

The European Union, international law and the Middle East peace process

by Urfan Khaliq

The ongoing malaise in Israeli-Palestinian affairs periodically leads to calls for action from the European Union to take a more active role and for it to assist in the search for a sustainable and just solution to that dispute. In its 2003 Security Strategy the EU noted that “resolution of the Arab-Israeli conflict is a strategic priority for Europe.” Twenty-seven economically developed and powerful states who have agreed to have a common foreign policy which seeks to, inter alia, uphold respect for international law, human rights, democracy and the rule of law have an obvious interest in settling a dispute in their proclaimed neighbourhood.

The EU and its Member States have long taken a position on the Middle East peace process (MEPP). The (then) nine Member States in the Venice Declaration of 1980 first set out their position and this, officially at least, still forms the basis of the EU’s approach. The Venice Declaration supports Palestinian self-rule, considers Israeli settlements in the Occupied Territories to be illegal and has been the basis for the EU repeatedly demanding that Israel comply with Security Council Resolutions 242 and 338. In both seeking to give effect to the Venice Declaration and in response to its increasing importance as a regional actor on the global scene, the EU has become involved in the search for peace in the Middle East in a number of different ways. The first is as a member of the Quartet, an ad hoc arrangement alongside the US, UN and Russia. The EU has three representatives in the Quartet – the External Relations Commissioner, the High Representative for the Common Foreign and Security Policy (CFSP) and a representative from the Member State which holds the Presidency at the time. The representative of the Presidency, of course, reflects in the Quartet the perspective of that particular Member State and thus the approach is usually subtly, sometimes markedly, different every six months.

The EU is also directly involved in the MEPP outside of the Quartet. The Presidency, Troika, President of the Commission, Commissioner for External Relations, Commissioner for Development and Humanitarian Aid,

High Representative for the CFSP and the Special Representative for the Middle East peace process all make separate and at times differing contributions to it. There are also the Member States some of whom, in particular the United Kingdom, France, Germany and Italy, ensure that their voices are also heard separately.

THE ASSOCIATION AGREEMENTS

The most important basis for relations between the EU and its Member States, on the one hand, and, on the other, the Palestinians or the Israelis are the Association Agreements which have been negotiated with them. These Agreements cover trade and other forms of cooperation and as a consequence of their coming into force relations with both Israel and the Palestinians have been enhanced. The 8th EU-Israel Association Council meeting of June 2008 decided to upgrade the existing relationship, although further to the Israeli incursion into Gaza at the end of 2008 this seems to be on hold. Technically this Agreement is “mixed”, it is between the Community and its Member States on the one hand and Israel on the other. The other Agreement is between the Community only and the Palestinian Liberation Organisation (PLO) on behalf of the Palestinian Authority. This Agreement continues to legally function notwithstanding the disintegration of the Palestinian Authority into Hamas and Fatah-controlled factions in Gaza and the West Bank respectively. The Agreement with the Fatah-dominated PLO continues to apply to the Hamas-run Gaza Strip, for example, with regard to that minimal quantity of goods which are exported from that territory to the EU’s Member States. Having first designated Hamas a “terrorist organisation” in 2001, the EU has no official contact with it.

Both the Agreements have in article 2 an “essential elements” clause which requires that, “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.” It is these clauses of the Agreements

which are invoked when calls are made for the EU to suspend relations with either Israel or the Palestinians further to a particular development, or more often one outrage or another. What such calls seem to overlook is the fact that the Agreements also contain a clause (arts 76 and 78 of the Agreements with Israel and the Palestinians respectively) which state that nothing in the Agreement shall prevent a party from taking any measures:

which it considers essential to its own security in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

In many senses the “essential elements” clause on the one hand and the “security considerations” clause on the other encapsulate the balance that must be struck by the Community (and in the case of Israel the Member States also) as far as both Agreements are concerned; respect for human rights and democratic principles are an essential element of the Agreement but any measures taken for essential security purposes are permissible. Blatant violations of international law by either or both sides in the context of the ongoing Palestinian-Israeli dispute, however, cannot go unchallenged by the EU; if the essential elements clause is to have any credibility in relations with other states (the clause is standard in all “third-generation” community Agreements) then it must be invoked where the rules and principles it seeks to protect are flagrantly violated. The essential elements clause must also be seen in the context of the EU’s more general foreign policy orientation of which it is a part. The EU has for a number of years now claimed to have a normative dimension to its foreign policy. This has been made clear in numerous declarations and in existing treaty provisions. The Lisbon Treaty, which is not yet in force, encapsulates the existing approach when in relations with the wider world it obliges the EU to “contribute to peace, security, ... the eradication of poverty and the protection of human rights, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

In the EU’s relations with both Israel and the Palestinians there are numerous examples of incidents or policies which are clear breaches of the principles and rules referred to in the Lisbon Treaty and in the essential elements clauses. With regard to the Israel, there are its numerous incursions into Gaza which have resulted in the indiscriminate killings of non-combatants and the wanton destruction of civilian infrastructure. For example, further to the Israeli attack on Beit Hanoun in 2006, the Human Rights Council established a fact-finding mission, with which Israel refused to cooperate, that concluded “there is evidence of a disproportionate and reckless disregard for Palestinian civilian life, contrary to the requirements of international humanitarian law and raising legitimate

concerns about the possibility of a war crime having been committed.” The UN Special Rapporteur at the time, Professor John Dugard, considered there was evidence of “serious war crimes” committed by Israel.

In the West Bank there is the ever-expanding settlement activity and the building of the “security wall” which, where it deviates from the Green Line (the 1949 armistice line which prior to 1967 was the boundary between Israel and Jordan) and encroaches into the Occupied Palestinian Territories, has been described by the International Court of Justice in 2004 as severely impeding the Palestinians’ right to self-determination; violating a number of international human rights and humanitarian law obligations incumbent upon Israel; being tantamount to de facto annexation; and taking a route not essential for security purposes. With regard to the Palestinians, there are the rocket attacks upon southern Israel emanating from Gaza and also other blatant violations of international humanitarian law, such as the targeting of Israeli civilians through suicide missions as well as the internecine conflict between the supporters of Hamas and Fatah.

ARGUMENTS AGAINST SUSPENDING THE AGREEMENTS

Prima facie it would be legally justifiable for the Community to suspend the Agreements with both Israel and the Palestinians. Article 60 of the Vienna Convention on the Law of Treaties 1969, which represents customary international law, concerns material breach of treaty obligations and clearly permits the Agreements to be suspended or terminated due to, for example, the acts mentioned above. In the case of relations with both Israel and the Palestinians, however, and in the more general context of the Middle East peace process things are not so straightforward. In the case of relations with Israel, the EU has not suspended the Agreement for a number of reasons.

First, Commission officials consider Israeli delegations in all fora to have a very business-like and professional approach to the issues of, inter alia, human rights and international law. Israeli diplomats, well aware of the different perspectives of the Member States, strategically make limited concessions to ensure that any consensus which may exist to take action by the Member States quickly breaks down. Second, even in the event that a decision can be reached between the Member States that the Agreement should be suspended, the EU is well aware that if this were done Israel would be likely to refuse to agree to its further participation in any negotiations concerning the MEPP or at least try and relegate it to an ancillary role. With the coming to power of Benjamin Netanyahu in a Likud-led coalition in March 2009, this has again become a very real possibility. It was reported at the end of April 2009 that the Israeli Deputy Director for European Affairs at the Ministry of Foreign Affairs, Rafi Brak, summoned EU envoys and warned them that the EU

would be excluded from all future Middle East peace negotiations unless it stopped publically criticising Israel and if plans to upgrade EU-Israel relations, as agreed in June 2008, were thrown off-track. The general idea, in practice, seems to be that the peace process and the EU's role in it must take priority and the possibility of maintaining some influence over Israel comes first.

Third, the dependence of the Palestinian Territories upon Israel for their economic survival and physical well-being means that the Member States consider that suspension of the Agreement with Israel is likely to have an adverse effect on the Palestinians. Negotiation and dialogue with Israel have thus been maintained at all costs. Finally, it is politically increasingly difficult for the EU's Member States to suspend the Agreement. The refusal to suspend it, following events that have already occurred, may mean that in future the violations will have to be even more serious before all the Member States agree to suspend it. In legal terms the position has probably not changed although Israel may be able argue that estoppel is now a relevant consideration.

With regard to the Palestinians, although the approach of the EU is somewhat different the outcome as far as the Agreement is concerned is much the same. At no point has the EU seriously considered suspending the interim Association Agreement, even though it ceased to provide direct assistance to the Hamas-led government of the Palestinian Authority and does not now provide direct aid to the Hamas-led administration in Gaza. For the EU, relations with the Palestinian Authority are about creating conditions and institutions in the Palestinian Territories which can contribute to a viable two-state solution. There has been a constant and long-standing emphasis on reforming the institutions of the Palestinian Authority. The EU's fundamental problem in helping in the reform of these institutions is that events on the ground move so quickly in those territories and in Israel itself. As a consequence, the EU's efforts since, in particular, 2000 have largely been engaged in damage limitation by trying to prevent the humanitarian and political situation deteriorating further as opposed to improving it per se. The EU has been reactive not proactive, even though on a number of occasions a proactive approach could have led to an improvement on the ground.

In taking action the EU has, of course, had to do so in the context of the overall political climate. The EU has, for example, continually stressed the virtues of democracy, human rights and the rule of law in its relations with the Palestinian Authority and did not ostracise Arafat during the last years of his life, despite tremendous pressure from the United States and Israel to do so, because he was the democratically elected Palestinian leader. Yet, in the context of an ongoing "war on terror" a Hamas election victory in the Palestinian Legislative Council Elections in January 2006 presented new dilemmas for the EU. The EU's behaviour both prior and subsequent to the election

is itself highly questionable from the perspective of international law, the discussion below will focus on the latter only.

STRIKING A BALANCE WITH HAMAS

The balance which the EU had to strike once Hamas won the 2006 PLC elections and formed a government was an extremely difficult one. The preferred option for the EU, which was unrealistic, was for Hamas to be pressurised to accept the conditions stipulated by the EU and, inter alia, renounce violence and formally recognise Israel. The EU however had to consider the implications of its attempt to isolate Hamas with its established policies and practices and any other consequences that may follow. First, in line with its long term policy in the Palestinian Territories, the EU ideally needed to try and maintain the Palestinian Authority's institutional fabric. If lawlessness and attacks on Israel were to be stemmed to any extent, then the institutions and security services which already existed had to be supported or at least not further undermined, even if some of them were now under the control of Hamas.

Second, the EU needed to continue its humanitarian aid supplies to the Palestinians not only due to the scale of the humanitarian emergency but also if the EU was to try (in which it failed) to avoid being perceived as punishing the Palestinians for exercising their democratic rights as they had been told to do. Third, the EU needed to consider if the suspension of direct aid to the Hamas-led government could lead to other negative consequences in the overall context of the Middle East. The Palestinian budgetary crisis exacerbated by Israel unlawfully halting all tax transfers meant that to stop the Palestinian Authority from collapsing the Hamas-led government had to turn to other donors. Some potential donors such as Iran and Syria are involved in proxy wars against Israel. The giving of aid by these states could strengthen the position of those in Hamas who take a harder line and make any peaceful negotiation between the Palestinian factions and in particular with Israel even less likely. Fourth, a number of the Member States felt that Hamas was undergoing (and continues to do so) an evolutionary process into a political body. The then Finnish Foreign Minister during the Finnish Presidency of the second half of 2006, for example, was reportedly very keen on dealing with the Hamas-led government. It was argued during an informal Foreign Ministers meeting that the peace process could only be moved along by engaging with the Hamas-led government as well as Fatah and the Israelis. The UK and Germany in particular were very concerned about the consequences such a move would have on relations with Israel and thus there was no change in approach towards Hamas.

THE TEMPORARY INTERNATIONAL MECHANISM

The EU's solution to resolving its dilemma about wishing not to further undermine some Palestinian institutions, exacerbating the humanitarian crisis and also not dealing with Hamas was to create a temporary international mechanism (TIM) – a funding mechanism approved by the Quartet but funded primarily by the EU which sought to bypass the democratically elected government and some Palestinian institutions and to assist needy individuals directly. The EU needed a Palestinian partner for the TIM to function, and that was to be President Abbas. The President's office identified those who were to benefit from the TIM. The TIM unit then validated and audited the funds to be transferred. In the context of vicious inter-Palestinian factional fighting and a power struggle, it is inconceivable that beneficiaries would be identified by the President who were not at least sympathetic to Fatah no matter how thorough the auditing of their needs. As well intentioned as the TIM may have been with regard to alleviating Palestinian suffering, it was designed to support an opposition politician, albeit one with a democratically legitimate mandate, against a democratically elected government with a view to engineering the collapse of that democratically elected government.

States or the organisations they form must not intervene in the internal affairs of another state. Although the Palestinian Territories are not a state, it is credible to argue that due to their unique nature the same restriction applies as far as its "domestic jurisdiction" is concerned as exists in international law generally. The International Court of Justice made clear in the *Nicaragua* case that the principle of non-intervention, "forbids all states or groups of states to intervene directly or indirectly in the internal or external affairs of other states. Intervention is wrongful

when it uses methods of coercion in regard to such choices, which must remain free ones. ... The choice of political, economic, social and cultural system and the formulation of foreign policy are all matters within the domestic jurisdiction of a state."

The EU's general strategy was to isolate Hamas and to support President Abbas (and by extension the opposition Fatah party) through, inter alia, the TIM and facilitate Hamas's failure. The unequivocal welcoming by the EU and Quartet of President Abbas's dismissal of the Unity Government in June 2007 in the context of a brutal conflict between forces loyal to either Hamas or Fatah again highlights the fact that the EU did and continues to do all it can to support him against Hamas. If the EU's strategy after the 2006 elections is considered as a whole, then it can be considered to satisfy the necessary threshold to amount to intervention as defined in the *Nicaragua* case. In many senses, the EU itself is acting in a way and also tolerating legal violations by the protagonists which it would not in any other circumstances. The EU's ultimate policy objective in the region is to help find a solution to and sustain any settlement in the dispute between Israel and some of its Arab neighbours. In the light of this objective, keeping the peace process on track is undisputedly the EU's top priority but it seems to be with little regard to the legal obligations of all involved. ●

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