerships depend on the acceptance of the notion of the normative power of Europe by the parties to the conflict. In the case of the Israeli-Palestinian conflict, not only there is no process of internalization by any of the parties to the European normative model but there is also a power asymmetry between Israel and the Palestinians which limits the processes and desired outcomes at which the deployment of the normative instruments are aimed.¹⁰⁶ Finally, the credibility of EU's discourse and actions for the preparation of a Palestinian Western-style democracy and the emphasis on the importance of dialogue with all the

¹⁰² *Ibid.*, p. 312.

¹⁰³ M. Pace, “The Construction of EU Normative Power” (2007) 45 *Journal of Common Market Studies* 1041-1064.

¹⁰⁴ *Ibid.*, p. 1043.

¹⁰⁵ *Ibid.*, p. 1054.

¹⁰⁶ *Ibid.*, pp. 1055-1056.

conflict parties have been seriously undermined following the EU's suspension of its direct financial aid to the Palestinian Authority after the election of Hamas.¹⁰⁷

A separate and final note should be devoted to Tocci's writings on the involvement of the European Union in the resolution of the Israeli-Palestinian conflict. In a well researched and developed policy paper published under the auspices of the Centre for European Policy Studies in 2005¹⁰⁸, Tocci demonstrates that the nature of the EU's credibility problem in the Middle-East stems neither from inadequate instruments nor from its internal divisions but rather derives from the manner in which the Union has chosen to deploy the instruments at its disposal.¹⁰⁹ Thus, Tocci analyses the limits to EU's use of conditionality on Israel and the Palestinians. Regarding the Palestinians, the demands for reforms of the institutions of the Palestinian Authority, democracy and good governance have been hampered by the deteriorating status quo, i.e. the persisting and deepening Israeli occupation. Restriction on movement and the withholding of PA tax revenues have weakened the attempts to empower the Authority and the functioning of the PA institutions. Furthermore, the inability and unwillingness of President Arafat to modify his actions and who cultivated an autocratic image was a major hindrance to demands for reform to the Palestinian Authority. Finally, the demands on the PA to stop the violence caused by Palestinian militant groups have not taken into account the fact that, first of all, the extent to which any moderate PA leader can use their power to quell violence is directly linked to Israel's conduct and, secondly, conditionality was not targeted at the direct authors of most violent acts perpetrated against Israel.¹¹⁰ In relation

¹⁰⁷ *Ibid.*, p. 1057.

¹⁰⁸ N. Tocci, note 30 above. The paper has been reproduced as a chapter in N. Tocci, *The EU and Conflict Resolution Promoting Peace in the Backyard* (New York 2007), pp 100-125. And summarized in N. Tocci, H. Darbouche, Michael Emerson, S. Fernandes, R. Hanau-Santini, G. Noutcheva and C. Portela, 'The European Union as a Normative Foreign Policy Actor (Centre for European Policy Studies), (Brussels 2008), pp. 19-22.

¹⁰⁹ N. Tocci, *Ibid.*, p. 1.

¹¹⁰ *Ibid.*, pp. 14-18.

to Israel, Tocci states that the EU has never exercised any form of conditionality against Israel, positive or negative, and in turn has been accommodating with Israel's illegal practices. She uses as a case-study the issue of the exportation of products coming from the settlements under preferential treatment.¹¹¹ On this point, Tocci draws heavily on interviews carried out with Charles Shamas from the Mattin Group.¹¹² At the end of her piece, Tocci interestingly advocates for the pursuance of positive conditionality in the EU's strategy towards the two parties based on a shared acknowledgement of the parties obligations under international law.

These three authors' contributions all highlight the inconsistencies between the EU's declared foreign policy objectives and the use or non-use of its traditional external relations instruments (i.e. positive conditionality) in the specific case of its relations with Israel and the Palestinians. While their work has informed the analytical arguments found in this dissertation, in the chapters that follow, I will attempt to demonstrate using case studies, interviews and textual analysis how the EU's economic and aid policies have become interwoven with the violations of international law in relation to Israel's occupation of the Occupied Territories and the consequences of this for the EU's legal integrity, formal EU human rights policy and the EU's *participative responsibility*.

¹¹¹ *Ibid.*, pp. 19-22.

¹¹² The seventh chapter of this dissertation develops Tocci's argument by testing EU's attitude vis-à-vis this problem to its compliance with the obligation not to recognize.

Chapter Six
European Union Policy towards the Palestinians:
Building Blocks against Road Blocks?

Europe's relationship to Palestine has an epic quality. Palestine has been coveted for centuries due to its geographical and religious centrality. It has been a focal point of conquests and rivalries.¹ If one has to look at the relationships between Europe and the Palestinians and not the land of Palestine and more specifically during the past century, these have gone through three phases. From 1920 to 1948, the first period was characterised by a colonialist stance. After the First World War, the United Kingdom was granted a mandate over Palestine and this after it had issued the Balfour declaration which promised a national home for the Jewish people and hence dramatically transformed the fate of the Palestinian people. After a long period following the creation of the State of Israel where the Europeans considered the Palestinians to be a refugee problem only, they began by the mid-1970s to recognise the Palestinian's national claims and thus started to deploy efforts to legitimise the Palestinian Liberation Organisation on the international scene and to integrate the organisation into the Israeli-Arab political process. The recognition of the right of the Palestinians to self-determination by the Europeans certainly helped to bring about international recognition of the Palestinian national claim. Finally, the beginning of the Peace Process marked a period of strong economic dependency accompanied by a political support for the Palestinian leaders, notably Yasser Arafat until his death in November 2004.

The suspension of the aid directed at the Palestinian Authority after the election of Hamas in January 2006 represented a change in the relations between the EU as up to

¹ B. Khader, *L'Europe et la Palestine : des Croisades à nos jours*, (Paris 1999), p. 8.

that event the Palestinians who had viewed the Europeans as the only third party able to understand their plight.

However, even up to the present, the EU-Palestinians relations are still characterised by a strong economic or aid dependency and, consequently, they are of an essentially unilateral nature. Furthermore, it is difficult to analyse and characterise the relationship between EU and the Palestinians without considering the relationships between the EU and Israel, Israel and the Palestinians, or the context of the Israeli occupation of the Palestinian Territories. The EU-Israel relationship considerably influences the relationships between the EU and the Palestinians as it is historically and politically complex as the next chapter demonstrates.

The focus of this chapter is an investigation of how the violations of international law committed by Israel and the Palestinians disrupt the implementation of the unilateral and bilateral instruments directed at the Palestinians and how the EU reacts to this interference in light of the principles developed in the second and third chapters of this dissertation. The first section focuses on the inoperability of the EC-PLO Interim Association Agreement; the second on the deployment of humanitarian aid in the Palestinian Occupied Territories; and the third on the Palestinian State building policy with the specific example of the training and funding of the Palestinian civilian police.

1. The Inoperability of the EC-PLO Association Agreement.

In 1986, the EC enacted Regulation 3363/86 on the tariff arrangements applicable to imports into the Community of products originating in the Occupied Territories which allowed Palestinian products to be exported to the EC market under the label “Made in

West Bank and Gaza". This was a concrete measure to promote the implementation of the right to self-determination of the Palestinian people because it dissociated the territory of the State of Israel from the Palestinian Occupied Territories.² In the same vein, with the conclusion of an agreement with the Palestinian Liberation Organisation³, the EU treated the Palestinians on an equal footing with all other members of the Euro-Mediterranean partnership and thus took another concrete step towards the recognition of the right of the Palestinian people to self-determination. Furthermore, the EC-PLO Interim Association Agreement was conceived as an instrument which would enhance trade and economic cooperation, hence fostering the economic development of the nascent Palestinian Authority.

However, the EC-PLO Interim Agreement has never been fully operational for two reasons. First of all, Israel has always refused to recognise it. Second, the curfews and closures imposed on the Palestinian population, especially during the Second Intifada, have seriously undermined the development of the Palestinian economy. As a result, Palestinian external trade scarcely exists, and the measures imposed on Palestinian exporters have diminished the competitiveness of their products.⁴ In 1998, in its communication to the Council and the Parliament, the Commission stressed that Israeli-imposed restrictions on the Palestinian economy and the non-recognition policy of the EC-PLO Interim Association Agreement was inevitably leading to violations of both the EC-PLO as well as the EC-Israel Interim Agreements because Palestinian exporters

² Council Regulation 3363/86 of 27 October 1986, OJCE L 306, 1st November 1986.

³ The legal basis of the EC-PLO Interim Association Agreement is not article 310 of the EC Treaty (Association Agreements) but articles 133 (Commercial Policy) and 181 (Development). See E. Paasivirta, "EU Trading with Israel and Palestine: Parallel Legal Frameworks and Triangular Issues" (1999) 4 EFA Rev. 305-326, p. 309.

⁴ Oxfam accounts that the transaction costs for Palestinians wishing to export are up to 70% higher than for Israelis exporting the same product. Quoted in "Development Assistance and the Occupied Palestinian Territories", International Development Committee of the House of Commons, Fourth Report of Session 2006-2007, HC 114-I, p. 20. Hereinafter "Development Assistance and the Occupied Palestinian Territories".

tended to use Israeli channels of exportation and to export under the EU-Israel Association Agreement.⁵ More than ten years later, the situation remains unchanged.⁶ As a consequence, the EU is facing a situation in which on the one hand, one of its international instruments is inoperable because a third State refuses to recognise one of its agreements and thus undermines its object and purpose and, on the other hand, the illegal actions of the same third State creates external circumstances which have as its consequence the undermining of the object and purpose of the treaty and its violation.

1.1. The Non-Recognition of the EC-PLO Interim Association Agreement by Israel.

Since its signing, Israel refused to recognize the EC-PLO Interim Association Agreement because, first of all, it contends that it is in contravention with the Paris Protocol which according to Israel, creates a “single customs envelope” while the EC-PLO Interim Association Agreement envisages the Israeli and Palestinian markets separately. Israel also considers that the Interim Agreement contradicts the terms of the Paris Protocol which allows for a *de facto* cumulation of origins between Israeli and Palestinian products, and the Israeli and Palestinian Association Agreements do not allow for a cumulation of this kind.⁷

The EU has rejected these arguments. The EU considers the Palestinian Occupied Territories to be a separate trading entity and do not form with the territory of the State

⁵ “Commission Communication on the Implementation of the Interim Agreement on Trade and Trade-Related Matters between the European Community and Israel”, Commission Communication, 12 May 1998, SEC (98) 695, p. 11-13. Hereinafter “Communication on the Implementation of the Interim Agreement”.

⁶ Interview with Mark Gallagher, Head of the Financial Cooperation and Institutional Reform Section, EC Assistance Technical Office for the West Bank and the Gaza Strip, Jerusalem, July 2007.

⁷ V. Yorke, *International Agreements with Third Parties* (Economic Policy Programme, London School of Economics), (London 1998). Available at http://www.met.gov.ps/cpp/EPPI/EPP_WYO_Work/6.pdf (last visited 15 December 2008).

of Israel a single customs territory. According to the 1998 Communication of the Commission, “the Paris Protocol leads to the conclusion that the West Bank and the Gaza Strip constitutes a *separate customs territory* since the Palestinians can and do exercise their own trade regime”.⁸ Furthermore, besides this legal consideration, the EU has been deaf to Israel’s arguments because it is eager to include the Palestinians in the Euro-Mediterranean Partnership (EMP) and to offer them the same treatment as any other members of the EMP. Nevertheless, until now this disagreement has not been resolved.⁹

Practically speaking, Israel has the means to object to the existence of the Interim Agreement and to render its non-recognition policy effective. Israel controls all the elements of the implementation of the Interim Agreement: it has control over all the trade outlets and makes Palestinians entirely dependent on transit through Israel. Consequently, for imports, in general terms, Israeli customs have a tendency not to accept imports marked as exempted from duty under the EC-PLO Agreement. Importers are obliged either to alter the custom formalities to show that the products are exempted under the EU-Israel Agreement - which delays the import - or to pay duty to Israeli customs. For exports, some Palestinian products manage to be exported with EUR1 certificates of origins.¹⁰ However, there still exists a tendency to contract Israeli exporters and export the products under the EU-Israel Association Agreement because of the numerous obstacles faced by Palestinian businessmen if they try to export their products directly to the EU.¹¹ Therefore, this situation leads to the violation of both the EC-PLO and EU-Israel Association Agreement.

⁸ Emphasis added. “Communication on the Implementation of the Interim Agreement”, p. 10.

⁹ Interview with Mark Gallagher, Jerusalem, July 2007.

¹⁰ Certificate EUR1 is the name of the certificate of origin used by exporters established in countries signatory of an association agreement with the EU and which proves that the exported goods are entitled to duty free treatment because they comply with rules of origin inscribed in the agreement.

¹¹ E. Paasivirta, note 3 above, p. 320.

If one looks strictly at the issue of non-recognition, it is difficult to assess whether Israel's non-cooperation in the implementation of the Interim Agreement amounts to a violation of international law. On the one hand, it could easily be advocated that Israel agreed in the Interim Agreement that the PA had rights to conclude international agreements or could be granted privileges but it does not have to recognise all the agreements it enters into or the privileges it benefits. On the other hand, it still can be advanced that Israel's attitude constitutes an abuse of rights. The principle of abuse of rights is described as the exercise by a State of a right either in a way that impedes the enjoyment by other States of their own rights and then for an end different from that for which the right was created.¹² Abuse of rights is in the words of Vaughan Lowe, an "interstitial norm", that is a legal concept although not obligatory but which is necessary to help the legal reasoning to proceed.¹³ A right is abused when it disrupts the capacity of enforcement of another right that normally coexists with the former. In the present case, the right of Israel not to recognize the privileges granted to the PA is abused, because as Israel possesses the means of enforcement of this Interim Association Agreement, it annihilates the right of the PA to have the agreement implemented. Nonetheless, this could have been prevented if the EU and the PLO had negotiated a transit agreement with Israel when they concluded the Interim Association Agreement and this it neglected to do. Without a transit agreement, the EU has no legal right to challenge this practice and therefore the violation of its agreements. Israel always offered to recognise the EC-PLO Agreement in exchange for allowing settlements to participate in preferential trade

¹² The principle of abuse of right is considered to be part of international law as a general principal of international law or as part of customary international law because of the numerous references to it by States in litigation and arbitration, by the PCIJ and the ICJ although it has never been endorsed as such by the latter. See A. Kiss, Abuse of Rights, In R. Bernhardt (ed.), *Encyclopedia of International Law*, (Amsterdam 1992) and M. Byers, "Abuse of Rights: An Old Principle, a New Age" (2002) 47 McGill Law Journal 389-431.

¹³ V. Lowe, The Politics of Law Making: Are the Method and Character of Norm Creation Changing?, In M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford 2000), pp. 212-221. See also M. Byers, *Ibid.*, p. 422.

with the EU and the EU has always refused to link the two issues and dealt with the issue of the exports coming from the Israeli settlements in an independent way.¹⁴

1.2. The Disruption of the Palestinian Economy.

On a broader perspective, the implementation of the EC-PLO Interim Association Agreement has been effectively “dormant” because of the severe decline of the Palestinian economy and this has had, as a consequence, the drastic diminution of Palestinian exports.¹⁵ After giving a broad overview of the obstacles to trade inside the Palestinian Occupied Territories, the following section analyses the ways the EU has tried to remedy this illegal interference in the implementation of its agreement and ease the freedom of movement inside the Territories.

1.2.1. Obstacles to Trade inside the Palestinian Occupied Territories.

The closure system in the West Bank and along the West Bank and the Gaza Strip has fragmented the Palestinian economic space, raised the cost of doing business and eliminated the predictability needed to conduct business.¹⁶ Furthermore, the obstacles placed on Palestinian importers and exporters under the guise of “security” have tremendously altered the competitiveness of Palestinian products. Palestinians have to rely on Israeli administration along the entire scale of the chain of exports. The obstacles placed in the way of Palestinian traders inside the West Bank as well as from the West Bank and Gaza to Israeli ports and airports, are all described by the Israelis as security

¹⁴ Interview with C. Shamas, senior partner of the Mattin Group, Ramallah, July 2006.

¹⁵ The amount of exports of goods and services was estimated at \$467 millions in 2004. It was \$657 millions in 2000. Sources Paltrade, www.paltrade.org (last visited 15 December 2008).

¹⁶ Intifada, Closures and Palestinian Economic Crisis: An Assessment (World Bank), (2004), p. 13. Available at <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/wbgaza-4yrassessment.pdf> (last visited 15 December 2008).

measures. Nevertheless, the increased costs caused by these, as well as their unpredictable and sometimes abusive nature, highlight their disproportionate and discriminatory character. Their direct and immediate effect serves to undermine the competitiveness of Palestinian products compared to Israeli ones rather than preserving the security of the State of Israel.¹⁷ For instance, movement of goods in and out of the Palestinian Occupied Territories depends on a system known as “back-to-back” transfer which increases the transport and labour costs and results in products often facing the risk of damage during these operations.¹⁸ Further, the security checks of containers at Israeli ports, which are done randomly are at the expense of Palestinian traders both causes delay and increases costs. The cost imposed is 250 New Israeli Shekels (NIS) for a 20 foot container, 400 NIS for a 40 feet container and 600 NIS for a physical check. Sometimes, the Israeli custom authorities give inaccurate information about the nature of the check and Palestinian traders have to pay an unflated amount of money.¹⁹

Therefore, obstacles to movements of goods obstruct the implementation of the EC-PLO Interim Association Agreement and also contribute to its violation – because Palestinian commercial operators tend to prefer to use Israeli channels of export and import. This results in some Palestinian products being exported and imported under the EU-Israel Association Agreement.

¹⁷ For a detailed account: Trade Impediments (Paltrade), (2005). Available at http://www.paltrade.org/cms/images/enpublications/Trade_Impediments_-_Issue_5.pdf (last visited 15 December 2008); Movement and Access Restrictions in the West Bank: Uncertainty and Inefficiency in the Palestinian Economy (World Bank), (2007) and Potential Alternatives for Palestinian Trade: Developing the Rafah Trade Corridor (World Bank), (2007). Available at <http://domino.un.org/UNISPAL.NSF/85255db800470aa485255d8b004e349a/bbc475552ab8cf22852572b3004f72ab!OpenDocument> (last visited 15 December 2008).

¹⁸ Traders who cannot obtain permits to carry their merchandise are subject to the “back-to-back” transfer system. It consists in the unloading the merchandise contained in a lorry at checkpoints and reloading the entire content into permit-carrying vehicles. The “back to back” transfer sometimes requires two or three vehicles. “Development Assistance and the Occupied Palestinian Territories”, International Development Committee of the House of Commons, Second Report of Session 2003-2004, HC 230-I, p. 40.

¹⁹ Interview with M. Haj Khalil, Palestinian Shippers Council, Ramallah, August 2007.

1.2.2. The EU's Efforts to Enhance the Freedom of Movement of Persons and Goods—the Case of the EU Border Assistance Mission (EU BAM) at the Rafah Crossing.

The EU has opposed this situation and used diplomatic and material means to correct it. However, most of the time the solutions offered have been hampered themselves by violations of international law and the EU has done little in the face of this, putting itself in a position of acquiescence to these violations. First of all, the EU has funded the construction of Gaza's airport and sea port, which were supposed to offer the Palestinians their own access for external trade and therefore avoid the Israeli channels. Both, however, were destroyed by the Israeli Defence Forces at the beginning of the second Intifada.²⁰ Second, it has raised the issue several times in the EU-Israel Association Council.²¹ Third, in May 2005, it set up a trilateral dialogue group at a ministerial level focused on trade issues, which, at the behest of Israel, was not to tackle issues of security. However, some EC civil servants tried to deconstruct the issues on the agenda in order to show that they had nothing to do with security. The group stopped meeting after the victory of Hamas in the legislative elections of January 2006, before any agreement could be reached.²² In November 2007, the EU announced its intention of restarting the work of its trilateral trade policy group.²³

Finally, the EU played a prominent role as a third party during the Gaza disengagement plan of 2005, and was the promoter of the Agreement on Movement and Access (AMA).

²⁰ This issue is tackled in the next section of this chapter.

²¹ Interview with Mark Gallagher, Jerusalem, July 2007.

²² *Ibid.*

²³ "State building for Peace in the Middle East: an EU Action Strategy", Joint paper by EU High Representative Javier Solana and EU Commissioner for External Relations Benita Ferrero-Waldner endorsed by the EU Council of Foreign Ministers ahead of the Annapolis Mideast Summit 27 November 2007.

In order to help in the implementation of the treaty, i.e., to allow the movement of people and goods but ensure the security of Israel and preserve the customs union between Israel and the Palestinians, the EU committed itself to sending a monitoring mission. This mission was stationed at the Rafah border crossing between Gaza and Egypt in order to supervise and train Palestinian custom officers. The EU Border Assistance Mission (BAM) is considered to be a success of European diplomacy and the sign of an evolution in the relationship between the EU and Israel.²⁴ The EU observers are based at Ashkelon (Israel) and enter Gaza through Keren Shalom (Israel). Their entry into Gaza and the accomplishment of their mission at Rafah is entirely dependent on the approval of the Israeli Defence Forces.²⁵

Since June 2006, after the seizing of an Israeli soldier by Palestinian activists, the Rafah crossing has been opened only intermittently -a form of collective punishment²⁶- and as a consequence the humanitarian crisis in Gaza has worsened²⁷ and the EU BAM has been unable to operate. The procedures negotiated in the protocol and put in place through the EU BAM, if implemented as they were until June 2006, are enough of a guarantee to ensure the security of the State of Israel since Israel itself agreed to these conditions. The

²⁴ Interview with Emmanuele Giaufret, Deputy Director of the EC Delegation for Israel, Head of the Political and Economic Section, Tel Aviv (Summer 2007). EU BAM is a European Security and Defense Policy (ESDP) mission created by the Joint Action 2005/889/CFSP, 12 December 2005 OJEU L327, 14 December 2005.

²⁵ Philippe Georges Jacques, Head of the Section on Infrastructures and UNRWA, EC Technical Assistance Office to the West Bank and Gaza Strip, August 2006.

²⁶ The organisation B'Tselem notes that, according to a report of the IDF, the IDF's Planning Division argued that the Rafah crossing "should be opened on occasion only after the kidnapped soldier is released and the shooting from the Gaza Strip stops [...]. The Israeli General Security Service opposed opening the crossing "even for a few hours, (so long as the matter of the abducted soldier remains unchanged. Pressure on this matter must remain in place at this stage)". The representative of the Coordinator of Government Operations in the Territories also believed that the crossing should remain closed until Shalit is released. Such action constitutes a collective punishment of the civilian population in the Gaza Strip, in violation of international humanitarian law. Article 33 of the Fourth Geneva Convention provides: "Collective penalties and likewise all measures of intimidation or of terrorism are prohibited". Article 33 also states that, "Reprisals against protected persons and their property are prohibited". See "30 Aug. 2006: B'Tselem to Defense Minister: Stop Using Rafah Crossing to Pressure Gaza Civilians", Briefing Note, B'Tselem, 30 August 2006.

²⁷ The Gaza Strip, One Big Prison (B'Tselem) (2007). Available at http://www.btselem.org/Download/200705_Gaza_Insert_Eng.pdf (last visited 15 December 2008)

refusal of Israel to open the crossing under these conditions raises serious doubts as to the legitimacy of the security concerns which have led to the crossing point being closed. In November 2006 and May 2007, the EU nevertheless decided to renew the mandate of the EU observers for six months without any changes.²⁸

In July 2006, the Palestinian Centre for Human Rights issued a press release in which it condemned the EU for being complicit in the collective punishment imposed on the population of Gaza, i.e., the closure of the passage, and urged EU observers to return immediately to the Rafah Crossing Point in order to allow thousands of Palestinians to travel to and from the Gaza Strip.²⁹ This claim is an overstatement. The mandate of the EU clearly did not allow the EU observers to reach the Rafah crossing point at their own will. As in the case of Dutchbat in Srebrenica, EU BAM officers do not have the mandate to intervene. Furthermore, like in the case of Dutchbat in Srebrenica, EU BAM is not *any* third party to the violation of international law.³⁰ One aspect, however, differentiates the case of Dutchbat from the one of EU BAM: in the case of EU BAM, the violation of international law is a prolonged one whereas in Srebrenica it was limited in time. This means that the EU has had opportunities to protest to the commission of this collective punishment and this particularly when the mandate of EU BAM was renewed. Therefore, renewing the mandate without considering the possibility of stationing EU monitors on the Egyptian side of the border, or in Gaza, and neglecting to negotiate measures which would allow for the opening of the crossing has led to the

²⁸ Joint Action 2006/773/CFSP, 13 November 2006, OJEU L 313/15, 14 November 2006 and Joint Action 2007/359/CFSP, 23 May 2007, OJEU L 133/51, 25 May 2007.

²⁹ "EU Contributes to Collective Punishment of Palestinians", Press Communiqué, Palestinian Centre for Human Rights, 3 August 2006. Available at <http://www.pchrgaza.org/files/PressR/English/2006/88-2006.htm> (last visited 15 December 2008).

³⁰ This dissertation analyses the violations of international law that happened in Gaza and in Srebrenica as objective facts and does not aim at comparing their gravity.

EU's acquiescence with Israel's violations of humanitarian law in this regard.³¹ It amounts to an endorsement of the present situation because, when it renewed the mandate, the EU was in a position to demand measures that would ensure the maximum effectiveness of the Rafah border crossing. Therefore, although the EU is concerned about the effect of the closures on the Palestinian economy and people, its involvement on the ground and first-hand knowledge of the situation puts the EU in a different position from any other third party to these violations of international law, reinforcing its duty to oppose them. Consequently, with its repeated silences when it had the opportunity and the legitimacy to contest, the EU has crossed the threshold of acquiescence to Israel's violation of international humanitarian law.

In June 2007, after Hamas took total control of the Gaza Strip following several months of fighting between Hamas and Fatah, the EU BAM stopped its activities and Israeli and Egyptian troops closed the Rafah terminal.³² Since then, Israel has enforced a siege on the population of Gaza. Its implications on the provision of humanitarian aid by the European Union to the Gazan civilian population are set out in the following section of this chapter.

³¹ See question by M. Moore MP to M. Beckett, 29 Mar 2007, Written Answer, Column 1773W, Commons Hansard.

³² "Temporary suspension of operations", EU BAM Rafah, press release, 15 June 2007.

2. European Aid to the Palestinian Occupied Territories and the Israeli Occupation.

In the 1990s, when the EC deployed its humanitarian aid to the Occupied Territories to improve the living conditions of the Palestinian population, it was part of a general policy of support of the Middle-East Peace Process and this aid was coupled with financial assistance to build self-governing structures and support projects for regional and bilateral Israeli-Palestinian cooperation.³³ With the absence of genuine progress in the Peace Process and the deterioration of the economic situation on the ground due to the worsening of the closure policy and other aspects of the Israeli “security” policy, the aid gradually focused essentially as a response to the humanitarian needs of the Palestinian population and increased continuously, even after the suspension of the direct aid to the PA in 2006. It is to be noted that the suspension of the aid to the PA had a financial cost. The use of a parallel channel to provide financial assistance to the Palestinian population is actually costlier than the direct aid to the Palestinian government. Oxfam, in February 2007 claimed that more than one million euros has been paid each month to HSBC for the bank to process European Union aid to impoverished Palestinians and key workers.³⁴ The head of the management TIM unit, Mario Mariani, does not contest the figures asserted by Oxfam but contends that the management cost of TIM does not exceed 5 % of the overall budget - for NGOs, the cost of management is around 25%. Mariani asserts that TIM is getting close to one million transactions and this service has a cost.

³³ M. Asseburg, The EU and the Middle-East Conflict: Tackling the Main Obstacles to Euro-Mediterranean Partnership In A. Jünemann (ed.), *Euro-Mediterranean Relations after September 11. International, Regional and Domestic Dynamics*, (London, Portland 2004), pp. 174-193, pp. 176-177.

³⁴ See R. McCarthy, EU's attempt to avoid Hamas costs £2m in bank charges, *The Guardian*, (7 February 2007).

Therefore, in operational terms, none can contest that TIM in the words of Mariani is “super efficient” and “super accountable”.³⁵

Inevitably and progressively, the humanitarian aid directed at the Palestinian population has become integrated into the “picture” of the Israeli occupation of the Palestinian Territories and as such, the violations of international law entailed by this occupation have an impact on the provision of this aid. The following paragraphs first detail the terms of the debate that accompanies EU’s humanitarian policy to the Palestinians and then, analyse how the EU is confronted in the implementation of its aid policy with the violations of international law occurring on the ground and how it reacts to them.

2.1. European Aid to the Palestinians Under Criticism.

The aid to the Palestinian people has never been immune from criticism. Apart from the fact that some suspect that the EU’s aid finances Palestinian terrorism³⁶, the EU is also accused of financing and entrenching the Israeli occupation of the Palestinian Territories.

In the 1990s, when the EU deployed large amounts of money to support the Peace Process, there was on its part as well as on the part of any donors, a genuine will to accompany the efforts towards the creation of a Palestinian State. At present, the international assistance is becoming a safety net to avoid a large scale humanitarian catastrophe.³⁷ At the same time, the EU has tried for some time to maintain medium-

³⁵ Interview with Mario Mariani, Jerusalem, 18 July 2007.

³⁶ This point is developed below.

³⁷ Twenty Seven Months- Intifada, Closures and Palestinian Economic Crisis (World Bank) (2003), p. 51. Nowadays, some 85 percent of Gazans are already dependent on partial food aid for basic nutritional needs. See Oxfam International Jerusalem Spokesman Michael Robin Bailey quoted in “Continued commercial closure of Gaza will cause complete humanitarian dependency” Press Communiqué, Oxfam, 15 July 2007. Available at

term development projects which would match its political commitment to assist in the creation of a Palestinian State, whereas the feasibility of its creation has been completely hampered during the past decade. The idea that prevailed was to create infrastructure and projects that would be useful *when the time comes*. Nevertheless, the current strategy of the EU is to be reactive to the present humanitarian crisis, i.e. to mitigate the socio-economic impact of the Israeli policy in the Palestinian Occupied Territories³⁸ – and this strategy became more evident after its decision to suspend the aid to the PA. This description of the EU's involvement parallels the legal argument that international aid helps relieve Israel from its obligation as an Occupying Power to ensure the welfare of the Occupied Population.³⁹ According to humanitarian law, the Occupying Power bears the primary responsibility to ensure the “welfare” of the occupied population (Article 43, 1907 Hague Regulations)⁴⁰ and is responsible for providing medical supplies and food to the population, as well as maintaining those institutions in charge of the provision of education and care for children (Articles 50, 55 and 56 Fourth Geneva Convention).⁴¹ Humanitarian agencies can offer their services to help the Occupying Power to provide the protected persons with food, medical supplies and medical services (Article 59,

<http://www.gisha.org/index.php?intLanguage=2&intItemId=498&intSiteSN=113> (last visited 15 December 2008).

³⁸ On the general issue of the deployment of aid in the context of the Israeli Occupation of the Palestinian Territories, see M. Keating, A. le More and R. Lowe (eds.), *Aid, Diplomacy and Facts on the Ground. The Case of Palestine*, (Bristol 2003). Furthermore, according to Le More, the shift of the international assistance to the Palestinians from development to humanitarian aid does not start with the beginning of the second Intifada as it is widely acknowledged but has gradually started since the beginning of the Peace Process. A. Le More, “Killing with Softness: Funding the Demise of a Palestinian State” (2005) 81 *International Affairs* 981-999, pp. 982 and 992.

³⁹ A. Meyer and D. Shearer, *The Dilemma of Aid under Occupation*, In M. Keating, A. L. More and R. Lowe (eds.), *Aid, Diplomacy and Facts on the Ground: The Case of Palestine*, (Bristol 2005), pp. 165-176, p. 170.

⁴⁰ Article 43 obliges the Occupying Power to restore and ensure, as far as possible, public order and life in the occupied territory and unless absolutely prevented to respect the laws in force in the occupied territory.

⁴¹ Article 50 provides in its first paragraph that the Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children. Article 55 exhorts the Occupying Power to the fullest extent of the means available to it to ensure the food and medical supplies of the population and particular, to bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. Article 56 urges the Occupying Power to the fullest extent of the means available to it, to ensure and maintain, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory.

Fourth Geneva Convention).⁴² However, they cannot do it in place of the Occupying Power (Article 60, Fourth Geneva Convention).⁴³

There is an acknowledgement from the EU's side and especially the humanitarian aid office ECHO (European Commission Humanitarian Office), that closures increase the cost of availability of the resources and therefore have a direct impact on the household economy.⁴⁴ These are the root cause of deterioration of the humanitarian indicators and a disproportionate response to the security concerns of Israel and if they are removed, the humanitarian situation will improve. Therefore, the ECHO expert interviewed explicitly stated that the deterioration of the humanitarian situation is due to the non-applicability by the Occupying Power of the rules applicable to the circumstances, i.e., humanitarian law. However, he considers that challenging the security measures employed by Israel is something to be done at the political level. ECHO fulfils its general mandate which is to provide assistance to people in distress and is driven by the fundamental humanitarian principles of humanity, neutrality, impartiality and independence.⁴⁵ Its objectives are to mitigate the effects of the chronic crisis caused to the civilian population and to decrease the pressure applied by the crisis on the household economy. The aid it has provided has prevented the total collapse of the socio-economic situation in the Occupied Territories. Without donor funding, poverty would be 40% higher.⁴⁶ This is not to say that concerns for the implementation of humanitarian law are completely out of the picture. In the case

⁴² Article 59 provides that if the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

⁴³ Article 60 provides: "Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59".

⁴⁴ The following paragraph substantially draws upon an interview with Alberto Oggero, ECHO expert, EC Technical Assistance Office to the West Bank and Gaza Strip, Jerusalem, August 2007.

⁴⁵ "Towards a European Consensus on Humanitarian Aid", Commission Communication, 13 June 2007, COM (2007) 317 final, p. 3.

⁴⁶ A. Meyer and D. Shearer, note 39 above, p. 168.

of ECHO, in all the sectors in which it intervenes (food aid, water sanitation, health...), it has included a strategy in order to protect the civilian population from deliberate harm. For instance, when a spring source is being polluted by settlers, ECHO will do its best to protect the source. Furthermore, a large part of the budget of ECHO is dedicated to contribute financially to the budget of the ICRC.

2.2. European Humanitarian Aid Policies in the Face of the Violations of Humanitarian Law in the Palestinian Occupied Territories.

Despite the claims for impartiality and independence, donors and humanitarian agents are not just *any* third party to the Israeli-Palestinian conflict and the humanitarian imperative does not absolve them of any form of responsibility. Their involvement on the ground and their connections with the parties place them in a different position from any other international third party to this conflict. Their actions are not unaffected by the violations of international law which result from the Israeli occupation of the Palestinian territories. This is especially the case when they evolve in an environment where facts on the ground are diminishing the development capacities of the Palestinian people.⁴⁷ This section details cases in which European humanitarian aid has faced the risk of becoming an integral part of Israel's malpractices or, when European humanitarian policies may be interpreted as incentives for the perpetuations of violations of international law.

⁴⁷ The legality of the Israeli settlement policy in the Palestinian Occupied Territories is detailed in the next chapter of this dissertation, pp. 256-258 below.

2.2.1. Funding Palestinian Violence?

First of all, European aid to the Palestinians has been alleged to support the funding of indiscriminate attacks against Israeli civilians as well as being diverted for the private use of representatives of the Palestinian Authority. Under the request of a group of Euro-parliamentarians, OLAF, the European Anti-Fraud Office launched in 2003 an investigation on the alleged use of the European funds to the PA for supporting indiscriminate armed attacks against Israeli civilians. It concluded that there was no evidence for support of such attacks being financed by the European Commission's contributions to the budget. However, it stated that the possibility of misuse of the Palestinian Authority's budget and other resources cannot be excluded, due to the fact that the internal and external audit capacity in the Palestinian Authority is still underdeveloped.⁴⁸ In the face of these criticisms, the TIM at the time, guaranteed to respond to an imperative of political accountability which ensures that the EU does not provide financial assistance for these illegal acts.⁴⁹ Like TIM, PEGASE offers a secure monitoring, verification and control system to provide a guarantee covering the use of donor funds. Furthermore, individual beneficiaries are routinely checked against international sanctions lists.⁵⁰

The possibility of European funds being used for the preparation or commission of indiscriminate attacks against civilians or for terrorist attacks clearly opens the door for accusations of aiding and assisting in the commission of a violation of international law.

⁴⁸ "Investigation into EU budgetary assistance to the Palestinian Authority Budget", Press Communiqué, Office Européen de Lutte Anti-Fraude (OLAF), Brussels, 17 March 2005, OLAF/05/03. Available at <http://domino.un.org/UNISPAL.NSF/fd807e46661e3689852570d00069e918/6f3404d7b1f6e39185256fd20059ad24!OpenDocument> (last visited 15 December 2008).

⁴⁹ Interview with Mario Mariani, Head of the Management Temporary International Mechanism Unit, Jerusalem, July 2007.

⁵⁰ On PEGASE, see http://www.delvbg.ec.europa.eu/en/funding/pegas_documents.htm (last visited 15 December 2008).

The European Union has a duty of due diligence to guarantee that its funds are not diverted for such a purpose. Like in the case of the arms sale analysed in the third chapter of this dissertation, the likelihood of the use of such funds for the commission of a violation of international law entails the exercise of a form of vigilance on the part of the European Union when delivering this aid to the Palestinian Authority.

2.2.2. The “Mitigation Projects”.

The wall, the settlements and the settler roads are physical instruments which helps enforcing the settlement policy of Israel in the Occupied Territories. In its *Advisory Opinion on the Legality of the Wall* of 9 July 2004, the International Court of Justice ruled that the wall and its “associated regimes”, the settlements and the settler roads create a *fait accompli* on the ground that may become permanent and as such are tantamount to a *de facto* annexation.⁵¹ When a humanitarian project interferes with these constructions in order to mitigate their impact on the lives of the Palestinian population, it may well face the risk of entrenching the expansionist agenda and maintaining the permanence of the illegal constructions. These issues have come to the agendas of international donors with the development of projects aimed at mitigating the impact of the wall among the Palestinian population affected by this construction in the years 2003 and 2004.⁵² The Ministry of Planning (MoP) of the Palestinian Authority issued a document aimed at inviting donors in their project to make sure contacts and accessibility between the local populations of both sides of the wall are maintained and that they sustain Palestinian efforts to remain in their houses and on their lands. After the release of the *Advisory*

⁵¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. (2004), p. 184 (para. 121). Hereinafter, “*Advisory Opinion on the Legality of the Wall*”.

⁵² By May 2004, donors had spent an estimated of \$22,616,811 on wall projects designed to moderate the negative effects of the barrier on surrounding Palestinian communities A. Meyer and D. Shearer, note 39 above, p. 172

Opinion on the Legality of the Wall, these efforts were taken over at the donors level in order to tackle their responsibility in the face of the wall. The Local Aid Coordinating Committee (LACC), the institution which supports the work of main donor liaison body in the West Bank and Gaza, published at the end of January 2005 a document which consists of guidelines directed at international donors considering undertaking mitigation projects in areas affected by the wall.⁵³ The document sets up a traffic light system: “Red Light” projects conflict with the prescription of the Advisory Opinion, “Green Light” projects are consistent; and “Orange Light” requires a case-by-case scrutiny. The document advocated the creation of a “Clearing House” inside the Ministry of Planning (MoP) dedicated to evaluating wall mitigation projects or, for donors who do not channel proposals through the MoP, to include a Project Impact Assessment to evaluate the compatibility of their project with the ICJ Advisory Opinion and MoP guidelines. Unfortunately, there has never been any follow up to this project because of the lack of agreement on its relevance among donors.⁵⁴

With respect to the mitigating projects, the position of the European Union has been very cautious. It has refused to undertake any mitigation projects and preferred to limit its actions to humanitarian efforts of a temporary nature, in addition to offering assistance in the field of advocacy and support to NGOs’ legal action against the wall.⁵⁵ Today the EU still follows the same policy regarding the populations affected by the construction of the wall with the proviso that priority is given for humanitarian aid directed at the population living west of the wall.⁵⁶ There is also a policy from certain EU

⁵³ J. A. Azzam and A. Hampson, *Wall Mitigation: Implications for Donors and Implementing Agencies Operating in Areas Affected by the Separation Barrier* (Local Aid Coordinating Committee), (2005). Available at [http://www.reliefweb.int/rw/RWFiles2006.nsf/FilesByRWDocUNIDFileName/DPAS-6NBJQ8-lacc-pse-30jan.pdf/\\$File/lacc-pse-30jan.pdf](http://www.reliefweb.int/rw/RWFiles2006.nsf/FilesByRWDocUNIDFileName/DPAS-6NBJQ8-lacc-pse-30jan.pdf/$File/lacc-pse-30jan.pdf) (last visited 15 December 2008). LACC is a coordination mechanism aiming at supplementing the Ad Hoc Liaison Committee at local level.

⁵⁴ Interview with Paul Prettitore, legal expert, World Bank, Jerusalem, July 2007.

⁵⁵ J. A. Azzam and A. Hampson, note 53 above, pp. 7 and 24.

⁵⁶ Interview with Alberto Oggero, Jerusalem, August 2007.

humanitarian agents not to request permits for entering certain zones because it is “a right under the Fourth Geneva Convention” and the Israeli authorities seem to have accepted this claim.⁵⁷ Indeed, this line of action prevents the EU from facing the risk of undertaking any kind of projects that might entrench the illegal situation created by the wall. It is a policy of minimal action where the EU takes no risk of having its responsibility engaged. In this instance, the EU has acted with diligence and preserved itself from recognising the construction of the wall.

Other donors have decided to go a step further and implement development projects to help Palestinian farmers to work on their lands on the other side of the wall by readjusting the work of these people on these lands and thus sustain the efforts of the local population to keep their lands. For instance, the Islamic Development Fund (a branch of the Al Aqsa Bank) has promoted the plantation of olive trees in the region of Deir Lassoun and Asharawieh (Tulkarem) instead of the previous greenhouses because this form of agriculture does not need as much intensive service and as such those who cultivate this plantation do not have to request regularly permits to access their lands.⁵⁸

2.2.3. Reconstruction after Destruction.

The destruction of infrastructure and houses is a common pattern of Israeli policies in the Occupied Territories. In May 2004, the IDF launched a large-scale military operation in Gaza, “Operation Rainbow”, leading to the destruction of 298 houses leaving 3800

⁵⁷ *Ibid.*

⁵⁸ Interview with Dr Abdel Atef, Head of the Programs and Projects Department. Palestinian Agricultural Relief Committees (PARC), Ramallah, August 2007.

people homeless.⁵⁹ Israel argued that such military action was necessary in order to prevent the construction of tunnels for smuggling arms under the border. However, the large-scale destruction of property which took place in this operation created some emotion in the donor community. When donors were about to issue a letter stating that they would not pay for the reconstruction of the houses, the US refused to sign this and insisted that a warning be written at the beginning stating that they refused to sign this letter. The letter has never been sent. Finally, the donor community agreed to pay for the reconstruction of the destroyed houses.⁶⁰ After UNRWA issued an appeal for U.S.\$ 15.84 million for Rafah by the end of May, on August 11, the EC allocated €1.35 million specifically for victims of house demolitions in Rafah and more precisely for temporary accommodation, cash assistance, shelter repairs, and key infrastructure, including the rehabilitation of water supply networks, sewage systems, and two schools.⁶¹ Commenting on the decision, the European Commissioner for Development and Humanitarian Aid at the time, Poul Nielson reminded Israel that “these funds do not absolve the occupying power of its responsibilities to uphold international humanitarian law.” He added: “As reiterated by the European Union and the United Nations, house demolitions are disproportionate acts that contravene international humanitarian law, in particular the Fourth Geneva Convention, and show a reckless disregard for the lives of civilians”.⁶² Chris Patten, European Commissioner for External Relations stated that the

⁵⁹ Rafah Humanitarian Needs Assessment: Submission to the Local Aid Coordination Committee (OCHA/UNRWA), (2004), p. 3, available at http://www.un.org/unrwa/news/unrwa_ocha_report.pdf (last visited 15 December 2008).

⁶⁰ Interview with Paul Prettitore, Jerusalem, July 2007.

⁶¹ Details of the amounts of financial assistance and quotation in Razing Rafah: Mass Home Demolitions in the Gaza Strip (Human Rights Watch), (2004), p. 97. Available at <http://www.hrw.org/en/node/11963/section/1> (last visited 15 December 2008).

⁶² “Commission provides a further €1.35 million in aid for victims of house demolitions in Rafah (Gaza Strip)”, Brussels, 11 August 2004, IP/04/1027.

EC should seek certain guarantees from the Israeli military forces that they will not destroy again what it builds.⁶³

Furthermore, the cases of protests by the EU to the destruction of civilian infrastructure have decreased. The bombing of the power station in Gaza is an example which illustrates the same pattern of behaviour in the face of commission of grave breaches of humanitarian law. On the 26th of June 2006, IDF planes targeted the power station of Gaza leaving Gazans with six to eight hours of electricity per day.⁶⁴ In a declaration, the Commissioner for External Affairs, Benita Ferrero Waldner stated that she was *disturbed* (emphasis added) by reports of interruption of electricity supply, including to vital services such as hospitals and asked Israel to act with prudence.⁶⁵ Later on, the European Union decided through the Temporary International Mechanism to provide fuel bought from Israel to hospital generators and water wells to ensure the continued availability of essential medical care and drinking water. Over 5 million litres of fuel have been delivered under the emergency fuel supply programme. Since its repair in November 2006, the electricity generated by the Gaza Power Plant has been exclusively financed by

⁶³ “Chris Patten on the Middle East Peace Process”, European Parliament Plenary Session, Strasbourg, 21 April 2004. Available at <http://www.chrispatten.org.uk/speeches/mc210404.htm> (last visited 15 December 2008).

⁶⁴ The bombing of the Gaza power station constitutes a violation of humanitarian law under article 52 (2) of Additional Protocol I which provides: “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage”. The rule contained in this article belongs to customary international humanitarian law. L. Doswald-Beck and J.-M. Henckaerts, *Customary International Humanitarian Law. Volume 1: Rules*, (Cambridge 2005), pp. 25-26 and 29. Specifically on the bombing of the Gaza power station, see Reprisals against Civilians. Report on Israeli Occupation Forces (IOF) violations against Palestinians civilians in the Gaza Strip for the period from the paramilitary operation on 25 June 2006 till 31 July 2006 (Palestinian Centre for Human Rights), (September 2006); Gaza Strip Situation Report (United Nations Office for the Coordination of Humanitarian Affairs), (10 October 2006) and Act of Vengeance: Israel's Bombing of the Gaza Power Plant and its Effects (B'tselem), (September 2006).

⁶⁵ “Benita Ferrero Waldner on current situation in Gaza”, News from the Communication Directorate General's Midday Briefing, Brussels, 28 June 2006. available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEX/06/0628&format=HTML.&aged=0&language=EN&guiLanguage=en> (last visited 15 December 2008).

the European Commission through the TIM.⁶⁶ Israel has never been held accountable for this damage.

In this instance, the European Union deliberately refused to protest against the commission of an illegal act when it had the opportunity and the legitimacy to do so because it paid for the reconstruction of the destroyed infrastructure. The absence of protest in this case clearly represents a case of acquiescence on the part of the European Union.

2.2.4. The Case of Destruction of Infrastructures Financed by the EU.

Another case at point is the EU's attitude towards the destruction of the Palestinian infrastructure by Israel which had been financed by the European Union. In early February 2001, the EU forwarded to Israel a list of damages caused by its military incursions in the Palestinian Occupied Territories estimated at approximately €17.29 million. This included damage to Gaza international airport and seaport, the Palestinian Broadcasting Corporation (PBC), the Palestinian police headquarters, two schools, a research laboratory, and a water treatment and pumping plant.⁶⁷ The destruction of these corresponded to a violation of humanitarian law because their destruction did not constitute an effective contribution to a military action in the circumstances ruling at the time.⁶⁸ Israel never paid the bill and the EU never dared to ask for anything afterwards, content with the finding of a legal enquiry which stated that the infrastructure was a donation to the PA and therefore, no legal channels were available to ask for

⁶⁶ Sources: European Commission Technical Office for the West Bank and the Gaza Strip. Available at http://www.delwbq.cec.eu.int/en/tim/tim_in.htm (last visited 15 December 2008).

⁶⁷ R. Miller, "Troubled Neighbours: The EU and Israel" (2006) 12 *Israel Affairs* 642-664, p. 662, note 16.

⁶⁸ See article 52 (2) of Additional Protocol I, note 64 above.

compensation.⁶⁹ Even in this case, no legal aid has been offered to the PA to ask for compensation. In 2005, at the time of the Gaza disengagement plan, the European Commission committed itself to disburse €40 million in order to, among other things, rebuild Gaza international airport and seaport.⁷⁰ The Commissioner Ferrero Waldner stated that this time, the EU will ask for guarantees from Israel not to destroy this new infrastructure.⁷¹ Nonetheless, the estimated total cost for EU and Member States funded projects for physical infrastructure, destroyed by the IDF between August 2001 to May 2007, amounts to €43 974 563 out of which €27 395 751 was from EU funding.⁷² No legal action is planned to obtain compensation for this material destruction. Like in the previous case-study, the EU was in a position to contest and ask for the payment of the destroyed infrastructure but it refused to do so. This attitude constitutes another incentive for the perpetuation of violations of IHL and entrenches Israel's claim to depart from rules of international law.

2.2.5. Compensating for the Retention of Taxes and Custom Duties.

Since the election of Hamas in 2006 until June 2007, Israel has retained the entirety of the taxes and custom duties owed to the Palestinian Authority and which accounts for \$475 million⁷³, as a way of preventing these sums of money to be used for the commission of terrorist acts on its territory. This is Palestinian income and, in normal circumstances, it is the main source for the payment of salaries of the PA employees and

⁶⁹ Philippe Georges Jacques, Jerusalem, August 2006.

⁷⁰ "Synopsis Euromed, Lettre d'information hebdomadaire sur le Partenariat Euro-Méditerranéen et le Programme MEDA", Edition n° 335, 17 November 2005.

⁷¹ "Chronological Review of Events Relating to the Question of Palestine", UNISPAL, February 2005. Available at <http://domino.un.org/UNISPAL.NSF/e9abb7dfb6c319c90525675900535dba/3d752e1f646122b985256fb9006a5f20!OpenDocument> (last visited 15 December 2008).

⁷² Sources: EC Technical Office for the West Bank, East Jerusalem and Gaza and UNRWA, 3 May 2007. Cited in S. Rockwell and C. Shamas, Third Annual Review on Human Rights in EU-Israel Relations. Accommodating to the "Special" Case of Israel. 2005-2006, (2007), p. 41.

⁷³ Israel has released \$100 m in 2006 but a large part of this sum will be used to support security operations. "Poverty in Palestine: the Human Cost of the Financial Boycott", Briefing Note, Oxfam, April 2007, p. 6. Available at http://www.oxfam.de/download/Palestinian_Aid_Crisis.pdf (last visited 15 December 2008).

accounts for one third of Palestinian income. The European Union offered Israel the opportunity to use TIM as a channel to distribute this money so that the Palestinian population could benefit from it.⁷⁴ Israel refused and its decision has led to the aggravation of the humanitarian crisis in the Palestinian Occupied Territories. The millions of euros transferred through TIM have helped prevented a humanitarian catastrophe which would have been mainly due to the retention of these taxes and custom duties.⁷⁵ As stated by the House of Lords EU Committee, the TIM cannot be a substitute for the full transfer of withheld Palestinian revenues by the Israeli government.⁷⁶ At the same time, TIM cannot be a substitute for the fulfilment by the Occupying Power of its obligations to the Occupied Population. According to de Soto, while the international community demanded from the Palestinian government that it should accept “previous agreements and obligations”, Israel deprives the PA of the capacity to deliver basic services to the Palestinian population in violation of one such “previous agreement” as well as its IHL obligations regarding the welfare of population whose land it occupies.⁷⁷

Since the Fayyad government took over in June 2007, Israel resumed payments of tax and customs duties, including back payments, and is now up to date with all payments

⁷⁴ Quartet declaration of 20 September 2006, “The Quartet encouraged Israel *and the Palestinian Authority* to consider resumption of such transfers via the Temporary International Mechanism to improve the economic and humanitarian conditions in the West Bank and Gaza.” (emphasis added). See also Council Conclusions on the Middle-East, 2776th External Relations Council Meeting, Brussels, 22 January 2007 and 2756th Council Meeting General Affairs and External Relations, Luxembourg, 16-17 October 2006.

⁷⁵ Dr Asseburg cited in “Poverty in Palestine: the Human Cost of the Financial Boycott”, Briefing Note, Oxfam, April 2007, p. 6.

⁷⁶ “The European Union and the Middle East Peace Process”, European Union Committee, House of Lords, 26th Report of Session 2006–07, 24 July 2007, HL Paper 132-I, p. 43.

⁷⁷ A. de Soto, “End of Mission Report (confidential report)”, published by the Guardian, (13 June 2007), p. 20, para. 52. When mentioning “the capacity to deliver basic services to the Palestinian population” by the Palestinian Authority according to “one such ‘previous agreement’”, de Soto refers to the spheres of authority that were transferred to the Palestinian Authority in accordance with the Declaration of Principles (Article VI.2), notably the fields of education, health and social welfare.

owed. However, continued payments are conditional on an administration that accepts the Quartet principles.⁷⁸

This case-study represents undoubtedly a case of acquiescence on the part of the European Union to Israel's decision to retain PA custom and duties. One can advance that it constitutes a case of recognition because the EU has integrated Israel malpractice in its policy in compensating for the retention of taxes and custom duties.

2.2.6. Obstruction to the Conduct of Humanitarian Work.

Israel interferes with the delivery of humanitarian aid to the Palestinians in complete contravention of the relevant provisions of the Fourth Geneva Convention regarding humanitarian assistance, notably article 61 of the Fourth Geneva Convention which provides that relief consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. It adds *in fine* that the Occupying Power shall facilitate the rapid distribution of these consignments.

First of all, the cost of humanitarian assistance is increased due to charges and taxes on stock, surcharges due to delays, and transit. The Euromed Human Rights Report on the EU-Israel relationship during 2003-2004 reports one case where the EU explicitly requested Israeli compensation for additional costs. The UN Italian representative, on

⁷⁸ "Development Assistance and the Occupied Palestinian Territories", International Development Committee of the House of Commons, Eleventh Report of Session 2007-2008, HC 522-I, p. 16.

behalf of the EU, asked Israel to pay for all additional costs of the delivery of goods to UNRWA's office in 2003 but his attempts were not successful.⁷⁹

Furthermore, Israeli security measures (permits, closures, etc.) in the Occupied Palestinian Territories delay the distribution of the aid. The ECHO office for the Occupied Palestinian Territories keeps a database of all incidents related to the delays of goods and persons.⁸⁰ Delays are measured according to several points of reference: the Fourth Geneva Convention, the Bertini Commitment and, for Gaza, the Agreement on Movement and Access. ECHO estimates that 20 percent of its \$35 million budget is lost through obstruction of its operations.⁸¹ Despite the declarations requesting Israel not to obstruct the delivery of humanitarian aid, no action has been undertaken to challenge these policies.

The absence of protest when the EU could have legitimately contested the obstruction of its humanitarian work in the Occupied Territories amounts inevitably to a case of acquiescence if not to a case of recognition of these illegal acts because the obstructions to its humanitarian work have become integrated in the enforcement of the humanitarian policy of the EU in the Occupied Palestinian Territories.

2.2.7. Complicity in Collective Punishment: the Case of the Cuts of Fuel

Supply in Gaza.

On 28 October 2007, as part of its policy to impose a blockade on the Gazan population that began to be implemented in June 2007, Israel decided to limit the amount of fuel it

⁷⁹ S. Rockwell and C. Shamas, *A Human Rights Review of the EU and Israel – Relating Commitments to Actions, 2003-2004* (Euro-Mediterranean Human Rights Network), (2004), p. 32.

⁸⁰ Interview with Alberto Oggero, Jerusalem, August 2007.

⁸¹ A. Meyer and D. Shearer, note 39 above, p.169.

would permit the EU to send to Gaza to no more than 250,000 litres per day—even though the plant now needs up to 500,000 litres per day. By early January 2008, Gaza's power plant reached the “red line” of its fuel reserves and was forced to cut electricity production by 30 percent, causing rolling blackouts throughout Gaza of up to eight hours per day on average.⁸² Benita Ferrero Waldner acknowledged in a declaration on January 21st that the blockade on Gaza was a collective punishment and urged Israel to restore the supply of fuel to its previous levels and open the crossings for the passage of humanitarian and commercial supplies.⁸³ The use of the qualification “collective punishment” was not followed by the Council. In its declaration on the Middle East one week later, it called on Israel in an elliptic formula to respect *its obligations* to Gaza (emphasis added). One can only speculate that it refers to its obligations under humanitarian law. The Council stated its grave concern at the humanitarian situation in Gaza and called for the continuous provision of essential goods and services, including fuel and power supplies.⁸⁴

The continuous provision of humanitarian aid to the population of Gaza corresponds to the fulfilment of the humanitarian imperatives to which the EU has committed itself. However, when such provision is disrupted by the Occupying Power itself, which is normally responsible for the provision of this aid, and when this disruption is part of a policy of collective punishment of a civilian population, this situation puts the EU in a different position from that of a mere humanitarian actor subject to a duty of neutrality.

⁸² “Israel's Fuel Cuts Cause 30% Reduction in Gaza Power Plant Production”, Briefing Note, Gisha, January 2008. Available at <http://www.gisha.org/index.php?intLanguage=2&intItemId=744&intSiteSN=113> (last visited 15 December 2008).

⁸³ “EU slams Israel's 'collective punishment' in Gaza”, *Eubusiness* (21 January 2008). Available at <http://www.eubusiness.com/news-eu/1200916924.77/> (last visited 15 December 2008).

⁸⁴ Declaration of the Council on the Middle East in Brussels, 28 January 2007.

By providing aid to the Palestinians, it has entered the “sphere” of the violation of international law.

How should this case-study be translated into legal terms? First of all, it is not a plain case of aid and assistance in the commission of an unlawful act in the sense that it is not the material humanitarian assistance that is necessary for the commission of the violation of humanitarian law.⁸⁵ There is no causal link between the aid provided and the violation of the humanitarian law. Second, it is inevitably a case of acquiescence because it consists of an assent to the violation of international law. It however goes a step further because the EU is giving effect to the illegal act by allowing this act to alter the way its policy is implemented. As such, it can be conceived as a case of recognition because it amounts to the acceptance by the EU of the opposability of the act and that is the endorsement of the legal consequences arising from the illegal act.⁸⁶

The analysis of the last three case-studies have demonstrated instances where the EU has recognised illegal Israeli practices in the conduct of its humanitarian policy in the Occupied Territories. However, as developed in the last chapter, the enforcement of the duty of non-recognition knows exceptions when it competes with another imperative or another obligation of international law. In the present cases, one can wonder whether the enforcement of the duty does not clash with the humanitarian imperatives of the Palestinian population in the Occupied Territories and that those imperatives do not prevail over the enforcement of the duty not to recognise. Nonetheless, one could object that humanitarian imperatives do not absolve the EU to find alternative ways in order not to step on the path of acquiescence like, for instance, requesting Israel to pay for the

⁸⁵ J. Crawford, *The International Law Commission on State Responsibility, Introduction, Text and Commentaries*, (Cambridge, New York 2002). pp.148-150.

⁸⁶ See Chapter Two of this dissertation, p. 78 above.

additional cost on the provision of humanitarian relief incurred as a result of the illegal restrictions to movement and access imposed by Israel in the Occupied Territories, or find ways to ensure the provision of all the fuel needed for the power station to function properly. Otherwise EU's humanitarian work helps perpetuating a "cost-free" occupation or in other terms, EU's behaviour amounts to a form of "complicity in alleviating the pain" or in "killing with softness" to paraphrase Le More.⁸⁷

3. The European State Building Policy, the Israeli Occupation and the Autocratic Drift of the Palestinian Authority.

The European State-building strategy was suspended after the election of Hamas at the legislative elections of January 2006. All the State-building, development projects and the people-to-people projects have been halted. After the designation of the emergency government of Salam Fayyad on 15 June 2007, the EU gradually resumed its contact and its aid to the Palestinian Authority. At Annapolis, 27 November 2007, Benita Ferrero Waldner announced that the State-building and development strategy was now officially back on track and she detailed the priorities of the European Union: support for the establishment of modern and democratic police forces, support for institution building and sustainable PA finances and good governance, support for sustained growth of the Palestinian economy by focusing on private sector activities, and supporting the PA's efforts to develop its trade policy and custom institutions.⁸⁸

⁸⁷ A. le More, note 38 above.

⁸⁸ "Institutional Reform and Capacity Building in the occupied Palestinian Territory" - Speech by EU Commissioner Ferrero-Waldner at the Annapolis International Conference on the Middle East, 27 November 2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/762> (last visited 15 December 2008).

The previous peace-building efforts of the European Union have been poisoned by the widespread corruption inside the Palestinian Authority. For a long time, in order not to “upset” its partner and maintain the negotiation process on track, the EU remained silent about this widespread corruption when at the same time it was undermining the confidence of the EU towards the PA and exasperated the staff of international donors working on the ground.⁸⁹ It was only with the outburst of the second Intifada, in 2000, that the EU decided to tackle seriously the issue of good governance and started to condition its aid to the implementation of reforms by the Palestinian Authority, such as enacting the Basic Law and the Law on Independence of the Judiciary, ensuring transparency of public finances, restructuring the security sector.⁹⁰ In order to improve the management of PA public finances, since April 2004, donors decided that all the international assistance directed at the PA be channelled through the Public Financial Management Reform Trust Fund established and managed by the World Bank.⁹¹ Nevertheless, it remains ironic to see that the response of the Palestinian people in sanctioning the corruption inside of the Palestinian Authority ruled by Fatah, i.e. the election of Hamas, has in effect been sanctioned by the EU itself. The new financial mechanism PEGASE which marks the reestablishment of the direct financial assistance to the Palestinian Authority is supposed to offer a comprehensive and secure monitoring, verification and control system to provide reassurance over the use of donor funds.⁹²

⁸⁹ Interview with Lynn Hastings, Legal Advisor and Alex Costy, Head of Coordination, United Nations Special Coordinator Office for the Middle-East (UNSCO), Jerusalem, July 2007.

⁹⁰ For an account on the urge for reforms to the PA and the limits of its success, see N. Tocci, *The Widening Gap between Rhetoric and Reality in EU Policy towards the Israeli-Palestinian Conflict* (Centre for European Policy Studies), (Brussels 2005), p. 15-17

⁹¹ See West Bank and Gaza, *The Public Financial Management Reform Trust Fund At a Glance* (World Bank), (2004). Available at <http://siteresources.worldbank.org/INTWESTBANKGAZA/Overview/20374462/AAG%20Reform%20Fund%20Status%20Report.pdf> (last visited 15 December 2008).

⁹² “PEGASE and Donors Contribution”. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/49&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 15 December 2008).

3.1. Reactivating the State Building Enterprise or the “Scandal of the International Community”.

The EU is confident that Annapolis creates a momentum in the political dialogue between the parties and enhances the chances of finding a peaceful solution to the current conflict.⁹³ To support the dialogue launched at Annapolis, at the Paris Donor Conference of 17 December 2007, the EU and its member States made public their intention to terminate the Temporary International Mechanism. The conference proposed that, by February 2008, the mechanism would be replaced by PEGASE which will support a broad array of activities in the four priority sectors of the Palestinian Reform and Development Plan which was agreed at Paris (governance, social development, economic and private sector development and public infrastructure development in areas such as water, environment and energy). With the establishment of PEGASE, the EU aims to shift from mere emergency assistance to a sustainable Palestinian development process by supporting Palestinian economic recovery and to help build institutions for a future state. The European Commission announced also it will pledge €440 million assistance for 2008.⁹⁴

Finally, in April 2008, the European Commission announced its intention to revive the EU-PA Action Plan and commended the PA government's efforts to produce the Palestinian Reform and Development Plan 2008-2010, which sets out the vision of the future Palestinian State.⁹⁵

⁹³ Remarks by Mr SOLANA at a joint press conference with Dr Qurei in Ramallah: “It [the Annapolis conference] is an opportunity that must be seized. The alternative to Annapolis is failure”, in “Javier SOLANA, EU High Representative for CFSP says Annapolis must not fail”, Ramallah, 13 November 2007, S324/07, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/discours/97119.pdf (last visited 15 December 2008).

⁹⁴“Overview of PEGASE, the new European Mechanism for support of the Palestinian people”, www.delwbg.ec.europa.eu (last visited 15 December 2008).

⁹⁵ “European Neighbourhood Policy – THE OCCUPIED PALESTINIAN TERRITORY”, Brussels, 3 April 2008, MEMO/08/213. Available at:

The European Union officially acknowledges that the deployment of its development strategy and the economic development in the Palestinian territories is contingent upon Israel allowing movement and access.⁹⁶ However, the EU continues its usual strategy of building capacities that could be useful “when the time for peace” comes, without acknowledging the fact that the fragmentation of the Palestinian land which results from the construction of the wall and the settlement policy renders the construction of a viable Palestinian State impossible.⁹⁷ Added to this is the fact that the State building efforts are only directed at the West Bank and not Gaza because of its control by Hamas.

The adoption by the member States of the EU of the European Action Plan for the Middle East, drafted by the Federal Foreign Minister Steinmeier at the Informal European Council of Lisbon, on 18-19 October 2007 is very telling in this respect. The illegal obstacles to peace are not mentioned at any point in the document. The action plan addresses the axes of priority for the EU policy towards the Palestinians as follow:

- We have to help the Palestinians to become less dependent on development aid again. This can only be achieved by strengthening the Palestinian private sector. [...]

www.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/213&format=PDF&aged=1&language=EN&guiLanguage=en (last visited 15 December 2008).

⁹⁶ See for instance, “Institutional Reform and Capacity Building in the occupied Palestinian Territory” - Speech by EU Commissioner Ferrero-Waldner note above and Council Conclusions on the Middle East Peace Process, 2870th External Relations Council, 26 and 27 May 2008, para 5: “The EU calls for the progressive removal of Israeli restrictions on movement and access in order to improve the situation on the ground and living conditions in the West Bank and revitalise the Palestinian economy. The EU welcomes as a step in the right direction the decision to remove a limited number of roadblocks but underlines the fact that much more remains to be done”.

⁹⁷ *Advisory Opinion on the Legality of the Wall*, p. 184 (para. 121) and Question of the Violations of Human Rights in the Occupied Arab Territories Including Palestine, Report of the Special Rapporteur of the Commission of Human Rights, John Dugard, on the Situation of Human Rights in the Occupied Territories Occupied Since 1967. U.N. Doc. A/HRC/2/5, Sep. 5, 2006, p. 16.

- Modern and democratic security forces in Palestine can provide the Palestinian population with the protection from crime and gangs they deserve and safeguard Israel from suicide bombers and terrorist threats.
[...]
- A well-trained population is the best guarantor of democracy and economic progress. The emigration of talented young people must be halted. [...]
- A new Palestinian state needs functioning and transparent state institutions. But time is of the essence. The EU therefore has to step up the efforts it has already begun on reforming state structures, including the development of democratic parties.⁹⁸

The action plan is not an official document but it illustrates the rationale behind EU's policy in the Occupied Territories which are exemplary of what Henry Siegman describes as the "scandal of the international community":

"[...] it knows what the problem is but does not have the courage to speak the truth, much less deal with it. It will deal with everything except the problem primarily responsible for the impasse".⁹⁹

Not only is the EU not ready to tackle the major obstacles which prevent the construction of a viable Palestinian State while implementing its State-building strategy, but it is also currently shutting its eyes to the human rights abuses committed by the

⁹⁸ "European Action Plan for the Middle East", 15 October 2007, available at <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Interview/2007/071015-BM-Artikel-Hbl-EUAktPL-NO.html> (last visited 15 December 2008).

⁹⁹ H. Siegman, Tough Love for Israel, *The Nation*, (17 April 2008).

Palestinian Authority in the West Bank. The EU's efforts in building a Palestinian civil police capacity are particularly illustrative of this situation.

3.2. The EUPOL COPPS Mission: A Case-Study.

On 14 November 2005, the Council established an EU Police Mission in the Palestinian Territories under the European Security and Defence Policy.¹⁰⁰ The operational phase started on 1 January 2006 for an initial duration of 3 years and under the code name EUPOL COPPS. It provides training and equipment to the Palestinian civil police. The establishment of EUPOL COPPS is, in the words of the 14 November 2005 Council Joint Action “an expression of the EU's continued readiness to support the Palestinian Authority in complying with its Roadmap obligations, in particular with regard to ‘security’ and ‘institution building’ (...)”.¹⁰¹ Although it is never expressly stated, the security referred to in the Joint Action, is the security of the Palestinian population but also the security of the State of Israel. EUPOL COPPS participates in the EU objectives of strengthening EU-Palestinian Authority co-operation on the fight against and prevention of terrorism as stated in the EU PA Action Plan.¹⁰² In his declaration after the Berlin conference in Support of Palestinian Civil Security and the Rule of Law, 24 June 2008, Javier Solana was more explicit in this respect:

“We are interested in creating security forces accountable to the law, not to a faction or a party. We want police forces that serve the community. This is in

¹⁰⁰ Joint Action 2005/797/CFSP, 14 November 2005 OJEU L 300, 17 November 2005

¹⁰¹ *Ibid.*, p. 1.

¹⁰² “Proposed EU-PA Action Plan”, European Commission, Brussels, 9 December 2004, p. 4.

the best security interests of Israel. The security of Israel will derive from a secure and violence-free Palestinian society”.¹⁰³

Because policing is a prerogative of the President of the Palestinian Authority and the police forces are under the orders of Mahmoud Abbas, the EUPOL COPPS programme has not been interrupted after the election of Hamas in January 2006, although it functioned in a slower pace following the change in power structure. Its activities experienced a new impetus during the summer of 2007. In the months of July and August 2007 members of EUPOL COPPS visited every facility belonging to the Palestinian Civil Police in the West Bank in order to assess their most urgent needs. EUPOL COPPS has organised two Public Order training courses for 88 Palestinian Civil Police officers at Jericho in September and December 2007. It has also organised a Palestinian-Israeli Traffic Police Workshop which took place on the 31st October 2007. Finally, so far, EUPOL COPPS has handed over equipment worth more than €150 000 in order to build up the capacities of the Palestinian civilian police.¹⁰⁴

At the Berlin Conference in Support of Palestinian Civil Security and the Rule of Law, member States of the EU proposed the extension of the EUPOL COPPS Mission with a criminal justice component and agreed to increase their financial participation in the mission by several millions of euro.¹⁰⁵

¹⁰³ “Summary of remarks by Javier SOLANA, EU High Representative for the CFSP, at the Berlin Conference in support of Palestinian Civil Security and Rule of Law”, Berlin, 24 June 2008, S228/08, p. 1. Available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/discours/102904.pdf (last visited 15 December 2008).

¹⁰⁴ “EU Council Secretariat Fact Sheet, European Union Police Mission for the Palestinian Territories (EUPOL COPPS)”, January 2008, p. 2. Available at http://consilium.europa.eu/uedocs/cmsUpload/070907-EUPOL_COPPS.pdf (last visited 15 December 2008).

¹⁰⁵ “EUPOL COPPS welcomes support, both political and financial, at Berlin Conference”, press release, Ramallah, 24 June 2008. Available at http://www.consilium.europa.eu/uedocs/cmsUpload/080624-Berlin_Conference.pdf (last visited 15 December 2008).

3.2.1. The Funding of the Palestinian Civil Police and the Israeli

Occupation.

The Palestinian civil police operates in the context of the Israeli occupation which is more than a mere constraint on the implementation of its mission. The occupation means the superposition of another power holder over the Palestinian Authority in the Palestinian Occupied Territories which itself exercises a form of authority over the Palestinian Authority and its police.¹⁰⁶ Therefore, the possibility of establishing an independent police entirely capable of implementing its mission over a territory where it exercises full jurisdiction are null. While the EU expressed its satisfaction at the work done by the Palestinian police in Nablus,¹⁰⁷ and it encourages the strengthening of the cooperation between the Palestinian police forces and the Israeli security forces.¹⁰⁸

In a recent interview, the police commander of Nablus, Fawaz Daoud explained the terms of this cooperation:

We're working as a Palestinian police from 6 am until midnight, and that authorisation has been given by the Israelis themselves, the IDF and from midnight until 6 am, it's an open night for the Israelis and for the ones who are above the law to do their job inside the city and this makes our job difficult sometimes. It makes it also difficult for the continuity of doing our

¹⁰⁶ As stated in the introduction of this dissertation, the Peace Process of the 1990s did not end the Israeli occupation but only added the Palestinian Authority below the structure of the occupation. See p. 14 above.

¹⁰⁷ "Javier SOLANA, EU High Representative for CFSP, says Annapolis must not fail", note 93 above, p. 2.

¹⁰⁸ "Un État palestinien démocratique doit disposer d'une police formée et disciplinée, d'instances juridictionnelles et de centres pénitentiaires. L'Europe aide. C'est aussi l'intérêt d'Israël", Brève par Javier Solana, *La Libre Belgique*, (23 June 2008).

jobs properly. [...] We have a Palestinian district coordination office which has a relation with the Israeli DCO (District Commander Office) but according to the incursions themselves, sometimes we're informed that there is some military action so we have to remove all the police and security personnel from the streets and vehicles but sometimes we are not and sometimes we confront each other – the Israelis, IDF, with our police and they tell us to go back to our [bases].¹⁰⁹

This statement confirms a common pattern already testified during the fieldwork conducted for this dissertation: the Palestinian police leaves the streets of the cities in the West Bank at night just before any Israeli military incursion. It also exemplifies the tight margin of manoeuvre of these police forces. All the EU's efforts put into its training and capacity building will not grant it the full sovereignty it needs to exercise properly its mission. Actually, on the contrary, the EU by not tackling the obstacles to the implementation of the State building policy is acquiescing in the situation. It has accommodated the implementation of its State-building policy to the perpetuation of the Israeli occupation. As such, its silence contributes to its entrenchment as an established fact and therefore helps diminishing the chances of the construction of a viable Palestinian State.

3.2.2. The Funding of the Palestinian Civil Police and the Autocratic Drift of the Palestinian Authority.

¹⁰⁹ Interview with Fawaz Daoud, police commander of Nablus by Arthur Neslen, March 2008. This interview is actually an extract from a forthcoming book about Palestinian identity by Arthur Neslen, generously provided by the author.

Furthermore, after the takeover of Gaza by Hamas, the President of the PA promulgated a number of decrees, by virtue of which he dissolved the Palestinian unity government which was formed in March 2007, declared a state of emergency throughout the OPT, and suspended the application of Articles 65, 66, 67 and 79 of the Palestinian Basic Law, thereby effectively removing certain powers of the elected Palestinian Legislative Council with regard to the formation of its government.¹¹⁰ As pointed by the Palestinian human rights organisation Al Haq, the state of emergency would enable some executive officials to bypass controls regulating human rights and freedoms, especially those pertaining to detention, freedom of expression, and the sanctity of private life and property.¹¹¹ Furthermore, on 27 August 2007 the PA government announced that the Minister of Interior had signed a decision to dissolve 103 charitable associations and civil society organisations. Although the decision was taken after having ascertained that these associations and organisations had contravened the relevant laws regulating the administrative and financial functioning of charitable organizations, it seems to be politically motivated since these organizations were registered by supporters of the Hamas movement.¹¹² Actually, since June 2007, PA institutions have progressively been *cleaned* of their Hamas elements and the PA government reigns over the West Bank by silencing Hamas opposition and imposing a repressive security policy and rigorous “law and order” agenda in the territory.¹¹³ The death of Hamas cleric Majed Al-Barghouti in a prison cell in Ramallah operated by the Palestinian Authority apparently after being

¹¹⁰ “Al Haq Position on the State of Emergency and the Presidential Decrees [translation of original Arabic text published 24 June 2007]”, Briefing Note, Al Haq, 24 June 2007. Available at <http://www.alhaq.org/pdfs/POSITION%20ON%20THE%20STATE%20OF%20EMERGENCY.pdf> (last visited 15 December 2008).

¹¹¹ *Ibid.*, p. 1.

¹¹² “Al-Haq Position Paper on the Ministry of Interior’s Decision to Dissolve 103 Civil Society Organisations [translation of original Arabic text published 19 October 2007]”, Briefing Note, Al Haq, 19 October 2007. Available at <http://www.alhaq.org/pdfs/Position%20Paper%20on%20Dissolved%20CSOs%20-%20English.pdf> (last visited 15 December 2008).

¹¹³ A. Neslen, *Inside a failed Palestinian police State Rootless Cosmopolitan*, (26 February 2008). Available at <http://tonykaron.com/2008/02/26/inside-a-failed-palestinian-police-state/> (last visited 15 December 2008).

tortured sheds light over the abusive practices of the intelligence services against the opponents of the government.¹¹⁴

The training and financing of the Palestinian civil police is necessarily taking place within the context of the autocratic drift of the Palestinian Authority. Because of its close involvement and support of the Palestinian Authority, the European Union is in a position to address the human rights abuses committed under its jurisdiction even if the civilian police is not involved in these activities. However, as in the case of the deterioration of the humanitarian situation of Gaza following the siege imposed on the population, the EU has adopted a position whereby it intends to minimize the impact of the illegal policies on the population. One example illustrates this point. In October 2007, violent clashes erupted between the police and Palestinians protesting at the talks between the PA and Israel held in Annapolis across the West Bank. One person died in Hebron.¹¹⁵ To prevent this tragic event occurring in the future, the EU organized a twelve-day training programme in riot control. The objective of the training was to teach police agents how to “intimidate” demonstrators but without using firearms.¹¹⁶ The newly-trained police was dispatched to the towns of the West Bank, and notably in Ramallah during the visit of President George W. Bush. Several people were arrested, a

¹¹⁴ Palestinian Authority: Punish Imam’s Death in Custody (Human Rights Watch) (4 April 2008). Available at <http://www.hrw.org/legacy/english/docs/2008/04/04/isrlpa18425.htm> (last visited 15 December 2008). The organisation Human Rights Watch has also reported systematic torture by the Palestinian Preventive Security and the Palestinian General Intelligence Service on detainees affiliated to Hamas. See “Occupied Palestinian Territories: Donors Should Press Security Forces to End Abuse”, press communiqué, Human Rights Watch, Berlin, 23 June 2008, available at <http://www.hrw.org/en/news/2008/06/22/occupied-palestinian-territories-donors-should-press-security-forces-end-abuse> (last visited 15 December 2008).

¹¹⁵ I. Kershner, Palestinian Is Killed in Hebron as Police Disperse Protest Over Mideast Peace Talks, *New York Times*, (28 November 2007).

¹¹⁶ “EU Council Secretariat Fact Sheet, European Union Police Mission for the Palestinian Territories”, note 104 above and S. Weizman, Palestinian Police Get Training in Riot Control, *Associated Press*, (28 May 2008). Available at <http://www.cnsnews.com/public/Content/Article.aspx?rsrcid=19191> (last visited 15 December 2008).

few injured but no deaths occurred this time.¹¹⁷ While the Palestinian Authority severely restricts freedom of expression and governs the West Bank with an iron fist, the EU attempts to minimise the visible aspects of this autocratic drift but does not address them in its relationships with the Palestinian Authority with a view to eliminating its malpractices.

The main obstacle to an effective implementation of EU's economic and humanitarian policy to the Palestinians has been the Israeli occupation. However, the EU has never properly addressed this major obstacle to the success of its economic policy and the interference of Israel illegal actions in the conduct of its humanitarian actions. As such, it is offering Israel incentives to continue its illegal actions in the Occupied Territories because it remains silent vis-à-vis violations of international law when one would expect that it would react given its involvement and its own interests on the ground. Furthermore, while it decided to revive by mid 2007 its State building programmes, the EU implements its strategy without addressing the impediments to the construction of a viable Palestinian State which result from the occupation and which actually renders its creation impossible and it remains silent on the human rights abuses of the Palestinian Authority. As stated by Asseburg, the European approach has not taken this sufficiently into account: it has been one of post-conflict peace-building as if there were no continuing conflict, occupation or mobility restrictions hampering economic development, reconciliation and institution-building.¹¹⁸ This dissertation agrees with Asseburg's argument and also asserts that by trying to maintain and continue the enforcement of its strategy without addressing the obstacles to its success, it contributes

¹¹⁷ Testimony from fieldwork conducted in the Occupied Territories in December and January 2007-8. See also A. Paq, Mr Bush's Trip to Ramallah, *Electronic Intifada*, (17 January 2008). Available at <http://electronicintifada.net/v2/article9232.shtml> (last visited 15 December 2008).

¹¹⁸ M. Asseburg, note 33 above, p. 177.

to the annihilation of the objective behind its strategy, i.e. the construction of a viable and democratic Palestinian State and to the perpetuation of the illegal occupation.

The next chapter examines the relationships between the EU and Israel and considers whether the same degree of compromising with the violations of international law on the ground in the implementation of their economic and cooperation policy is to be found.

Chapter Seven
The Relationships between Israel and the EU or
the Impossibility of Separation between Israel as an Economic and Scientific
Partner and Israel as an Occupying Power.

Israel is a by-product of European history. Many historical and political aspects which accompany the construction of the State of Israel find their origins in Europe's history. The Zionist movement elaborated in Austria by Theodore Herzl takes root in the European nationalist trends of the end of the 19th Century and is a response to Europe's anti-Semitism. Furthermore, the establishment of the first Jewish settlers in Palestine became possible after it appeared certain that the British government obtained a mandate on Palestine during WWI. This followed the negotiation of the Sykes Picot agreement and the British Prime Minister Lord Balfour issued a declaration, in 1917, granting the Jewish people a national home in Palestine. The emigration of Jewish people to mandate Palestine accelerated with the ongoing anti-Semitic persecutions in Europe during the first half of the twentieth century, the rise of Nazism in Germany and the Second World War. Finally, the creation of the State of Israel became an inevitability for the Western powers after the world discovered the atrocities of the Holocaust where six millions Jewish individuals perished.¹

Since the creation of the State of Israel, connections between the European States and Israel have been strong. Support for the State of Israel has taken many stances including the Suez crisis in 1956 where the United Kingdom, France and Israel launched a military attack against Egypt after its president, Gamal Abdel Nasser nationalised the Suez Canal.

¹ For a non exhaustive literature review on the history of Zionism and the construction of the State of Israel: B. Morris, *Righteous Victims: A History of the Zionist-Arab Conflict, 1881-2001* (New York 2001); I. Pappé, *A History of Modern Palestine: One Land, Two Peoples* (Cambridge, New York 2006); G. Piterberg, *The Returns of Zionism: Myths, Politics and Scholarship in Israel* (London, New York 2008); T. Segev, *One Palestine Complete: Jews and Arabs under the British Mandate* (London 2001); A. Shlaim, *The Iron wall: Israel and the Arab World*, (London 2001).

However, the creation of the European Community marked the beginning of a new trend in the relationships between Israel and the European States. Since the early 1970s, the member States of the European Community have attempted to promote and implement a *common* foreign policy through their various statements on the Arab-Israeli conflict and the Palestinian issue² as this has long remained the most contentious issue between the EU and Israel. Since the 2004 enlargement of the EU, one can testify a “shift” towards an appeasement in their relationships.

Nonetheless, although EU-Israel relationships have been poisoned by politics and mutual misunderstandings, it has never affected the continuation and progressive deepening of their economic ties.³ After the signature of the Rome Treaty, Israel saw, in the emerging common market, an outlet for its agricultural and industrial production and hence a chance for its own economic development. Since the beginning of the external commercial policy, Israel has been a privileged partner of the EU. However, as this chapter demonstrates, it has always been impossible to operate a detachment of the status of Israel as a trading entity and a scientific partner from its status as an Occupying Power. Violations of international law, notably Israel’s settlement policy, have interfered in the EU’s economic and commercial relations with Israel and as this chapter demonstrates, the way in which these relations are implemented can engage the international responsibility of the EU. Therefore, after having described the nature of the relationships between Europe and Israel and the framework of the relationships between the two parties, the present chapter dedicates a long section to the issue of the products coming from the settlements. Finally, it outlines other elements in the relationships

² For an account on the focus of the European Political Cooperation vis-à-vis the Israeli-Palestinian issue see I. Greilsammer and J. Weiler, *Europe's Middle-East Dilemma: The Quest for a Unified Stance*, (London 1987).

³ R. Miller, “Troubled Neighbours: The EU and Israel” (2006) 12 *Israel affairs* 642-664, p. 655.

between the EU and Israel and other cooperation agreements where the same problematic has been identified or potentially can be raised.

1. Europe and Israel: A Heated Relationship.

The EU is made of 27 member States, all of which have different views on the Israeli-Palestinian issue. Even inside the constituency of the member States, there is a wide range of differences of opinion on the topic. Israel is a small State of 7.5 million inhabitants and in Israel itself, the left wing and right wing movements differ in their attitude towards Europe. Nonetheless, there are general trends and consistent patterns that come out in the history of the relationship between Israel and Europe which the present section outlines.

In Chapter Four, this dissertation highlighted the divergent positions between Israel and Europe on the importance of the respect for international law, particularly within the context of the Israeli-Palestinian issue. This difference of views is actually accompanied by a major divergence in their respective views on the threats to security in today's world, the instruments to bring about a sustainable peace, the use of violence and war in international politics. Instead of power balances, deterrence and the use of force, the European approach highlights reconciliation and compromise.⁴ Violence and wars are in general seen as being the consequences of structural issues, social and economic. In the case of the Middle East, the current instability is seen by the EU as the result of poor governance, poor human rights records, marginalization of women, low participation of

⁴ G. Steinberg, Kantian Pegs into Hobbesian Holes: Europe's Policy in Arab-Israeli Peace Efforts, *The EU in Regional and Bilateral Dispute Settlement*'' organised by the Israeli Association for the Study of European Integration in cooperation with the Friedrich Naumann Foundation, The EU-Israel Forum, The German Innovation Center & The Interdisciplinary Center, (Herzliya 2004), p. 8.

civil society and poor economic and social performance.⁵ Europe wants to bring the countries of the Middle East closer to its model of governance. As seen in Chapter Five of this dissertation, the European Neighbourhood Policy and the Euro Mediterranean Partnership before it form essential elements in the implementation of this policy.

In Israel, this approach is seen as being unrealistic because it fails to take into account those issues with which the Middle East is confronted and more precisely the unique geostrategic position of Israel “as a border country between the Arab world on one side and Europe on the other”.⁶ This situation, Israel contends, poses existential dangers and requires security measures which are incomprehensible for the European States. This makes Israel believe that the EU is incapable of grasping its security concerns.

At the same time the political foundations of the European Union based on “perpetual peace”, cooperation with neighbours and attenuation of national identities have no echo in the foundations of the State of Israel itself. The multilateralism which is prevalent in the European system of decision making contrasts severely with the common “trust no one” or “few against the many” themes developed among the Israeli society. The principle of self reliance, except for the US, is with Zionism, the Holocaust and the Jewish nature of the State one of the defining themes of the State of Israel.⁷

Israel is also the historical product of two movements which have characterized European history in the nineteenth and twentieth Century: colonialism and more

⁵ “Reinvigorating Human Rights in the Mediterranean Area”, Commission Communication, 21 May 2003, COM (2003) 294 final. Hereinafter “Reinvigorating Human Rights”.

⁶ Y. Dror and S. Pardo, “Approaches and Principles for an Israeli Grand Strategy towards the European Union” (2006) 11 EFA Rev. 17-44, p. 37.

⁷ Self reliance can be defined as the ability for a State to respond autonomously to its security threat. This principle in Israel is the product of the trauma of the long history of persecutions and hostile environment surrounding it. R. del Sarto, “Israel's Contested Identity in the Mediterranean” (2003) 8 Mediterranean Politics 27-58, p. 35.

specifically UK's ambition and then presence in Palestine through its mandate which allowed the settlements of Jewish population in this territory and nationalism which gave rise to Zionism. Consequently, on the one hand, due to the dominant social climate in Europe of "post-colonialism", "post-nationalism" and "post-conflict" and of multiculturalism, the Europeans in general perceive the claims of Israel and its foundations as being hardly understandable and anachronistic.⁸ On the other hand, any claim of the EU that Israel should respect the right of the Palestinian people to become a State is perceived as an illustration of Europe's double standard when it comes to self-determination and national claims.⁹

Furthermore, any criticism of the disproportionate use of violence by the Israeli Defence Force against the Palestinian civilian population is countered with accusations of hypocrisy focused on Europe's claim of a higher morality in today's world. This is mostly because of Europe's main responsibility in the Holocaust.¹⁰ Europe and the Holocaust are inseparable in the Israeli psyche.¹¹ Hence, one finds the general belief that Europe has a moral commitment to support Israel in its quest for security and also the general

⁸ G. Steinberg, European NGOs against Israel, In M. Gerstenfeld (ed.), *Israel and Europe: An Expanding Abyss*, (Jerusalem 2005), pp. 111-123, p. 112.

⁹ A. Carmi and J. Carmi, *The War of Western Europe Against Israel*, (Jerusalem, New York 2003), p. 102. "Nationalism is generally associated with chauvinism, intolerance, racism and violence, and is eschewed. (Exceptions are made for nations considered to have been victims of European colonialism, for whom nationalism is considered to be part of the process of recovering a lost identity, as in the case of the Arab world, in general, and [...], for the Palestinians, in particular. This dispensation is not granted to Jews and to Israel, however.)", in G. Steinberg, note 4 above, p. 8.

¹⁰ Y. Dror, The EU and Israel: Radically Different Worldviews, In M. Gerstenfeld (ed.), *Israel and Europe: An Expanding Abyss*, (Jerusalem 2005), pp. 25-35., pp. 33-34.

¹¹ As an illustration of this mental association, after the Berlin declaration in 1999 in which the EU formally expressed its support for the creation of a Palestinian State, PM Benjamin Netanyahu stated that it was "regretful that Europe where a third of the Jewish people perished, would see it fit to attempt to impose a solution that endangers the State of Israel and its interests". Cited in J. Peters, *Europe and the Arab-Israeli Process: The Declaration of Berlin and Beyond*, In S. Behrendt and C. Hanelt (eds.), *Security in the Middle-East*, (Munich 1999), pp. 25-41, p. 29.

perception that any criticism of Israel is a demonstration of anti-Semitism.¹² Strong anti-European feelings and bias are widely widespread among the right-wing public in Israel.¹³

This general resentment and distrust is counterbalanced by a strong feeling of guilt for the *Shoab* from the European States that were under Nazi Germany occupation during WWII and collaborated actively or passively in the genocide of the Jewish people.

Consequently, Euro-Israeli relationships have been characterized by a flow of hectic crises and hard times characterised by “crunchy”¹⁴ or even surrealistic exchanges.¹⁵ One example among many can be found in the denial of access of the Spanish Foreign Minister Josep Piqué, and the High Representative of the Common Foreign and Security Policy, Javier Solana to Arafat’s headquarter in Ramallah in April 2002 was a direct snub to Europe and a rebuttal of its policies.¹⁶

Since 2004, there has existed a genuine political will to *ameliorate* the relationships between both parties which many considered had been at their worst during the fourth first years of the second Intifada.¹⁷ In the words of Jana Hybaskova MEP, Chairman of the EU-Israel parliamentary delegation, the European institutions focus their efforts on pragmatic initiatives such as the deepening of the scientific cooperation with Israel – which she sees as more important than the description of the suffering of the Palestinian

¹² Y. Dror & S. Pardo, note 6 above, p. 34.

¹³ One finds for instance in the Jerusalem Post a litany of anti-European attacks and expressions of anti-European feelings. A selected quote among many: “The Europeans only wish to “beautify the world” and we are not esthetically beautiful enough in their eyes to justify our existence as a nation, a State or either a faith”, Berel Wein, Jerusalem Post, 24 August 2002, quoted in A. Carmi and J. Carmi, note 9 above, p. 147.

¹⁴ Interview Emmanuele Giaufret, Deputy Director of the EC Delegation for Israel, Head of the Political and Economic Section, Tel Aviv, July 2007.

¹⁵ Informal conversation with Michael O’Ryan, former Head of the Israel Desk, DG Relex, European Commission, Brussels, September 2005.

¹⁶ R. Miller, note 3 above, p. 647.

¹⁷ Interview with Jana Hybaskova MEP, Member of the European Parliament. chair of the European Parliament Delegation for relations with Israel, Véronique De Keyser, Member of the European Parliament and Charles Tannock Member of the European Parliament, Brussels, August 2006. See R. del Sarto, “Changes in EU-Israeli Relations?” (2006) 7 Internationale Politik Transatlantic Edition 92-103.

people. According to her, European institutions also tend to “depoliticise” the bilateral cooperation from the Middle-East Peace Process and the human rights situation in the Occupied Territories.¹⁸ This shift is due to the enlargement of the EU to Eastern European states which are inclined to preserve privileged relationships with the United States and to support the efforts of the “War on Terror” campaign. European decision-makers also believe that if they want to influence the course of the Peace Process, it is better to maintain a good relationship with all the parties to the conflict.¹⁹

2. Economic Dependency of Israel on the European Union.

If one does not look at Europe in the large sense, i.e. as an historical, cultural, geographical and political entity, but instead only at the European Union and particularly the economical project it encompasses with the European Community, things are very different. Despite the political discrepancies and the tensions, the bilateral economic and scientific cooperation between the EU, its member States and Israel have been consistently strong and have increased and developed with time.²⁰ In only very rare instances, the EU has used its economic instruments to exercise pressure on Israel regarding the human rights violations in the Occupied Territories.²¹

From the very beginning of its creation, Israel has developed an interest in the European Community project. In October 1958, PM Ben Gurion instructed Gideon Raphael, the new ambassador to Belgium, to focus his efforts principally on the Commission of the European Economic Community in Brussels. The latter established a diplomatic mission with full ambassadorial status. Israel thus became out of the first States along with the

¹⁸ Interview with Jana Hybaskova, Brussels, August 2006.

¹⁹ Interview with Emmanuele Giaufret, Tel Aviv, July 2007.

²⁰ R. Miller, note 3 above, p. 655.

²¹ See Chapter Eight of this dissertation, p. 299 note 39 below.

United Kingdom and the Republic of Ireland, with observer status in the European Communities.²² The primary reason for the development of this strategy to the EC is obviously economic. Israeli decision-makers saw, in the wakening of the EC economical giant, a way out of the drastic effects of the economic and trade boycott enforced by the Arab States which started even before the establishment of the State of Israel in 1948.²³ For Israel, the EU market is not only the largest and the most lucrative market but it is also the nearest. As a small isolated State, it needs to integrate into a wider regional market. The EC is the premier trading partner of Israel with a total trade amounting to €23.5 billion in 2006. In the same year, the EU ranked number one in Israel's import and number two in its exports, the first being the Palestinian Occupied Territories. Israel ranks 30th in EU's import and 22nd in EU's exports.²⁴

To a lesser degree, cultural and developmental reasons explain these close ties. Although Israeli society is the result of the emigration of Jewish population from all over the world, Israel shares lots of commonalities with Europe's economic and political make up, at least more than with its Middle Eastern neighbours.²⁵ Furthermore, Israel maintains complex and intense relationships with the Jewish communities living in the EU member States. Israel believes it has a natural responsibility to act against anti-Semitism in Europe because of its responsibility for the safety of the Jewish people. It is worth also noting that one fifth of the Israeli adult population has EU citizenship (6%) or is intending to apply for it (14%) following the 2004 enlargement.²⁶

²² H. Sachar, *Israel and Europe. An Appraisal in History*, (New York 1999), p. 212.

²³ Interview with Emmanuelle Giaufret, Tel Aviv, July 2007 and C. Yaacov, *Israel and the EEC, 1958-1978: Economic and Political Relations*, In H. Giersch (ed.), *The Economic Integration of Israel in the EEC*, (Tübingen 1980), pp. 13-37, p. 13.

²⁴ Source http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113402.pdf (last visited 15 December 2008).

²⁵ Israel's Finance Ministry repeatedly stressed that it would prefer a divide within the EMP "16 and 11" rather than "15 and 12" (EU member States/southern Mediterranean countries), in R. del Sarto, note 7 above, p. 33.

²⁶ Y. Dror and S. Pardo, note 6 above, p. 29.

This proximity and the development of these ties have opened the debate in Israel on its accession to the EU. This idea is supported by the Israeli public as well as by some Israeli leaders. Benjamin Netanyahu, Silvan Shalom and Shlomo Ben Ami have expressed such views.²⁷ It is nonetheless very unlikely that Israel will be one day be a member State of the EU as there are many contradictions between the European project, which is an open space with freedom of circulation and establishment for its citizens and residents, and the very nature of the State of Israel, a State for the Jewish people as it is encapsulated in the Law of Return.²⁸ However, Israel is committed to further its integration into the European Union. Europe is important for Israel. Many politicians in Israel understand this.

3. The Framework of the Relationships between Israel and the EU.

The efforts which Israel devoted to the strengthening of its relations with the European Community lead at first to the conclusion of a modest deal but one which made official the establishment of a relationship between the two partners. In 1964, the two parties signed an agreement which granted reduced duties on certain agricultural products such as grapefruits, avocados and plywood. The accord confirmed that Israel would share whichever duty reduction might later be extended to other Mediterranean nations such as Spain or North African countries.²⁹ The agreement was upgraded by another one concluded in 1970. In 1975, Israel and the EC signed an agreement far wider in scope than the predecessor according to which duties were reduced by 70 to 90 percent on an

²⁷ For an interesting account of the benefits and disadvantages of Israel joining the EU, see A. Tovias, *Mapping Israel's Policy Options Regarding its Future Institutionalised Relations with the European Union, Centre for European Policy Studies Working Paper*, (2003).

²⁸ Y. Dror and S.Pardo, note 6 above, p. 31.

²⁹ H. Sachar, note 22 above, p. 213.

extensive range of agricultural products.³⁰ Further, by 1977, the EC committed itself to the gradual elimination of custom duties on manufactured products.

In 1994, in a declaration, the European Council at Essen referred to the need for greater cooperation and the granting of a special status for Israel.³¹ One year later in the context of the Euro-Mediterranean partnership, the EU and Israel signed an Association Agreement whose objectives are the promotion of free-trade, political dialogue and economic cooperation. Nonetheless, the Association Agreement does not mark a big change in the relationships between the two because Israel had already been granted a *de facto* status of associate member. However, although ambitious and far reaching in its scope, most of the features of this agreement, except from the free trade area aspects, have not been exploited. The Association Agreement was signed in 1995 but came into force only in 2000 because of France and Belgium's delay in its ratification.³²

The expansion of free trade with the European Community had to be implemented obviously with the parallel elimination of trade barriers on the Israeli side. Therefore, the Israeli market had been progressively opened to a wide influx of industrial and agricultural products alike and has deepened, over the years, Israel's trade imbalance with the EC.³³ Israeli decision-makers were very aware of this fact when they started to open their borders to EC products but they thought that in the long run it would produce a rationalizing effect on Israeli nascent high-tech industry.³⁴ By the early 1990s, this industry blossomed – and this mainly because of the arrival of highly qualified migrants

³⁰ *Ibid.*

³¹ Declaration of the European Council in Essen, 9 and 10 December 1994.

³² See Chapter Four of this dissertation, p. 162 above.

³³ Israel's trade deficit with the EC rose from \$3.5 billion (102% of Israel's trade deficit) in 1990 to \$6.9 billion (159% of Israel's trade deficit) in 2000 in T. Sadeh, "Israel and the Euro-Mediterranean Market" (2004) 9 Mediterranean Politics 29-52, p. 31.

³⁴ Interview with Abraham Rami Gutt, former Israeli diplomat, Tel Aviv, September 2008 and H. Sachar, note 22 above, p. 218.

from the old Soviet bloc who channelled their skills in the creation of several thousands of start-up companies. Despite an important economic recession in the beginning of the 2000s, Israel has managed to maintain its status as a global technology leader. By the beginning of 2005, Israel had the highest rate of research and development (R&D) investment per GDP in the world and spent 5% of GDP on R&D.³⁵ The developments and achievements in this sector made Israel a very attractive partner. In 1996, it became a full participant in the EU Research and Development Framework Program allowing Israeli institutes and companies full access to EU research and development funding. So far, Israel has participated in the fourth, fifth and sixth Framework Program and is a member of the seventh. In July 2004, due to its significant technological capabilities on space programs and global navigation satellite system applications, equipment and technology, Israel and the EU reached final approval and agreement on the European satellite navigation program, GALILEO. Israel's association in the research and scientific programs and advancements is therefore what grants Israel the special status the Essen declaration was promising.

So far, the existing framework of relations with the EU has revolved essentially around trade in goods and manufactured products and research and development cooperation. Israel thus welcomed the EU-Israel Action Plan agreed in December 2004 which at first seemed to offer a real opportunity to broaden the scope and level of these relations.³⁶ The EU-Israel action plan addresses six different topics: political dialogue and cooperation; economic integration with a view to prepare Israel to participate in the EC market; cooperation in justice and home affairs issues; environmental cooperation; people-to-people contacts; cooperation in the fields of transport, energy, science and technology. The European Commission has published the first progress report on Israel

³⁵ R. Miller, note 3 above, p. 658.

³⁶ "Proposed EU-Israel Action Plan", European Commission, Brussels, 9 December 2004.

in 2006. Israel showed interest in participating in several programs and agencies such as Custom 2013, Fiscalis 2013, Marco Polo, etc...³⁷ Since November 2007, Israel is a member of the Competitiveness and Innovation Programme (CIP) under which the Commission promotes innovation, entrepreneurship and growth of small and medium-sized enterprises.³⁸ Furthermore, due to its highly developed economy, Israel has been allocated €8 million only for support of the Action Plan activities. On the 27th of December 2006, the European Investment Bank announced that it would renew its cooperation with Israel with two loan-contracts. The first contract is of €200 million and will serve the funding of environmental projects; the second is of 75 million and will be directed to the funding of small and medium size enterprises in the field of tourism, health and education.³⁹

On 16 June 2008, at the Eighth meeting of the Association Council, the European Union decided to upgrade its relationship with Israel in various fields of cooperation. The nature and the process of the upgrade are discussed in the following chapter.⁴⁰ Nonetheless, whatever the nature or the content of the upgrade will be, past experience has shown that it has been impossible to operate a detachment between the status of Israel as an economic and scientific partner and Israel as an Occupying Power. Israel implements all its international agreements without making a distinction between its territory and the territories it occupies. Therefore, with respect to the implementation of its free-trade agreement with the EU, Israel has always exported products originating from its settlements in the Palestinian Occupied Territories as if they were products

³⁷ "Strengthening the European Neighbourhood Policy. ENP Progress Report Israel", Commission Communication, 29 November 2006, COM (2006) 726 final.

³⁸ Israel joins EU competitiveness programme, Brussels, 1st of November 2007, IP/07/1643.

³⁹ "European Investment Bank (EIB) resumes activities in Israel after an 11 year break", available at http://www.delisr.ec.europa.eu/newsletter/english/default.asp?edt_id=22&id=475 (last visited 15 December 2008).

⁴⁰ Statement of the European Union at the eight meeting of the EU-Israel Association Council, Luxembourg, 16 June 2008, General Secretariat of the Council. Available at <http://www.delisr.ec.europa.eu/english/specialftr.asp?id=59> (last visited 15 December 2008).

originating from Israel proper. The issue has been raised before the European Commission after the signature of the 1995 Association Agreement. Since then the issue has constituted a “stone in the shoe” of the relationships between the EU and Israel despite the fact that the financial weight of the issue is minimal.⁴¹ The issue of the products coming from the settlements is an interesting case where, first of all, an issue of humanitarian law has found itself in the heart of a commercial treaty and, second, where violations of human rights and international law cause violations of EU law.

4. The Export to the EU of Products coming from the Settlements Under Preferential Treatment.

The third chapter of this dissertation has demonstrated that the situations envisaged by the International Court of Justice in the *Advisory Opinion on the Legality of the Wall* and by the International Law Commissions articles on State responsibility did not embrace all the possible actions and inactions of a non-injured State in its participation in the commission of a violation of international law. The case of the provision of humanitarian aid by the European Union to the Palestinians and the implementation of its Palestinian State-building policy has demonstrated this theory. However, the case of the products coming from the settlements represents an issue which is relevant to analyse in the light of the duty of non-recognition. The prohibition of settlements contained in Article 49.6 of the Fourth Geneva Convention finds its *raison d'être* in the prevention of the risk of

⁴¹ Actually, the volume of Israeli exports to the EC market that directly originate from settlements only amounts to €100 millions per year and custom liability for such exports is estimated at €7 millions per year. G. Harpaz, “The Effectiveness of Europe's Economic and ‘Soft’ Power Instruments in its Relations with the State of Israel” (2005) 7 Cambridge Yearbook on European Legal Studies 159-185, p. 183.

annexation.⁴² Therefore, the violation of the prohibition on settlements falls *per excellence* within the scope of the duty of non-recognition.

4.1. Israel's Settlement Policy.

The settlement policy started in 1967 just after the Six Day war and while the Labour government was in power. It was based at the time on security reasons although the legal adviser for the Israeli minister of Foreign Affairs, Theodor Meron, concluded that the project was illegal.⁴³ In 1977, when Likud formed its government, the security concerns gave room to an ideological claim based on historical and religious grounds. Since then, the settlements have expanded unabated even at the time of the so-called Peace Process. In 2007, about 450000 Israeli settlers lived in the West Bank, including East Jerusalem.⁴⁴ The Gaza disengagement plan in 2005 did not actually alter the dynamics of the settlement policy in the West Bank.

This policy consists in the dispossession of Palestinian lands which takes place either by registering it as “state land”, seizing it for military needs and playing extensively on the absentee law provisions.⁴⁵ Once acquired by the Israeli government, Israeli citizens establish residence on this land thanks to a sophisticated governmental system designed to encourage Israeli citizens to live in the settlements by increasing their standards of living.⁴⁶ The settlements have become an essential feature in the *de facto* annexationist

⁴² Article 49, paragraph 6 of the Fourth Geneva Convention provides that “the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies”.

⁴³ G. Gorenberg, *Occupied Territories: The Untold Story of Israel's Settlements*, (London, New York 2007), p. 99-102.

⁴⁴ Source OCHA, <http://domino.un.org/unispal.nsf/3822b5c39951876a85256b6c0058a478/b42d43070242bf018525734c0045ed8c1OpenDocument> (last visited 15 December 2008).

⁴⁵ For a detailed explanation of these administrative practices, see Land Grab. *Israel's Settlement Policy in the West Bank* (B'Tselem) (May 2002), pp. 47-63, hereinafter “Land Grab”.

⁴⁶ *Ibid.*, pp. 73-84.

project of the Israeli occupation of the Palestinian Occupied Territories. Israel unlawfully extends its jurisdiction to the territories it occupies and consequently, settlements have become completely integrated into the economic life of the country. Its economic actors are thus as equally associated with commercial operations as are any other economic operator in Israel proper.⁴⁷ The settlement policy is a subject of heavy debate and huge controversy in Israel itself. It is the major source of resentment and distrust for the Palestinian population. One of the plausible explanations for its maintenance across the last four decades by any government, Labour or Likoud, is that it is a strategic way of maintaining the divide between the secular and religious components of Israeli society. According to Neslen:

“The settlements united religious and secular Israeli Jews around a self-concept that merged faith and security and held out the prospect of an integrated Israeli Jewish identity”.⁴⁸

The Israeli settlements in the Palestinian Occupied Territories are a violation of international humanitarian law. The ICJ ruled in the *Advisory Opinion on the Legality of the Wall* that settlements contravene Article 49.6 of the IVth Geneva Convention and *might* constitute with the regime associated to the wall a *de facto* annexation.⁴⁹ *De facto* because even if the State of Israel does not recognise the settlements as part of its territory, it extends part of its legislation to them through military orders in order to eradicate any significance of the Green Line in the everyday life of the Israeli citizens living in the Palestinian Occupied Territories.⁵⁰ Furthermore, the prohibition of transfer of civilian

⁴⁷ *Ibid.*, pp.

⁴⁸ A. Neslen, *Occupied Minds. A Journey through the Israeli Psyche*, (London, Ann Arbor, MI 2006), pp. 240-241.

⁴⁹ *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ Rep. 2004, p. 180 (para. 120).

⁵⁰ “Land Grab”, note 45 above, pp. 65-66.

population in occupied territory amounts to a war crime pursuant to the statute of the International Criminal Court (article 8.2 (b) (viii) of the Rome Statute) –even though Israel is not a party to the Statute.

The settlement regime is associated with a network of closures and by-pass roads which aim to separate and protect Israeli settlers from the Palestinian population and, according to Israel, to prevent the commission of terrorist attacks in Israel proper. This network of closures represents a stranglehold which tightens or gets looser according to the evaluation by the Israeli authorities of the risks for the security of their citizens. Finally, the settlements policy is being sealed by the construction of the wall which penetrates into the West Bank so as to encompass 76 % of the West Bank settlers' population and gradually whittles away 10% of the West Bank territory.⁵¹

4.2. Historical Overview of the Issue of the Export of Products Coming from the Settlements.⁵²

The Association Agreement concluded between the EU and Israel provides for the establishment of a free trade area between the Community and the State of Israel and grants preferential treatment to products exported from the EU to Israel and from Israel to the EU. This preferential treatment is only granted to products originating from the territory of the parties to the Association Agreement that is, products “wholly obtained or substantially transformed” in the territories of the member States of the EU and the territory of the State of Israel (Protocol 4).

⁵¹ Question of the Violations of Human Rights in the Occupied Arab Territories Including Palestine, Report of the Special Rapporteur of the Commission of Human Rights, John Dugard, on the Situation of Human Rights in the Occupied Territories Occupied Since 1967. U.N. Doc. A/HRC/2/5, Sep. 5, 2006, p. 2.

⁵² The following two sub-sections draw substantially upon several interviews with Charles Shamas, senior partner of the Mattin Group conducted in Brussels and Ramallah from September 2004 to August 2007.

For the purpose of the application of this rule, the agreement provides in Article 83 that:

“This agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European and Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand to the State of Israel”.

Since the signing of the agreement, Israel has been exporting products originating from the settlements in the Palestinian Occupied Territories to the EU under preferential treatment. Israel pretends that World Trade Organisation rules or rules related to international trade apply to administered territories and therefore to the Palestinian Occupied Territories in order to include its settlements in its trade agreements.⁵³ The issue was brought to the attention of the EU at the time of the signing of the EU-Israel Association Agreement by Palestinian and European non-governmental organisations—in the knowledge that Israel has always extended the implementation of all its trade agreements to the settlements. The European Commission has considered that this issue constituted a difference of interpretation of the treaty. In 1998, in the communication on the implementation of the interim EU-Israel Association Agreement, the Commission stated that Israel was suspected of breach of the treaty for exporting goods into the Community which did not originate in Israel.⁵⁴ Its reasoning was in line with the EU’s diplomatic stance on the settlements that the application of the Association Agreement

⁵³ S. Pardo and L. Zemer, “The Qualified Zones in Transition: Navigating the Dynamics of the Euro-Israeli Customs Dispute” (2003) 8 EFA Rev. 51-75, p. 52.

⁵⁴ “Commission Communication on the Implementation of the Interim Agreement on Trade and Trade-Related Matters between the European Community and Israel”, Commission Communication, 12 May 1998, SEC (98) 695, p. 5. Hereinafter “Communication on the Implementation of the Interim Agreement”.

to the settlements constitutes a *de facto* extension of Israel's sovereignty to the Occupied Territories. The territorial scope of the Association Agreement has to be limited to the 1967's borders because the Israeli settlements in the Occupied Territories constitute a violation of international law and cannot be considered as part of Israeli territory.

In 2000, several member States' customs authorities launched a procedure of verification requesting the Israeli customs authority to check the origin of products suspected to originate from the Occupied Territories.⁵⁵ The national customs services were working from a small list of settlements products and evidence provided by the Commission. They addressed 4000 verification enquiries to Israeli customs between August 2000 and July 2001, to which they received the answer that the products in question originated in Israel. Then, they asked for guidance from the Commission and, as they were given none, accepted Israel's responses. No duties were recovered even in cases where Israel's answers specifically named the settlements in which the products were produced.

Finally, the Commission confirmed its supposition that Israel was violating the agreement and issued a notice in November 2001 warning European importers that the products originating from the settlements, which obtained a preferential treatment, could be subjected to a custom duty.⁵⁶ A second cycle of verification was launched and it failed.⁵⁷ The Custom Cooperation Committee, the body specially set up to solve this

⁵⁵ Member States were not verifying uniformly. Hence, that created a distortion of the market and the Commission had to redress that situation. Sweden considered it was a Community competence, not a national one. Spain inverted the burden of proof and conducted broad investigations. France did the same –the French custom authorities presumed that every product carried some doubt. Germany tried to make the system of verification work. They aggressively investigated to recover duties and they tried to find their own cases of fraud. Interview with Charles Shamas, Ramallah, August 2006.

⁵⁶ "Notice to Importers", OJEC C 328, 23 November 2001.

⁵⁷ Attempts at recovery are based on article 32 of the Fourth Protocol of the EC-Israel association agreement which provides that if the verification responses provided by the exporting country's authorities do not "contain sufficient information to determine the authenticity of the document in question or the real origin of the products", the importing country's authorities "shall refuse entitlement" to preferences irrespective of the real origin of the product in question. It entails the exporting country to issue a response

issue was originally convened in July 2001. It similarly failed to find a solution. The matter was referred to the Association Council, which was not successful either. Since then, every year, the matter has been referred to the agenda of the Association Council and this came out always with the same conclusion that the EU and Israel must find a “technical solution” to this issue.

The European Commission refused to employ the means provided by the Association Agreement which would have forced Israel to stop the violation of the treaty, the use of which would have entailed initially convening an arbitration panel (Article 75). Instead it continued to rely on the Member States’ customs authorities requirement of Israel’s cooperation in order to verify the origin of the *suspected* products and recover duties whenever the Israeli custom authorities were not cooperative or failed to provide adequate evidence.

4.3. Recent Developments: the Olmert Arrangement and the Amendment of the Association Agreement for the Purpose of the Euro Pancumulation System of Origin.

Over the last three years, the issue has seen two important major developments. The first was when the Israeli government offered a technical arrangement to the EU; the second when it decided to amend the protocol on origins to include Israel in the Euro med pancumulation system of origins.

that the importing country will not find sufficient. It is not necessarily suited to the present case where the member States formulated a verification inquiry concerning the precise location of a product’s production and Israel answered that the product was produced in the Occupied Territories and asserted its eligibility for preferential treatment under the agreement.

In 2003, the European Commission pressed Israel to find a solution to the issue of the products coming from the settlements. For the Commission, as long as no solution has been found to this issue, the protocol on origins could not be amended for the purpose of including Israel in the paneuromed system of cumulation of origins. The paneuromed system of cumulation of origins is the technical name for the establishment of a free-trade area between the new neighbouring countries of the EU and it is designed to allow goods produced jointly in two or more of the countries of the region to maintain their preferential access to the EU market.⁵⁸

In November 2004, the Israeli Minister of Trade and Industry at the time, Ehud Olmert offered the European Commission the expected “technical solution” to this problem, referred to as the *Olmert arrangement*. According to the offer, settlements goods can be identified separately from proper Israeli goods. Israeli exporters shall indicate the name of the cities, villages or industrial zones where production has taken place on all preferential proofs of origin issued in Israel for export to the EU.⁵⁹

The arrangement originally proposed is a compromise. On the one hand, it enabled the EU to recover duties for products coming from the settlements and at the same time, it allows Israel to continue applying the Association Agreement to the Occupied Territories and issue proofs of origin accordingly. It alleviates the administrative burden of the member States custom authorities, which are now empowered with a list of the Israeli settlements and can distinguish between products coming from Israel proper and products coming from the settlements. On the other hand, it allows Israel to continue

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Source http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_783_en.htm (last visited 15 December 2008).

⁵⁹ For a detail of the terms of the arrangement: http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCFE_PROD1_023628 (last visited 15 December 2008).

applying the Association Agreement to the Occupied Territories and issue proofs of origin accordingly. It does not need to acknowledge in any official documents that products coming from the settlements are not products from Israel and it allows Israel by stating for example, "Israel-Barkan", to continue to maintain a customs link between the Territories and itself.⁶⁰

The EU was cautious with the arrangement because it realised that the way in which it would endorse it was crucial for the preservation of its rights under the treaty. According to Article 45 of the Vienna Convention on the Law of Treaties, a State loses its right for invoking a ground of the suspension of a treaty if by its conduct it has acquiesced to the unlawful implementation of the treaty by its partner. Furthermore, according Article 31.2.a. of the VCLT, it means that if the arrangement was to be applied and interpreted in connection with the Association Agreement, the Association Agreement shall be interpreted in a manner that renders the malpractice permissible.

At first the Commission was willing to refer the arrangement to the Association Council for endorsement and was ready to accept the arrangement as an acceptable solution in order to amend the protocol on origins. If this decision had been put into practice, it would have definitely amounted to acquiescence of the EU to Israel's violation of the agreement. Consequently, the EU would have lost its right to suspend the agreement and accepted the alteration of the meaning of the treaty. After a while, aware of the risk which the EU was facing, the Council took all necessary steps to avoid a formal acceptance of the Olmert arrangement by the EC institutions which could be interpreted as having legal effect in European and international law. This was demonstrated by the

⁶⁰ R. Frid and G. Harpaz, "Israel : Exported Products to the EU – An Agreement reached Over the Treatment of Products Exported to the EU From the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip (the Territories)" (2004) 10 *International Trade Law and Regulation* 32-33, p. 32.

fact that neither the Association Council, nor the Association Committee have endorsed the arrangement. All the measures referring to the arrangement were taken by the Custom Cooperation Committee. It was put into practice in February 2005.

In December 2005, the Commission decided with Israel to amend the protocol on origins for the purpose of enabling Israel to participate to the Euromed pancumulation system of origins and this without having solved properly the rules of origin issue.⁶¹ This decision could have had very serious consequences that the EU tried to prevent. First of all, it could have amounted to spreading the violation of international law among all the pancumulation system. Practically speaking, it means that products from the settlements would have been able to comingle with Turkish or Jordanian products and be exported with preferential treatment to the EU. It would have been extremely difficult to detect which product is originating from where with the risk that the whole system would have been tainted. The EU was very much aware of those risks and has been trying to avoid them. Before it entered into agreements enabling third countries participating in the pancumulation system of origins, it made sure that they concluded an arrangement with Israel in order not to grant preferential treatment to products coming from the settlements -which is a copycat of the Olmert Arrangement.

⁶¹ Emmanuele Giaufret talked about the arrangement as an *astuce* (fr) = a trick or astuteness (en). Interview with Emmanuele Giaufret, Tel Aviv, July 2007. Furthermore, two MEPs asked whether the EC institutions considered that the implementation of the Olmert arrangement provides a satisfactory solution to the issue. The Council stated that the new Protocol will be accompanied by a statement in which the EU will reaffirm its position as to the territorial scope of the EU-Israel Association Agreement. The Commission described the arrangement as a practical way of handling the problem of exports of goods from the settlements, Written Questions by Caroline Lucas (Verts/ALE) to the European Commission, 6 July 2005, P-2496/05 and Oral Question by Saïd El Khadraoui to the Council, 22 June 2005, H-0544/05. Respectively available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+P-2005-2496+0+DOC+XML+V0//EN> and <http://www.europarl.europa.eu/sides/getDoc.do?type=QT&reference=H-2005-0544&language=EN> (both links last visited 15 December 2008).

It is interesting to note that the conclusion of the Olmert arrangement has been seen as an illustration of Israel's gradual change of perception of the EU's importance as a "soft" power global player.⁶² Harpaz considers the arrangement as an imposition by the EU of its own solution and an illustration of the EU's economic and political pre-eminence. Israel was backed by some legal opinions stating that the convening of an arbitration panel could have provided in Harpaz's words, Israel with "an objective, legal immunity from strong, subjective, economic and political pressures" exerted by the EU. Harpaz has a point if one considers that the arrangement is seen in Israel, and particularly in Israeli traders and right-wing circles, as a defeat because it weakens the well-established position that the settlements are an integral part of Israel. It is nonetheless important to note that the arrangement does not fix the issue. It remains a compromise rather than imposed solution.

4.4. Is There a Duty not to Recognise the Certificates of Origins Coming from the Settlements?

To sum up, Israel is still extending the implementation of the Association Agreement to the settlements and the EU is trying to avoid the endorsement of the consequences of this illegal extension. Therefore, from a point of view of international responsibility, is it possible to advance the opinion that the EU has breached its duty of non recognition, that it has recognised the unlawful practice?

This dissertation has already advanced in its second chapter that recognition amounts to the acceptance for a subject to international law of the opposability of an act and the

⁶² On this aspect see G. Harpaz, "The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip. – The Limits of Power and the Limits of the Law" (2004) 38 *Journal of World Trade* 1049-1058. See also, G. Harpaz, note 41 above p. 182.

breach of the duty not to recognition consists in the endorsement of the legal consequences arising from the illegal act. That is, the State that recognises an illegal act waives of its own rights to contest the illegality of the act or situation.⁶³ While there is obviously an obligation not to recognise Israeli settlements, the answer to the question whether the acceptance of certificates of origins of products coming from the settlements amount to a breach of the duty of non-recognition is not clear-cut and requires a study of international practice on non-recognition.

The ICJ stated in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*⁶⁴ that certain acts “such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitant of the territory” were not subject to the duty of non-recognition⁶⁵ as otherwise, it would clash with another competing imperative which is the respect and the acknowledgement of the existence and interests other than economic of the inhabitants of the territory. As detailed in the second chapter of this dissertation, other considerations or interests can over-ride the enforcement of the duty. The question remains whether certificates of origin fall into this exception.

In the 1994 *Anastasion* case⁶⁶, the European Court of Justice (ECJ) expressly ruled that member States of the EU should not accept certificates of origins and phytosanitary certificates issued by the authorities of an entity which was not recognized, the Turkish Republic of Northern Cyprus (TRNC).⁶⁷ In a preliminary ruling procedure, the ECJ had

⁶³ See Chapter Two of the dissertation, p. 79 above.

⁶⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. (1971), p. 16.

⁶⁵ *Ibid.*, p. 56 (para 125).

⁶⁶ Case C432/92, *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Anastasion (Pissouri) Ltd* [1994] ECR I-3087, at 3116.

⁶⁷ In 1974, the Turkish armed forces intervened in the Northern part of Cyprus and thus partitioned the island into two distinct parts. On 15 November 1983, the Turkish Cypriot community declared an

to answer five questions from the High Court of Justice (Queen's Bench Division), all of which related to the interpretation of the Association Agreement between the then EEC (European Economic Communities) and the Republic of Cyprus⁶⁸ and the Plant Health Directive.⁶⁹ More precisely questions were asked whether the terms of the directive and the agreement could allow the acceptance by the custom authorities of the member States of the EC certificates issued by authorities other than the ones of the Republic of Cyprus (i.e. by the TRNC) and whether the answer to these questions would be different if certain circumstances related to the situation of the island of Cyprus were established.

The UK and the Commission contended that, in view of the special situation of the island of Cyprus, the authorities of the member States are bound to accept certificates issued by the authorities situated in the Northern part of the island and not by officials authorized by the Republic of Cyprus, in order to prevent discrimination between nationals and companies of Cyprus as provided by article 5 of the Association Agreement. They argued that accepting those certificates does not amount to recognition of the TRNC but was in the interest of the inhabitants of the Northern part of the island because it was almost impossible for them to obtain certificates other than by the authorities of the TRNC. They thus used the "*Namibia* exception" argument.

The Court rejected these contentions. The system of verification of the authenticity of the origin of a product as established by the 1977 Protocol to the Association Agreement is based upon cooperation and mutual reliance between the competent authorities of the

independent State, the Turkish Republic of Northern Cyprus. SC Resolution 541 (1983), the SC called upon "all States not to recognise any Cypriot State other than the Republic of Cyprus", and in SC Resolution 550 (1984), the SC reiterated the duty of all states "not to recognise the purported State of the Turkish Republic of Northern Cyprus" and "not to facilitate or in any way assist the aforesaid secessionist entity".

⁶⁸ Agreement of the 19 Dec 1972 establishing an association between the EEC and the Republic of Cyprus, annexed to Council Regulation 1246/73, OJEC L 133, 14 May 1973.

⁶⁹ Council Directive 77/93, OJEC L26, 31 Jan 1977. The Plant Health Directive contains measures to be adopted by member States of the EC in order to prevent the introduction into, and spread within, the European Community of serious pests and diseases of plants and plant produce.

importing State and those of the exporting State.⁷⁰ Such cooperation is excluded in cases where the authorities of an entity are recognized neither by the Community nor by the member States. The only Cypriot State they recognize is the Republic of Cyprus.⁷¹ In those circumstances, the acceptance of movement certificates not issued by the Republic of Cyprus would constitute, in the absence of any possibility of checks or cooperation, a denial of the very object and purpose of the system established by the 1977 Protocol.⁷² Furthermore, the Court rejected the argument that the acceptance of movement certificates fell into the *Namibia* exception. It followed the Advocate General in his Opinion that the situation of Namibia and Cyprus were not comparable from either a legal and factual point of view.⁷³

Therefore, although the main legal argument of the Court is based on an interpretation of the agreement - the system of cooperation set up by the 1977 Protocol cannot function properly if the movement certificates are not issued by the authorities of the Republic of Cyprus- it is corroborated by elements of international law, i.e. the non-recognition policy of the member States of the EU of the TRNC pursuant to SC resolutions 541 and 550.⁷⁴ In this sense, the Court clearly endorsed the non-recognition principle as formulated by the ICJ in the *Namibia* opinion by inferring that administrative cooperation is excluded with the authorities of an entity which is not recognized either by the Community or the member States.⁷⁵ It maintained the same position in the *Anastasiou II*⁷⁶ and *Anastasiou III*⁷⁷ judgments.

⁷⁰ Para. 38 of the decision.

⁷¹ Para. 40 of the decision

⁷² Para. 41 of the decision

⁷³ Para. 49 of the decision

⁷⁴ For a view that the Court exclusively ruled by reference to Community law and disregarded the international legal order as not being applicable to Community situation, S. Shaelou, "The European Court of Justice and the Anastasiou Saga: Principles of Europeanisation through Economic Governance" (2007) 18 *European Business Law Review* 619-640.

⁷⁵ This principle guided the legal service of the Council which had to give their opinion on a proposal for a Council regulation issued by the Commission on the 24 April 2004, with the view of putting an end to the

Therefore, when drawing a parallel with the issue of the products coming from the Israeli settlements, one can learn from this case that a movement certificate does not fall into the *Namibia* exception.

Nonetheless, inasmuch as the circumstances in *Anastasion* were different from the ones in the *Namibia* Advisory Opinion, they also differ with the ones around the issue of the products coming from the Israeli settlements in the Occupied Territories. In the Cypriot case, the Turkish custom officers were not the legitimate ones under the EC-Cyprus Association Agreement who were designated to cooperate with the European customs administration. Moreover, the Northern Turkish Republic of Cyprus could not claim to be the successor of the Republic of Cyprus in the rights and obligations granted by the treaties previously signed by the Republic of Cyprus prior to the invasion of the Turkish troops. In the Israeli case, even if the settlements are not recognised, the Israeli authorities are the legitimate authorities to deal with the functioning of the customs and excise over the Occupied Territories. Actually, the Israeli military authority has the duty to do so.⁷⁸ However, the exercise of this prerogative should be exercised for the benefit of the occupied population. In the present case, Israel is clearly in breach of international

economic isolation of the Turkish Cypriot community by facilitating trade between the Northern part of Cyprus and the EC Customs Territory (*Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of Cyprus does not exercise effective control*, COM (2004) 466 final). This proposal was censured by the legal service of the Council which stated that designating a body in the areas for the purpose of issuing certificates of origins and carrying out the necessary controls without the consent of the Republic of Cyprus would constitute explicit recognition of another authority in the areas other than the government of the Republic of Cyprus, *which would be contrary both to international law and European Law* (emphasis added). (Doc 11874/04, 25 August 2004, non public version) Cited in T. Christiakis, *L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales* In T. Jean-Marc and T. Christian (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, (Leiden, Boston 2005), pp. 126-166, p. 156.

⁷⁶ Case C219/98, *Anastasion and Others* [2000] ECR I-5241.

⁷⁷ Case C140/02, *Anastasion and Others* [2003] ECR I-10635.

⁷⁸ A belligerent occupant possesses the right to collect the taxes and custom duties imposed by and for the benefit of the occupied population in accordance with article 48 of the 1907 Hague Regulations : "If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as possible, in accordance with the rules of assessment and incidences in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate government was so bound". See, G. von Glahn, *The Occupation of Enemy Territory. A Commentary on the Law and Practice of Belligerent Occupation*, (Minneapolis 1957), p. 150.

law because the extension of its national custom authorities is coupled with its illegal practice of transferring part of its population to the territories it occupies. Israel extends its national customs jurisdiction to the territories it occupies for the benefit of the settlers.

Therefore, the connection between the Israeli and Cypriot cases stems from the principle that a product cannot be granted preferential treatment under EU law if the origin it claims in order to be allowed the preferential treatment contradicts international law.

4.5. Does the Attitude of the EU Amount to Recognition?

In the present case, the EU has not recognised the illegal settlement policy. Even if it still has not solved the problem of the violation of the Association Agreement, the EU has refused the normal consequences of recognition, that is, it has taken all precautionary measures not to give to the illegal situation the rights that its own law would require the EU to give. First of all, it has tried to find ways to tax products coming from the settlements. The Olmert Arrangement represents a way for the EU to *de facto* enforce of its non-recognition policy of the Israeli settlements as being part of the Israeli territory. Second, the last precaution it took by pressing the countries associated to the pancumulation system of origins to make sure that they do not grant preferential treatment to the products coming from the settlements illustrates all the care it devoted not to have its system of external relations and trade tainted by the malpractices of its partner.

However, the shield built by the EU to prevent its legal system to being altered by the violations of international law of its commercial partner is very fragile and the

developments of its relationship with Israel always puts it on the edge of recognition. An article in the Israeli newspaper "Globes" dated 27- 28 February 2006 stated that the Israeli government has allocated NIS 30 million to the Export Institute in order to compensate operators across the Green Line whose products would be subject to export duties from European customs officers.⁷⁹ First of all, this is a proof that Israel is willing by any means to maintain an economic link between the Territories and itself. Second, it is a violation of the rules of the World Trade Organisation⁸⁰ and hence of the EU-Israel Association Agreement (Article 6.1) which prohibits the parties to subsidise the exportation of their products. This new episode of the saga proves that the present situation is not tenable but it has so far not been addressed by the Commission which claims it has not received any confirmation that it was operational.⁸¹

It is important to note that recently, the UK government has announced that it was willing to search for cases of violations of the EU-Israel Association Agreement that have been brought to light, notably the exportation of agricultural products grown in West Bank settlements under the label "Made in West Bank" and which has caused the loss of millions of pounds in revenue.⁸² According to the Alternative Information Centre, British officials have tabled a proposal at the European Council, calling for discussion on

⁷⁹ S. Peretz, Lying on the Fence, *Globes*, (27-28 February 2006).

⁸⁰ See article 3 of the Uruguay Round Agreement on Subsidies and Countervailing Measures:

"3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact(4), whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I(5);

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1."

⁸¹ Interview with Emmanuele Giaufret, Tel Aviv, July 2007.

⁸² T. Franks, Concern over EU-Israel Trade Abuses, *BBC Radio Four*, (1st November 2008) (radio broadcast).

means to tighten the policing of the rules on import duty, so consumers can make an informed choice between Palestinian and settlement goods.⁸³

There are no reasons not to welcome this initiative. However, the measures offered do not constitute a solution to the problem because they do not compel Israel to differentiate between its territory and the settlements when it implements the Association Agreement. A solution to this problem can only be found only if the EU establishes a way to shift the burden of proof in differentiating products originating from the settlements and products originating from Israel proper on the Israeli side. However, the risk is that time passes and the EU does not solve properly this problem. In this case, the continuous inaction from the EU in the face of Israel's uninterrupted practice in issuing certificates of origins for products coming from settlements might change the balance of the zero sum game created by the arrangement and place the EU on the slippery slope of recognising Israel's extension of the implementation of the Association Agreement to its settlements in the Occupied Territories.

Finally, it is important to note that other European partners also illegally extend their jurisdiction to territories they occupy. One notable case is the illegal annexation of Western Sahara by Morocco. In 1976, Morocco partly invaded the territory of Western Saharan after it was relinquished by Spain and entirely annexed it in 1979. Since then, Morocco has exploited, exported and facilitated the exploitation of Western Sahara resources such as its fish, phosphates and sand. The EU and Morocco signed in 1996 an association agreement which entered into force in 2000 and which is devoid of any mention to the territory of Western Sahara and any provision excluding Western

⁸³ A. Hackbarth, Israeli Government Criticizes UK Government's Move to Clearly Label Settlement Made Products, *Alternative Information Center*, (17 November 2008). Available at <http://www.alternativenews.org/news/english/israeli-government-criticizes-uk-governments-move-to-clearly-label-settlement-made-products-20081117.html> (last visited 15 December 2008).

Sahara.⁸⁴ Furthermore, in May 2006, they signed a fisheries agreement, which entered into force in February 2008, establishing the right for European fishing vessels to access the Moroccan fishing zones in exchange for a financial contribution, including Western Sahara waters into the scope of the agreement.⁸⁵ The inclusion of Western Sahara in the scope of both agreements constitutes for Chapaux and Koury a breach by the European member States and the European Commission of their duty of non-recognition.⁸⁶ According to an article in the *EUObserver*, the European Commission explained that it considers Morocco as the de facto administrator of Western Sahara.⁸⁷ As much as this assertion is objectionable, it can explain the difference of position and strategy of the EU institutions in comparison to the case of bilateral relationships between the EU and Israel since the EU considers Israel as an Occupying Power therefore subject to the obligations prescribed by International Humanitarian Law.

5. The Participation of Settlements in Community Programmes.

The settlement policy in the Occupied Territories is offering challenges to which the EU must respond. The extension of the implementation of the Association Agreement to the settlements is the issue the EU has been the most adamant to tackle. However, as Israel does not differentiate between its territory and the settlements, this problem is to be

⁸⁴ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJEC L 70/2, 18 March 2000.

⁸⁵ Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco; OJ L141 of 29/05/2006, p.1

⁸⁶ S. Koury, The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law In K. Arts and P. P. Leite (eds.), *International Law and the Question of Western Sabara*, (2007), pp. 165-198 and V. Chapaux, The Question of the European Community-Morocco Fisheries Agreement, In K. Arts and P. P. Leite (eds.), *International Law and the Question of Western Sabara*, (2007), pp. 217-237.

⁸⁷ A. Balzan, Commission under fire over Morocco fisheries agreement, *EUObserver.com*, (9 March 2006). Available at <http://euobserver.com/9/21092> (last visited 15 December 2008).

found in an actual or potential manner in the entire spectrum of the EU-Israel relationships.

During the year 2005, the problem has been raised inside the European Parliament that entities located in the Palestinian Territories have participated in the Vth and VIth Framework Programmes.⁸⁸ This news provoked a certain embarrassment in the European Commission because, once again, it is clearly not in line with the official position of the EU that the settlements do not form part of the State of Israel and therefore it contradicts the conditions of participation of Israel to the Framework Programme. The Commission promised that it would be very “vigilant” in monitoring the future use of the EU’s research budget, which amounts to €50 billion over the next seven years.⁸⁹

This vigilance has been translated into an operational procedure with the Israeli authorities in charge of implementing the programme. The Directorate General Research of the European Commission checks the address of those entities about whom it may have reasonable doubts against a list of settlements based in the Occupied Territories. If suspicion remains, they refer the issue to the Israeli authorities. According to Emmanuele Giaufret, the solution found is certainly the most appropriate because the problem is minimal and is too difficult for the Commission to detect. It cannot afford to verify all

⁸⁸ In response to a question to the Commission by MEP Graham Watson (ALDE) inquiring about the reported participation of Israeli settlement-based entities in FP5 and FP6, Commissioner Ferraro-Waldner replied that “the Commission is looking into suggestions that settlement-based entities have participated in bilateral co-operation programmes with the State of Israel, in the light of the contractual obligations entered into”. 12 December 2005, E-4633/05. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2005-4633+0+DOC+XML+V0//EN&language=BG> (last visited 15 December 2008).

⁸⁹ D. Cronin, Europe: Heading for a new Security Deal with Israel *International Press Service News Agency*, (22 February 2008).

the applications sent to the DG Research in Brussels to participate in the Programme. Only the best projects are selected and this not based on national or ethnic criteria.⁹⁰

Nonetheless, as pointed at by the EuroMed Network of Human Rights, the “screening arrangement” falls short of preventing any entity based in the settlements from participating in the programme. First of all, it cannot prevent an entity using an address in Israel but with a core or affiliated settlement facility from taking part in the programme, neither can it detect the participation of a minor subcontractor— a minor subcontractor being one which receives less than 25% of the funds allocated to the contractor which signs the project agreement with DG Research. Further, the Israeli Ministry of Industry, Trade and Labor’s technological and Research & Development cooperation organisation (MATIMOP) was a contractor to a number of FP6 projects. MATIMOP’s companies list contains settlement enterprises and some of the MATIMOP R&D centres are located in settlements. It does not seem that the “arrangement” agreed with the Israeli authorities extends to MATIMOP’s companies.⁹¹ The “arrangement” thus fails to provide a proper filter to protect the EU’ system. It can only prevent visible annoyances and thus political scrutiny of the European Commission. Furthermore, the main issue with the arrangement is that it does not offer a proper disincentive for the participation of entities based in settlements in the Programme. Entities based in settlements officially can still participate in it. The Commission has not thoroughly modified the rules of the programme in order to prevent their participation.

Furthermore, so far, no precautionary measures have been taken in order to prevent entities based in settlements to participate in the Competitiveness and Innovation

⁹⁰ Interview with Emmanuele Giaufret, Tel Aviv, July 2007.

⁹¹ S. Rockwell and C. Shamas, A Human Rights review on the EU and Israel - Mainstreaming or Selective Extinguishing of Human Rights? (Euro-Mediterranean Human Rights Network), (2005). p. 38.

Programme (CIP) Israel joined in November 2007 and to benefit from loans granted by the European Investment Bank. Finally, as stated earlier in this chapter, the EU and Israel agreed on June 2008 to upgrade their relationships and the EU raised the prospects of Israel's participation in several community programmes. It remains to be seen if the EU will take precautionary measures to effectively prevent the participation of entities based in settlements in these programmes.

Chapter Eight
Conclusions, Perspectives for the Near Future and Recommendations:
Towards a Law-Based Involvement of the European Union
in its Relationships with Israel and the Palestinians.

The Israeli occupation of the Palestinian territories poses a claim for exceptionality which is directed at third parties, i.e. those outside this factual situation. In this respect, third parties have a responsibility to object this claim in order not to render it legitimate or acceptable. As it has been detailed in this dissertation, the EU has been confronted with this claim for exceptionality throughout the deepening of its relations with the parties involved with the conflict. By increasing its presence on the ground and its ties with Israel and the Palestinians, it has entered the “sphere” of violations of international law. Not only it has enhanced its responsibility to protest to the claim but also it has increased the risks of compromising itself with the violations of international law happening on the ground. First of all, through a summary of the previous chapters of this dissertation, this chapter demonstrates that parallel to the process of continuous international law violations pursuant to the occupation of the Palestinian territories, through repeated silence and inactions in tackling the disruption of its peace-building instruments by violations of international law occurring on the ground, the EU has entered a process of acquiescence which has led in some instances to progressive compromising and recognition of violations of international law and has breached its initial commitment to base its relationship with Israel and the Palestinians on respect for human rights. Secondly, this chapter exposes critically the recent developments and future perspectives of the EU’s involvement with Israel and the Palestinians. Finally it formulates recommendations for a better directed involvement of the European Union in the resolution of the Israeli Palestinian issue, notably the mainstreaming of international law in its relation with both parties.

1. Towards Acquiescence and Compromising.

The former deputy director of the European Commission Technical Assistance Office to the West Bank and Gaza Strip, in an interview he gave a few months before he left his office in August 2007, used this very evocative image to describe EU's policy and involvement in the Palestinian Occupied Territories:

“Imagine you have a block of concrete in the middle of the road which has been there for years and blocks the traffic. Our [EU's] strategy has consisted so far in fixing the holes in the road, adding a layer of macadam from time to time, mow the grass on the sides. Nonetheless, we have never tried to remove the concrete block and undermine its foundations”.¹

The EU regularly condemns the illegality of some aspects of the Israeli occupation such as the settlements policy, extra-judicial killings and Palestinian attacks against Israeli civilians in its declaratory policy.² However, the EU has never acknowledged the structural aspect of the occupation which is characterized by power asymmetry and a settlement policy which amounts to a *de facto* annexation of the West Bank. The EU's deployment of its strategy towards the parties to the conflict is necessarily confronted by this structure which interferes with the implementation of its policy. Nonetheless, the EU maintains its economic, State-building and humanitarian policy with its partners while failing to address these interferences and therefore contributes to the entrenchment of the illegal occupation. Furthermore, so far, since it decided to revive its State building

¹ Interview with Philippe Georges Jacques, Head of the Section on Infrastructures and UNRWA, EC Technical Assistance Office to the West Bank and Gaza Strip, Jerusalem, August 2006.

² This dissertation considers the illegal acts of violence against Israeli civilians by Palestinian groups as repugnant and illegal. See p.13 note 6 above. It sees them as well as a development and emotional response to the ongoing and violent occupation and the denial of the right to self-determination of the Palestinian people.

policy, the EU has been silent on the human rights abuses of the Palestinian Authority and therefore contributes to the diminishment of the possibility of the construction of a democratic Palestinian State.

As detailed in the fourth chapter of this dissertation, the promotion of international law, humanitarian law and human rights is a primary objective of the external policy of the European Union. In this respect the EU has included in all its external agreements a clause which specifies that respect for human rights is an essential element of its relations with its partners. This clause was included in the Association Agreements which the EU signed with Israel and the Palestinian Liberation Organisation. By doing this, the EU undertook the commitment that respect for human rights was a central element in the conduct and development of its relations with Israel and the PLO. As a consequence, the cases of acquiescence and recognition of human rights violations recounted in this dissertation consist of a violation of the commitment which the EU undertook when it inserted the human rights clause in its Association Agreements with Israel and the Palestinians.

1.1. The Entrenchment of the Occupation in the Developmental, Humanitarian and State-Building Policies which the EU Directs at the Palestinians.

By the beginning of the 1990s, parallel to its humanitarian aid, the EU had deployed financial assistance to foster the development of the Palestinian territories. In line with Regulation 3363/86 on the tariff arrangements applicable to imports into the

Community of products originating in the Occupied Territories,³ it signed an interim association agreement with the PLO whose objective was to foster the economic development of the Occupied Territories. The implementation of this agreement has been hampered by the violations of international law on the ground, notably the curfew and closure policy. When the EU intended to correct the situation, the efficiency of the measures adopted was hampered by its equidistant approach to the conflict, i.e., its denial of the power asymmetry which characterizes the relation between Israel and the Palestinians⁴ and also by the violations of international law on the ground generated by the structure of the occupation. First of all, in the case of the trilateral groups on transport, energy and trade set in place by the EU, the supposedly exercise of dialogue and divestment from the issues of the conflict by the parties represents a case of cynicism when it was agreed from the beginning that these groups would not consider issues related to “security”. Secondly, in the case of EU BAM and the destruction of the infrastructure financed by the European Union, the interference caused by these violations of international law in the implementation of the EU’s policy obviously placed the EU inside the “sphere of the violation of international law” and thus increased its duty to protest. By failing to claim compensation for the destruction of the infrastructure it financed and by renewing the mandate of EU BAM while failing to protest at the disruption to the implementation of its mission, the EU acquiesced in these violations of international law and thus gave incentives for the perpetuation of the illegal occupation.

Furthermore, in order to respond to the worsening of the economic situation in the Palestinian Occupied Territories and in the absence of immediate results of its development policy, the EU gradually migrated its efforts towards humanitarian aid. This

³ Council Regulation 3363/86 of 27 October 1986, OJEC L 306, 1st November 1986.

⁴ M. Pace, “The Construction of EU Normative Power” (2007) 45 *Journal of Common Market Studies* 1041-1064, p. 1055.

dissertation has demonstrated that the European Union has integrated the constraints of the occupation and the violations of international law it entails in its humanitarian policy except in some instances like the case of the “mitigation projects” against the effects of the construction of the wall. The EU demonstrated its readiness to pay for the reconstruction of infrastructure illegally destroyed by the IDF such as the case of the house demolitions in Rafah in 2004 or the reconstruction of the power station in Gaza in 2006. The EU was also ready to compensate for the retention of tax and custom duties by Israel and not to ask for compensation for the cost of the obstruction of its humanitarian operation. Finally, the most obvious example of the integration of the structure of the occupation and its related violations of international law in the enforcement of its humanitarian policy is the case of the EU’s provision of fuel while Israel enforces a siege over the population of Gaza. In this case, the EU has recognised Israel’s illegal actions by allowing this act to alter the way it implements its policy. The occupation and the violations of international law it generates are then integrated into the implementation of the humanitarian policy of the EU and these interferences are never properly questioned, contested or tackled. Therefore, through its humanitarian policy, the European Union is helping the occupation to entrench and perpetuate. To paraphrase the words of Philippe Georges Jacques, the EU has “taken note of the concrete block”.

The same pattern of acquiescence and entrenchment exists in relation to the implementation of the EU’s State-building policy. After the takeover by Hamas of the Gaza Strip in June 2007 and the nomination of the government of Salam Fayyad by President Abbas, the EU decided to relaunch its State-building policy. This policy is directed at the West Bank only and contains a strong focus on security-related aspects. This dissertation has taken the example of the implementation of EUPOL COPPS to illustrate how the EU maintains and implements its strategy as if the occupation did not

exist and by turning a blind eye to the human rights abuses committed by the Palestinian Authority in the West Bank. First, the Palestinian civil police cannot properly implement its mission because of the presence of a foreign entity on the territory over which it exercises jurisdiction and furthermore, the civil police is part of the apparatus of an authoritative government whose human rights abuses are progressively being denounced. By failing to address these issues while it is in a position to do so because of its strong involvement on the ground and deep ties with Israel and the Palestinian Authority, the EU contributes to the rendering of the objective of its State building policy unattainable.

1.2. On the Verge of Recognition of the Israeli Settlement Policy.

The previous chapter of this dissertation has demonstrated that the illegal settlement policy permeates all aspects of the economic relationships between Israel and the EU and as such it poses a legal challenge to the European Union which faces the risk to have its international responsibility engaged.

The most illustrative example of this issue is Israel's exports of products which originate from its settlements in the Occupied Territories to the European Union under the EU-Israel Association Agreement as if they were coming from Israel proper. Since the signing of the Agreement, several NGOs brought this problem to light and have managed to mobilise forces inside the European institutions to keep the debate on this issue alive. The huge amount of attention attracted by the problem is mostly due to the fact that the export of products coming from the settlements under preferential treatment constitutes a violation of EU law. It was a detectable issue of "hard law" and therefore, given EU's attachment to the rule of law and EU's legalistic culture, it was supposed to provoke a long and intense debate.

As noted by the Euro-Mediterranean Human Rights Network Review on the EU and Israel:

[...] in the EU's institutional culture there is a great difference between its tolerance for conducting EU affairs in a *de facto* legally wrongful manner, and its tolerance for persisting in wrongful action or inaction once *legal impropriety* has been made evident, placed under scrutiny and debate within the institutions, and taken up by elements of the European public. For very strong reasons of general self-interest and institutional self-interest, the EU remains attached to its own rule of law. There is broad EU political consensus regarding the importance of not weakening the presumption of rule of law within the Community and as a European Union by conspicuously acting in contempt of it.⁵

In 2005, Israel and the EU agreed on a “technical solution” to overcome this problem. However, as detailed in the previous chapter, this “technical solution” is a simple “astuteness” which still allows Israel to encompass the settlements within its territory when it implements the Association Agreement. Furthermore, Israel is trying to find ways to bypass the arrangement by compensating economic operators located across the Green Line.

The only solution to this issue is for the EU to press Israel to distinguish between its territory and the settlements in the implementation of the Association Agreement. The same applies for the participation of Israel in any Community programmes. Otherwise, if the EU remains silent in the face of Israel's attempt to overcome the terms of the 2005

⁵ S. Rockwell and C. Shamas, A Human Rights Review of the EU and Israel – Relating Commitments to Actions, 2003-2004 (Euro-Mediterranean Human Rights Network), (2004), pp. 20-21.

arrangement, if, with the passage of time, it fails to tackle Israel's persistent practice of issuing certificates of origin for products coming from the settlements –even though it intends to tax them when they enter the EC market, and if it does not employ measures to prevent or create strong disincentives for the participation of settlements in its programmes, then the EU likely breach its duty not to recognise the settlements as legal.

1.3. **Missed Opportunities in the EU Declaratory Policy to Promote Respect for International Law.**

The EU's accommodation or acquiescence to Israel's claim to depart from international law can also be illustrated by instances where the EU silenced condemnations of violations of international law, failed to repeat condemnations in successive declarations, and to hold Israel accountable for conditions which it previously enounced. The following examples detail two of these cases.

First of all, after Israel announced its intention to disengage from Gaza, i.e. to dismantle its settlements in the Strip, the EU declared that it welcomed the initiative provided that it was implemented in accordance with five conditions laid down by the European Council in March 2004 and reiterated in October 2004:

- “it took place in the context of the Roadmap;
- it was a step towards a two-state solution;
- it did not involve a transfer of settlement activity to the West Bank;
- there was an organised and negotiated hand-over of responsibility to the Palestinian Authority;

- and Israel facilitated the rehabilitation and reconstruction of Gaza”.⁶

Israel announced that the Gaza disengagement plan absolved it from its responsibility over the Strip and ends the occupation of Gaza.⁷ However, Israel stated as well that it would guard the perimeter of the Gaza Strip, continue to control Gaza air space, and continue to patrol the sea off the Gaza coast.⁸

It can now be contended with confidence that the Gaza disengagement plan never ended the occupation of the Strip. Operation Summer Rain in June and July 2006, and the subsequent military incursions of Israel in the Strip, are enough evidence that Israel never pulled out of Gaza.⁹ Furthermore, so far the Gaza disengagement plan has been a means

⁶ Declaration of the European Council in Brussels, 25-26 March 2004 and 11 October 2004, (Middle East Peace Process- Council Conclusions). These conditions were actually “whispered” by Henry Siegman to Javier Solana. Informal conversations with Henry Siegman, November 2006.

⁷ The primary implication of the disengagement plan was set out in Principle Six (Political and Security Implications) of the revised disengagement plan which provides: “the completion of the plan will serve to dispel the claims regarding Israel’s responsibility for the Palestinians within the Gaza Strip”. Originally, the first version disengagement plan stated that “there would be no basis for the claim that the Gaza Strip is still an occupied territory” but this was deleted in the final version of the disengagement plan. See I. Scobbie, “An Intimate Disengagement: Israel’s Withdrawal from Gaza, the Law of Occupation and of Self-Determination” (2004-2005) Yearbook of Islamic and Middle Eastern Law 3-31.

⁸ “Israel’s Disengagement Plan: Renewing the Peace Process”, 20 April 2005. Available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israels+Disengagement+Plan+Renewing+the+Peace+Process+Apr+2005.htm> (last visited 15 December 2008).

⁹ The disengagement plan gave rise to an academic and political debate whether the disengagement plan ended the occupation of Gaza. For Scobbie, the disengagement from Gaza fails to observe the requirements of the process aspects of self-determination and threatens to breach the substantive aspects of the occupant’s duty to maintain the integrity of the territory it occupies. Furthermore, Scobbie notes that after the deployment of the Operation Summer Rain in June and July 2006, it is enough to note that the re-entry of Israel ground forces demonstrates that the disengagement plan did not end the occupation. The ease with which the Israeli Defence Force re-establish a physical presence on the ground in Gaza clearly fulfils the ruling in *Prosecutor v. Naletilic and Martinovic* that a guideline to determine whether “the occupying power has the capacity to send troops within a reasonable time to make the authority of the occupying power felt” (*Prosecutor v. Naletilic and Martinovic*, ICTY, Judgment, 3 May 2006, Case No. IT-98-34-A, p. 74, (para. 217)) See I. Scobbie, note 7 above, pp. 25 and 31. Stephanopoulos contends that Israel still occupies Gaza for two reasons: first it retains effective control over the territory, and second, because agreements between Israel and the Palestinian Authority (PA) prohibit unilateral changes to the legal status of Gaza and the West Bank. N. Stephanopoulos, “Israel’s legal obligations to Gaza after the Pullout.” (2006) 31 Yale Journal of International Law, 524-528. Shany argues that the three pronged test for the existence of occupation set out in the 1948 Nuremberg Hostages case should be applied - actual presence of hostile forces in the territory; their potential to exercise effective powers of government in the area; and the inability of the legitimate government of the area to exercise its sovereign authority over the territory. (United States v. Wilhelm, in 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Order n. 10, at 1230, 1243) Y. Shany, “Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement”, 8 Yearbook of International Humanitarian Law, (2006) 369-383

to consolidate Israel's grip over a large proportion of the West Bank. At the time the disengagement plan was announced, in 2004, Dov Weisglass, the Prime Minister's aide, "pragmatically" stated that the significance of the Gaza disengagement plan was the "freezing of the peace process". According to him, when the international community had given its assent to the disengagement plan and consequently, Israel had succeeded in "freezing the peace process", then Israel could pursue its settlement policy in Jerusalem and the rest of the West Bank without having to fear any pressure from the outside.¹⁰

Nonetheless, the EU never repeated the conditions it enunciated in 2005 and it never challenged Israel's contention that the Gaza Strip is no longer occupied and consequently that Israel still has to abide by its obligation under the Geneva Convention. Actually, more precisely, the EU's position on the issue over whether Israel should abide by its obligations under humanitarian law has been extremely ambiguous and, from the point of view of this dissertation, has given rise to a case of acquiescence to Israel's claim that it did not have any responsibility for the Palestinian population in the Gaza Strip. As it was mentioned in the sixth chapter of this dissertation, despite the fact that on January 21st 2008, Benita Ferrero Waldner condemned the siege on Gaza as a collective punishment, the Council did not use this legal qualification afterwards and in an elliptic formula referred to *Israel's obligations* without specifying if they were obligations under humanitarian law.¹¹

Furthermore, in April 2008, while the Council urged regular and unrestricted delivery of fuel supplies to the Gaza Strip in order not to aggravate further the humanitarian crisis, the Presidency of the EU (Slovenia at the time) even implied that the collective

¹⁰ Ari Shavit, Top PM Aide: Gaza Plan Aims to Freeze the Peace Process, *Haaretz*, (6 October 2004) cited in N. Tocci, *The Widening Gap between Rhetoric and Reality in EU Policy towards the Israeli-Palestinian Conflict* (Centre for European Policy Studies), (Brussels 2005), p. 11.

¹¹ See Chapter Six of this dissertation, p. 227 above.

punishment on the population of Gaza could legitimately be expected to worsen if Palestinians conduct acts of violence:

“ Hamas and other militant groups in Gaza have their share in aggravating the humanitarian situation, including through carrying out the attacks on the Nahal Oz and Kerem Shalom crossings”.¹²

In this instance, this dissertation takes the stance that the absence of repetition of the conditions attached to the Gaza disengagement plan, the refusal to use the term “collective punishment” while condemning the blockade on Gaza and the declaration which placed on Hamas a responsibility in provoking the aggravation of the blockade on Gaza consist in a very equivocal response to Israel’s claims that it does not have any responsibility for the population of Gaza and to an attitude of acquiescence to Israel’s illegal practices.

The decision of the Council in 2005 not to publish a report on the situation of Jerusalem constitutes another case of acquiescence. In November 2005, the British newspaper, the Guardian, leaked a report on East-Jerusalem drafted by the EC Technical and Assistance Office for the West Bank and Gaza.¹³ This report was initiated by the political councillor of the British embassy at the time the UK presidency of the European Union. The ten-page document demonstrated the clear Israeli intentions to turn the annexation of East Jerusalem into a concrete fact through the implementation of several inter-linked policies which are reducing the possibility of reaching a final status agreement on Jerusalem.

¹² EU Presidency Statement on Fuel Shortage in Gaza, 24 April 2008. Available at <http://unispal.un.org/unispal.nsf/9a798adb322aff38525617b006d88d7/6ba1ff19f48d584f85257436004a58d0?OpenDocument> (last visited 15 December 2008)

¹³ N. Watt, EU shelves East Jerusalem report over fear of alienating Israel, *The Guardian*, (13 December 2005).

“Israel's main motivation”, the report asserts, “is almost certainly demographic - to reduce the Palestinian population of Jerusalem, while exerting efforts to boost the number of Jewish Israelis living in the city - East and West”.¹⁴

At the last minute, the Council refused to publish this report under the pretext of the ongoing elections in Israel. European leaders wanted to avoid a confrontation with Ehud Olmert whose party *Kadima* was likely to win the elections and was considered pro-Europe.¹⁵ Javier Solana, the head of the Common Foreign and Security Policy stated expressly that he thought the report was very one-sided and unhelpful.¹⁶ In this situation, the EU made it clear that it had knowledge of an illegal situation and that it was ready to contest it but finally decided not to act publicly. By withdrawing its protests over the illegal situation, the EU demonstrated that it acquiesced in Israel's *de facto* annexation of East Jerusalem and its claim to depart from international law.

1.4. The Human Rights Aspects of the European Neighbourhood Policy in the Case of Israel and the Palestinian Authority: Another Case of Acquiescence?

The pattern of acquiescence of the EU towards Israel's claim to be exempt from rules of international law and human rights protection and towards PA human rights abuses can also be seen in the developments of the EU human rights instruments with Israel and the PA within the context of the European Neighbourhood Policy.

¹⁴ Jerusalem and Ramallah Heads of Mission, Report on East Jerusalem (EC Technical Office to the West Bank and Gaza Strip), (Jerusalem 2005), p. 8 (para. 20). The report is available at <http://www.waronwant.org/?lid=11418> (last visited 15 December 2008).

¹⁵ Interview with Philippe Georges Jacques, Jerusalem, August 2006.

¹⁶ N. Watt, note 13 above.

As stated in the fourth chapter, in its Communication on Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners, the Commission acknowledged that:

“There is an urgent need to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli/Palestinian conflict as a central factor in the efforts to put the Middle East peace process back on track. This will require a special effort by the EU and the setting up of an appropriate strategy”.¹⁷

However, when the EU designed its European Neighbourhood Policy action plan with Israel and the Palestinian Authority, the EU missed an opportunity to implement this “appropriate strategy” for the promotion of respect for human rights and international law.

- **The EU-Israel Action Plan.**

First of all, when they drafted the EU-Israel Action Plan, Israel and the EU failed to agree on the establishment of a human rights sub-committee whereas such a committee has been set up in other Mediterranean partners Action Plans such as Jordan’s and Morocco’s. Instead, with Israel, human rights issues were supposed to be tackled during meetings of the sub-committee on political dialogue and cooperation. As a consequence, in order to adopt a “balanced” approach with the parties, the Commission did not include a human rights sub-committee in its action plan with the Palestinian Authority

¹⁷ “Reinvigorating Human Rights in the Mediterranean Area”, Commission Communication, 21 May 2003, COM (2003) 294 final, p. 5.

and therefore considerably reduced its ambitions to promote compliance with human rights standards and humanitarian law by the parties to the conflict.

Furthermore, instead of establishing a human rights sub-committee, in February 2007, the EU and Israel agreed on the establishment of two informal working groups respectively on human rights and on International Organisations. It is important to note that no public record is kept of their meetings.¹⁸ The establishment of the human rights informal working group was considered as a little victory on the EU's side "because of the difficulty of tackling human rights issues with Israel".¹⁹ Nonetheless, the establishment of this informal working group falls short of the EU's initial commitments to promote human rights and to place compliance with human rights as an essential element of its relations with Israel.

Additionally, the EU-Israel Action Plan makes only brief mention of human rights, and this in contrast of other Action Plans agreed with its Mediterranean partners.²⁰ Under the heading "Shared Values", the sub-heading "Democracy, human rights and fundamental freedoms" includes the general commitment:

¹⁸ The EU-Israel Action Plan within the European Neighbourhood Policy: What is the impact of the EU-Israel Action Plan on Human Rights in Israel and the Occupied Palestinian Territories?, *Training and Seminar, Euro-Mediterranean Human Rights Network*, (Tel Aviv and Ramallah 2007), p. 4.

¹⁹ Interview with Emmanuele Giaufret, Deputy Director of the EC Delegation for Israel, Head of the Political and Economic Section, Tel Aviv, July 2007.

²⁰ For instance, the EU-Morocco Action Plan contains one specific section on human rights with four sub-headings: *Ensure the protection of human rights and fundamental freedoms according to international Standards; Freedoms of association and expression; Further promote and protect the rights of women and children; Implement fundamental social rights and core labour standards*, in Proposed EU-Morocco Action Plan, European Commission, Brussels, 17 December 2004, pp. 4-5. The EU-Jordan Action plan contains also one specific section on human rights with five sub-headings: *Support the freedom of the media and strengthening freedom of expression; Promote Freedom of association and Development of Civil Society; Ensure respect of human rights and fundamental freedoms in line with Jordan's international commitments; Promote Equal Treatment of women; Promotion of fundamental social rights and core labour standards*; in "Proposed EU-Jordan Action Plan", Brussels, European Commission, 9 December 2004, pp. 4-5.

- Work together to promote the shared values of democracy, human rights, rule of law and respect for human rights and humanitarian law
- Explore the possibility to join the optional protocols related to international conventions on human rights
- Promote and protect rights of minorities, including enhancing political, economic, social and cultural opportunities for all citizens and lawful residents
- Promote evaluation and monitoring of policies from the perspective of gender equality
- Promote a dialogue on policies for the physically and mentally disabled.²¹

Finally, in the Action Plan, the status of Israel as an Occupying Power, its responsibility under humanitarian law and its human rights obligations towards the occupied population are not mentioned. Instead, the Action Plan makes only an implicit reference to the obligation for Israel to respect the principle of necessity and proportionality in its military operations in the Occupied Territories. For instance, under the heading “Regional and international issues”, the sub-heading “Situation in the Middle-East”, the Action Plan encourages the parties to strengthen political dialogue and intensify areas for further cooperation and states:

“While recognising Israel’s right of self-defence, the importance of adherence to international law, and the need to preserve the perspective of a viable comprehensive settlement, minimising the impact of security and counter-terrorism measures on the civilian population, facilitate the secure

²¹ “Proposed EU-Israel Action Plan”, European Commission, Brussels, 9 December 2004, p. 4.

and safe movement of civilians and goods, safeguarding, to the maximum possible, property, institutions and infrastructure”.²²

- **The EU-PA Action Plan.**

The EU-PA Action Plan sets up several objectives designed to intensify political, security, economic and cultural relations between the parties.²³ In this document, the EU and the PA acknowledged that there were a number of constraints and limitations resulting from the ongoing Israeli-Palestinian conflict and the continuing occupation, including settlement activity, restrictions to movement as a result of the closure policy and the separation barrier preventing these objectives to be attained.²⁴ However, neither in the drafting of the EU-PA Action Plan nor in the designing of the EU-Israel Action Plan, has the EU proposed measures to tackle these “constraints and limitations”.

For instance, in the EU-PA action plan, the EU and the PA have agreed to take concrete measures to implement the EC-PLO Interim Association Agreement on Trade and Cooperation. However, the two measures envisaged to fulfil these objectives are to:

- “Examine possibilities of greater use of the institutional framework of the Interim Association Agreement (e.g. Joint Committee meetings, working groups etc.)
- Examine prospects of negotiation of a full Association Agreement”.²⁵

²² *Ibid.*, p. 6.

²³ “Proposed EU-PA Action Plan”, European Commission, Brussels, 9 December 2004.

²⁴ *Ibid.*, p. 1.

²⁵ *Ibid.*, p. 11.

The illegal measures which prevent the proper implementation of the EC-PLO Interim Association Agreement are not mentioned in any place either in the EU-PA or in the EU-Israel Action Plans.

As seen in the fifth chapter of this dissertation, the human rights dimension of the ENP is encapsulated in a system of positive conditionality. The achievements of reforms and progress in the field of human rights and democracy identified in each individual action plan are supposed to be reviewed each year and they condition the development of cooperation and the granting of privileges by the EU.²⁶ The quasi-absence of reference to the human rights issues which are endemic to the Israeli-Palestinian issue and the silence on the status and responsibility of Israel as an Occupying Power in the EU-Israel Action Plan represents another case of acquiescence by the EU to the violations of human rights and humanitarian law which result from the Israeli-Palestinian conflict. The lack of consideration of such issues points towards a future dissociation between the development of the integration of Israel in the European market and the improvement of the human rights situation in Israel and in the Palestinian Occupied Territories.

Furthermore, despite the fact that the Commission decided not to establish a sub-committee on human rights with the PA, the EU-PA action plan contains references to several human rights aspects which all form part of a common commitment between the EU and the PA to build the institutions of an independent, democratic and viable Palestinian State. In the Action Plan, the PA is invited to “strengthen legal guarantees for freedom of speech, freedom of the press, freedom of assembly and association in accordance with international standards” and “ensure the respect of human rights and basic civil liberties in accordance with the principles of international law, and foster a

²⁶ Chapter Five of this dissertation, p. 190 above.

culture of non-violence, tolerance and mutual understanding”.²⁷ However, since it revived its ties with the PA, the EU is not adamant to address these issues with the PA government whereas the same government has conducted a “muscle” policy in the West Bank conducive to human rights abuses in order to install “law and order” in the territories and clear them of the influence of Hamas.

2. Perspectives for the Near Future: Reactivation of the EU-PA Action Plan and Upgrade of the EU-Israel Relations.

As seen in the sixth chapter of this dissertation, in April 2008, the EU decided to revive the EU-PA Action Plan and in June of that year it agreed to increase the capacities of EUPOL COPPS and to extend its mission with a criminal justice component. The implications of this decision vis-à-vis the EU’s commitments to promote respect for international law and human rights have been detailed in the same chapter.

Furthermore, during the last EU-Israel Association Council on 16 June 2008, the EU officially announced its intention to upgrade its relationships with Israel as requested by Israel itself and agreed one year before.²⁸ At the EU-Israel Association Council on 5 March 2007, a “Reflection Group” was established in order to consider ways to upgrade the relationships between the two parties.²⁹

Israel is impatient to see the EU fulfilling the commitment it formulated at the Essen Council in December 1994 according to which “Israel, on account of its high level of

²⁷ “Proposed EU-PA Action Plan”, note 23 above, p. 6.

²⁸ Statement of the European Union at the eight meeting of the EU-Israel Association Council, Luxembourg, 16 June 2008, General Secretariat of the Council. Available at <http://www.delisr.ec.europa.eu/english/specialfr.asp?id=59> (Last visited 15 December 2008)

²⁹ Interview with Emmanuele Giaufret, Tel Aviv, July 2007.

economic development, should enjoy special status in its relations with the European Union”.³⁰

As a consequence of this common intention, the ambitions of Israel were very high. In the view of the proposal for upgrading it submitted before the convening of the “Reflection Group” set for the 9 October 2007, the status Israel aspired to was very close to one of a member State but “without the institutions”.³¹ Naturally, Israel demanded a significant integration in the European Single Market and in European agencies, programs and working groups with participation of Israeli ministers in charge of specific areas of activity in relevant meetings of the European Council “in those areas which will be jointly identified as areas of full participation within the process of European integration”. In order to strengthen political cooperation with the EU, Israel demanded, for instance, an annual meeting between heads of State of the EU and from Israel, a meeting of Israel and EU Foreign Ministers during each EU presidency, an Israel-EU strategic dialogue twice a year. Israel wishes to “have a say” and be associated with EU actions and involvement in the region. The most striking aspects are the demands to be involved in the formulation of the European diplomacy in a manner which is even not granted to candidate members of the EU. Israel expressly requested fixed consultations in Brussels prior to the issuing of declarations by the foreign Ministers of the EU and, in return, a readiness for alignment on Israel’s part with European declarations in agreed-upon areas of the CFSP.

³⁰ Declaration of the European Council in Essen, 9 and 10 December 1994. See declaration of Oded Eran, Israel’s ambassador to the European Union: “Despite past declaration, Israel does not enjoy any EU preference”, 23 March 2007, <http://www.ejpress.org/article/voices/15353> (last visited 15 December 2008)

³¹ Unpublished document. Provided by the courtesy of the Flemish Peace Institute (Brussels).

The nature of the upgrade was supposed to be decided at the Association Council in 2008.

In its final declaration after the Association Council of 16 June 2008, the EU officially acknowledged the upgrade of its relations with Israel. Nonetheless, the nature and content of the development of the relationships between the two partners is much less substantial than that Israel aspired to. The approach chosen seems to be a gradual and slow integration in the EU market while at the same time maintaining its declaratory policy condemnatory of Israel's illegal actions.

In the declaration, the EU announced the readiness of Israel to participate in several Community programmes, such as the EU Health programme 2008-2013 and Intelligent Energy-Europe programme. According to the document, the EUROPOL and Israel were planning to negotiate an operational agreement. Furthermore, horizontal negotiations covering air transport and in view of the signing of an agreement between the EU and Israel have been finalised.

However, in its declaration, the EU is careful to linking the upgrade with Israel to the resolution of the Israeli-Palestinian issue. The EU states expressly:

“The process of developing a closer EU-Israeli partnership needs to be, and to be seen, in the context of the broad range of our common interests and objectives which notably include the resolution of the Israeli-Palestinian conflict”.³²

³² Statement of the European Union, note 28 above, para. 6, p. 2.

The document is scattered with references to the situation in the Palestinian Occupied Territories. It condemns the building of settlements as illegal, as prejudging the outcome of final status negotiations and as threatening the viability of an agreed two-state solution.³³ It calls for the progressive removal of Israeli restrictions on movement and access in order to improve the situation on the ground and living conditions in the West Bank and to revitalise the Palestinian economy.³⁴ It also expresses its concern at the unsustainable humanitarian situation in Gaza.³⁵ Finally, it declares that any measures to prevent and combat terrorism must comply with international law, in particular international human rights law, refugee law and humanitarian law.³⁶

Finally, the EU also calls for the creation of a Subcommittee on Human Rights to replace the informal Working Group on Human Rights.

3. Recommendations.

The EU's deep involvement with Israel and the Palestinians necessarily requires that it exercises a form of diligence in the implementation of its policy and directs its actions towards Israel and the Palestinians with a certain level of diligence. Absent such an approach, the EU compromises itself with the violations of international law emanating from the ground to the extent that it offers incentives for the perpetuation of the illegal situation created by the Israeli occupation of the Palestinian territories and also in some cases even "receive the fruits" of the illegal occupation. Its repeated silences and inactions, when confronted in the implementation of its policy towards the parties with violations of international law and human rights only, helps the illegal occupation to

³³ *Ibid.*, para. 18, p. 4.

³⁴ *Ibid.*, para. 20, p. 4.

³⁵ *Ibid.*, para. 21, p. 5.

³⁶ *Ibid.*, para. 31, p. 6.

perpetuate or, in the words of Philippe Georges Jacques results in “entrenching the concrete block”, i.e., the occupation. Therefore, a form of diligence or concern not to encourage or offer incentives for the commission and perpetuation of violations of international law should be mainstreamed in all the aspects of EU’s policy and actions directed towards Israel and the Palestinians. Such an approach should be also coupled with efforts to maintain the claim that respect for international law, human rights and humanitarian law is a central aspect of the Israeli-Palestinian issue.

Therefore, first of all, it is important that the EU maintains the position it expresses in its declaratory policy and regularly condemns all violations of human rights and humanitarian law occurring on the ground.

Secondly, the “security first” approach adopted in the context of the Palestinian State-building, without addressing the human rights abuses committed by the Palestinian government, accelerates the process towards the creation of a failed Palestinian State which is clearly not in the interest of the EU, Israel and especially the Palestinians themselves. EUPOL COPPS is planning to include a course on human rights in the training of the roughly 800-member public order unit of the civil police.³⁷ While this is obviously a positive initiative, the EU should go a step further in its policy directed to the Palestinian Authority. It should, first of all, exercise a duty of due diligence by ensuring that its aid and policy do not assist the entrenchment and perpetuation of illegal policies and human rights abuses. Furthermore, the re-establishment of the State building strategy and the efforts to build up a Palestinian civilian police should naturally be accompanied by an equal focus and similar efforts by the donor community on the mainstreaming of human rights and the rule of law in all the aspects of their State-

³⁷ “Palestinian Civil Police, Connect, Train, Build, Equip, Mobilise”. Funding request submitted for your consideration, Palestinian Ministry of Interior, Berlin Conference 24 June 2008, pp. 5 and 8.

building policy.³⁸ Finally, the EU should set up a sub-committee on human rights and condition its financial and technical assistance to the Palestinian Authority on respect for human rights and fundamental freedoms by the PA government.

Nonetheless, regarding this last point, it is important to note that the PA is a non-State actor and as such, it has limited capabilities. Much of the reforms which need to be implemented call for the cooperation of Israel, notably in the trade and security sector. It is thus fundamental to condition the development of the Palestinian State building policy to the efforts and achievements of Israel in eliminating the obstacles to construction of a viable a Palestinian State and to its cooperation in these sectors. This might initially be seen as an unbalanced approach because it requires conditioning the granting of privileges to one party on the achievement of another actor but it is the only way to tackle properly the obstacles to the implementation of a Palestinian State and to render its creation possible and sustainable.³⁹

Furthermore, in a context such as the Israeli occupation of the Palestinian territories, humanitarian aid cannot possibly play a neutral and impartial function. It is crucial in a context like this one that the EU also exercises a form of diligence in the conduct of its humanitarian policy in order not to entrench the illegal policies of the Occupying Power.

³⁸ While the EU was bypassing the PA government, the projects that were managed through the President's office have not been interrupted. As such, it lead to the situation where State-building projects related to police and security were still funded but projects related to the strengthening of the Palestinian judicial system were interrupted. This necessarily has an impact on the situation on the ground and it makes it difficult to relaunch the entirety of the State-building project. Interview with Mark Gallagher, Head of the Financial Cooperation and Institutional Reform Section, EC Assistance Technical Office for the West Bank and the Gaza Strip, Jerusalem, July 2007.

³⁹ Actually the EU has once linked the development of the relationships between the EU and Israel to Israel's obstruction of EC's economic and developmental instruments directed at the Palestinians. In late 1987, the European Parliament postponed the final ratification and approval of the trade protocols attached to the 1975 EC-Israel trade agreement until Israel allowed Palestinian citrus growers to market their goods directly to the Community via Israeli ports without a change in certificates of origin in accordance with regulation 3363/86. Interview with Charles Shamas, senior partner of the Mattin Group, Ramallah, July 2006. See also R. Miller, "Troubled Neighbours: The EU and Israel" (2006) 12 *Israel affairs* 642-664, p. 654 and I. Greilsammer, "The Non-Ratification of the EEC-Israeli Protocols by the European Parliament (1988) " (1991) 27 *Middle Eastern Studies* 303-321.

Such an approach is inevitably difficult to implement because it necessarily poses a dilemma between the imperatives of aiding a population in need and the risk of perpetuating the “cost free” occupation. However, it can still be undertaken at different levels. First of all, this approach implies a day-to-day implementation and therefore a form of strong resilience from humanitarian workers who, for instance, have to insist with the Israeli authorities that they do not have to request “special permits” which Israel imposes for certain zones which are actually areas coveted for its settlement policy.⁴⁰ It necessarily requires a strong coordination among donors and a common will to face these issues. Nevertheless, things can already be achieved on the EU side only. At least, the EU should demand the reimbursement of all the additional cost on the provision of humanitarian relief incurred as a result of the illegal restrictions to movement and access imposed by Israel in the Occupied Territories. It should also state regularly that its humanitarian assistance does not relieve Israel from its obligation as an Occupying Power. It should finally claim from Israel the reimbursement of the destroyed infrastructure which was initially financed by the EU.⁴¹

Furthermore, the EU should take precautionary measures in order to prevent the participation of settlements in the programmes Israel will be associated with. Such an initiative would require the adoption of several different steps. First of all, all the relevant General Directorates of the European Commission which manage the programmes to which Israel is or will be associated should be informed of the possibilities of participation of entities based in settlements. Secondly, the EU should establish clearly with Israel that its association in Community programmes precludes the participation of

⁴⁰ Interview with Alberto Oggero, ECHO expert, EC Technical and Assistance Office, Jerusalem, July 2007.

⁴¹ Véronique de Keyser, Member of the European Parliament, has requested several times the adoption by the EU of the principle “destructor-payer” on the same model of the principle “polluter-payer” implemented in environmental law. Interview with Véronique de Keyser, Member of the European Parliament, Brussels, August 2006.

any entities based in settlements. Finally, all financial instruments and public procurements tenders should specify that entities whose location has been established in contravention to international law are not entitled to participate.

Regarding the participation of settlements to the EU-Israel Association Agreement, the EU should restate that the Olmert arrangement does not solve the problem of the exports of products originating from the settlements. It also should address Israel's practice of refunding settlement businesses through illegal subsidies for any import taxes paid by these businesses in their export to the EU in the EU-Israel Association Council and take the necessary steps under the Association Agreement accordingly to solve this issue i.e. convoking an arbitration panel.

Furthermore, the exclusion in community programmes of entities based on a territory whose acquisition contravenes international law, as well as the exclusion of territories occupied or annexed from the scope of EU's agreements, should form part of a general policy of the EU in order to implement its international obligation of non-recognition. Efforts in this sense have already been initiated by APRODEV and the Mattin Group in their advocacy work. In 2005, they called for the introduction of "Safeguard Provisions" in the European Neighbourhood and Partnership Instrument (ENPI)⁴² that would ensure first of all that all agreements concluded, and all measures financed, under the ENPI are implemented by each contracting party in accordance with the requirements of general international law and second, that no contracts enabling privileged participation of Community-financed programmes or measures are concluded with any political authority, public institution or private actor directly participating in, actively facilitating or

⁴² The European Neighbourhood and Partnership Instrument is the financial instrument which supports the implementation of the European Neighbourhood Policy and the Action Plans decided with the countries associated to the ENP.

actively deriving benefit from the commission of internationally wrongful acts.⁴³ These measures could have targeted the activities performed in the settlements based in Palestinian Occupied Territories but also in Western Sahara on behalf of Morocco. Unfortunately these amendments were not adopted. Such provisions would have enhanced the value of the ENPI as an instrument of positive conditionality and would have helped ensure that the EU's objective of promotion of human rights and international law are respected and promoted through the engagements concluded under the ENPI.

Finally, the EU should exercise positive conditionality on Israel. If negative conditionality and sanctions against Israel are not conceivable at the moment, the EU should at least link the expansion of its relationships with Israel to Israel's respect and implementation of human rights and humanitarian law in the Palestinian Occupied Territories. Not doing so amounts to an implicit acknowledgment of Israel's human rights abuses against the Palestinian population. The EU's declaration following the EU-Israel Association Council in June 2008 demonstrated an intention not to bend over Israel's claim to detach the EU-Israel relationships from the situation in the Occupied Territories. In drafting the new EU-Israel Action Plan by the first term of the year 2009, the EU should go a step further and clearly condition the development of its relation with its partner to the improvement of the human rights situation in the Occupied Territories. In this respect, it should respect its commitment to place human rights as an essential element of its relationship with Israel. The expression of its will to establish a sub-committee on human rights in its declaration following the EU-Israel Association Council could be interpreted as a move in the right direction. However in order to improve the EU's commitment to

⁴³ "Non-paper on the ENPI: A Recommendation for the Introduction of 'Safeguard Clauses'", Mattin Group, September 2005. I would like to thank the Mattin Group and APRODEV for sharing the material on the "Safeguard Clauses" with me.

base its relationship with Israel on respect for human rights and to implement proper positive conditionality with Israel, the EU should previously determine clear human rights benchmarks which will be assessed in each session of the human rights sub-committee and will help to standardise current performance and give incentives to the development of the EU-Israel relationships. Finally, as part of the implementation of its positive conditionality policy towards Israel, the EU should condition the development of its relations with Israel to Israel's cooperation and their implementation of the EU's instruments and policies which are directed at the Palestinians, notably the EC-PLO association agreement.

4. Concluding remarks.

The present dissertation has demonstrated that the European Union is progressively acquiescing and accomodating with the violations of international law that derive from the occupation of the Palestinian Occupied Territories. In this respect it has used a framework based on an empirical approach to international law in order to explain how States or international actors can contribute to the commission or the perpetration of violations and which draws upon international jurisprudence and several concepts of international law such as the duty of due diligence, the notion of acquiescence and the duty of non-recognition.

Furthermore, this dissertation has exposed that through this process of acquiescence and compromising, the EU has also breached the commitment to base its relations with Israel and the Palestinians on respect for human rights it took when it included a human rights clause.

List of People Interviewed

Adamos Adamou, Member of the European Parliament, chair of the European Parliament Delegation for relations with the Palestinian Authority.

Dr Abdel Atef, Head of the Programs and Projects Department, Palestinian Agricultural Relief Committees.

Alban Biaussat, Political Advisor, EC Technical Office for the West Bank and Gaza.

Alex Costy, Head of Coordination, United Nations Special Coordinator Office for the Middle-East.

Fawaz Daoud, police commander of Nablus. Interviewed by Arthur Neslen in March 2008. This interview is actually an extract from a forthcoming book about Palestinian identity by Arthur Neslen, generously provided by the author.

Véronique De Keyser, Member of the European Parliament.

Mark Gallagher, Head of the Financial Cooperation and Institutional Reform section, EC Assistance Technical Office for the West Bank and the Gaza Strip.

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