



1-1-2017

Rethinking Oslo: How Europe Can Promote Peace in Israel-Palestine

Omar M. Dajani

University of the Pacific, odajani@pacific.edu

Hugh Lovatt

Follow this and additional works at: <https://scholarlycommons.pacific.edu/facultyother>



Part of the [Law Commons](#)

Recommended Citation

Dajani, Omar M. and Lovatt, Hugh, "Rethinking Oslo: How Europe Can Promote Peace in Israel-Palestine" (2017). *McGeorge School of Law Other Faculty Works*. 287.

<https://scholarlycommons.pacific.edu/facultyother/287>

This Report is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Other Faculty Works by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.



EUROPEAN
COUNCIL
ON FOREIGN
RELATIONS

ecfr.eu

POLICY
BRIEF

RETHINKING OSLO: HOW EUROPE CAN PROMOTE PEACE IN ISRAEL-PALESTINE

Omar Dajani & Hugh Lovatt

SUMMARY

- The Oslo Accords have provided Israel with effective political cover to maintain a prolonged occupation and undermine prospects for Palestinian self-determination through a two-state solution. They have also enabled Israel to externalise the political and financial costs of its unlawful practices. Unless structural flaws in the Oslo process are corrected, any new talks brokered by the US seem sure to end in failure once again.
- Open-ended occupation is unacceptable. European officials must speak out clearly against Israeli efforts to entrench a reality in which Israel systematically discriminates against Palestinians and in favour of its settlers
- European states have the power to influence negative dynamics on the ground, and in the negotiating room. If Europe truly believes that preserving the possibility of a two-state solution is a strategic and moral imperative, it must rethink its approach to peacemaking. Chiefly, it should invest greater political capital to realign Israel's incentives with the goal of ending its violations of international law and support sovereignty building for Palestinian institutions instead of just capacity building.

In 2017, Palestinians and Israelis mark several milestones. It is 100 years since Great Britain issued the Balfour Declaration, which committed it to the establishment of a Jewish national home in Palestine. It is 70 years since the international community endorsed the United Nations Partition Plan, the first in a series of international efforts to achieve a two-state solution. It is 50 years since Israel conquered and began its occupation of the West Bank (including East Jerusalem) and the Gaza Strip during the Six Day War. And it is 30 years since the first Palestinian intifada erupted, shattering the illusion that Israel could maintain its military occupation without facing resistance.

These milestones highlight not only the grim durability of the conflict, but also the ineffectiveness of international efforts to help resolve it. For now, the two-state solution remains the goal, but confidence has waned in the capacity of the Middle East Peace Process, as configured by the Oslo Accords, to deliver a peace agreement and end the conflict. Ongoing diplomatic efforts by the United States may yet be capable of relaunching negotiations between Israelis and Palestinians. But in the absence of any effort to correct structural flaws in the Oslo process, they seem sure to end in failure once again.

The Oslo Accords, which were initially conceived as a framework for conflict resolution and bilateral cooperation, have, over almost 25 years, been transformed into a regime of conflict management in which there are few constraints on unilateral action by Israel. Successive Israeli governments have exploited the Oslo Accords' complex jurisdictional scheme and numerous loopholes to minimise the transfer

of territory and authority back to Palestinian institutions. Instead they have been used as cover for the massive expansion of Israel's West Bank settlement enterprise.

The international community, ever fearful of darkening the atmosphere around peace talks, has generally acquiesced to the Oslo Accords' muddying of international norms and marginalisation of multilateral institutions. At the same time, it has provided significant financial assistance, not only to facilitate Palestinian state building, but also to help redress the consequences of the occupation for Palestinians. This dynamic, created by the Oslo Accords, has allowed Israel to externalise the political and financial costs of its occupation, and condemned Palestinians to a seemingly endless state of external dependency. The Oslo Accords and the process they triggered have thereby served to entrench an occupation they were meant to end.

Three dominant features are defining the emerging reality on the ground today:

1. Israel's annexation (*de jure* and *de facto*) of swathes of West Bank territory
2. Israel's imposition of a systematic discriminatory regime across the occupied Palestinian territory (OPT)
3. The increasing fragmentation of Palestinians' political and economic life owing in part to crippling restrictions on movement in, and access to, their own territory

Although the situation may seem static, these features are placing Palestinians and Israelis on a path towards open-ended conflict.

The absence of a meaningful diplomatic process is reducing the prospects for fulfilling a two-state solution and lending weight to those on both sides who favour alternative strategies and outcomes. A Palestinian civil rights-based strategy that directly challenges the premises of Zionism as a movement for Jewish self-determination may be what replaces the current Oslo process. Or the new reality could be even more unstable, characterised by ever more fragmentation of the Palestinian national movement, increased extremism on both sides, and cycles of intensified intercommunal violence and state repression.

European states have the power to influence these dynamics. But they have so far proved reluctant to use the tools at their disposal to deter Israel from its unlawful practices, or push Palestinian factions towards national re-unification and re-democratisation. Europe may be tempted to step back and only provide support from the side-lines for renewed American diplomacy. But if Europe truly believes that preserving the possibility of a two-state solution is a strategic and moral imperative, it must rethink the current peace-making model, which has "acquiesced to

Israel's practice and policies" and has failed to "effectively challenge the underlying basis for its continued occupation of Palestinian territory".¹

This report builds upon a companion legal memo by Dr Valentina Azarova in an effort to identify how Europe can better hold the line against Israeli efforts to: irrevocably alter the political geography and demographic character of the OPT; obscure the OPT's legal status; and undermine the potential for a two-state solution.² To that end, Europe must follow through with differentiation practices to ensure that its actions and policies towards Israel are consistent with its own domestic legal order.³ It will also need to more boldly invest political capital to realign Israel's incentives with the goal of ending its violations of international law and, more broadly, its occupation of the Palestinian territory. In addition, the focus of Europe's support for Palestinian institutions should shift from capacity building to sovereignty building and work towards re-legitimising Palestinian governance structures.

How the Oslo Accords entrenched Israel's occupation

For almost 25 years, the Middle East Peace Process has revolved around the Oslo Accords – the series of agreements concluded by Israel and the Palestine Liberation Organization (PLO) between 1993 and 1999. In several respects, the Accords have been a success. They nudged both parties towards negotiation over the "permanent status" issues that have fuelled the Palestinian-Israeli conflict, they promoted and sustained the vision of a two-state solution, and they helped to contain successive rounds of violence. But the Oslo Accords have failed to deliver on the core promises of the peace process: delivering an end to the conflict and ensuring Palestinian self-determination. Instead, the framework for conflict management they established has served to thoroughly entrench Israel's occupation of the West Bank and Gaza Strip.

A framework for unilateralism

The Oslo Accords gave birth to a transitional period that was designed to last only five years. But more than two decades later they continue to shape the reality on the ground and international engagement in profound ways. The Accords lessened Israel's military presence in major Palestinian population centres, paved the way for the return of the PLO to the OPT, and allowed for limited self-governance through the establishment of the Palestinian National Authority

¹ Valentina Azarova, "Israel's unlawfully prolonged occupation: Consequences under an integrated legal framework", European Council on Foreign Relations, 2 June 2017, available at http://www.ecfr.eu/publications/summary/israels_unlawfully_prolonged_occupation_7294. (hereafter, Valentina Azarova, "Israel's unlawfully prolonged occupation").

² Valentina Azarova, "Israel's unlawfully prolonged occupation".

³ For more on differentiation and its application, see: Valentina Azarova, "Israel's unlawfully prolonged occupation"; Hugh Lovatt, "EU differentiation and the push for peace in Israel-Palestine", European Council on Foreign Relations, 31 October 2016, available at http://www.ecfr.eu/publications/summary/eu_differentiation_and_the_push_for_peace_in_israel_palestine7163 (hereafter, Hugh Lovatt, "EU differentiation and the push for peace in Israel-Palestine").

(PA). In so doing, they helped to preserve the Palestinian cause on the international stage and consolidated the presence of Palestinian national institutions on the ground.

In addition, the numerous agreements comprising the Accords set out detailed cooperative arrangements in a wide range of fields – from security to civil affairs to resource management – that continue to affect the everyday lives of Palestinians. But what was conceived as a temporary framework for bilateral cooperation pending a peace agreement has morphed into an entrenched regime that has done little to constrain unilateral action by Israel, providing effective political cover for its creeping annexation, and undermining prospects for Palestinian self-determination.⁴

Although the parties agreed that the arrangements they established would be transitional, the Oslo Accords said little about what the parties were making a transition to and from. Israel did not acknowledge in the Oslo Accords that the West Bank and Gaza Strip were occupied territory, though that had long been the view of its courts and the entire international community. Nor did it explicitly recognise the Palestinians' right to self-determination or statehood – limiting itself to an oblique acknowledgement of the "legitimate rights of the Palestinian people."⁵

The Accords' vagueness regarding the ultimate outcome of the process may have made it easier to commence negotiations, but it made it much harder for the parties to conclude them successfully, encouraging hard bargaining and allowing back-sliding when new governments came to power. Having committed to relatively little up front, successive Israeli governments have attempted to: dilute the terms of reference for negotiations; encourage international submission to the realities Israel has unlawfully created in the OPT; and force Palestinian concessions – all without having to move, in any meaningful way, towards de-occupation on the ground.

Three key features of the Accords enabled Israel to act unilaterally to deepen its occupation even while peace talks were in progress. First, the Accords' jurisdictional scheme left Israel in full control of most of the West Bank during the interim period – including many of the areas that Israeli politicians and planners had long targeted for acquisition on ideological or strategic grounds. Second, the Accords' many ambiguous formulations – regarding, for instance, how much territory would be transferred to Palestinian jurisdiction, how many Palestinian prisoners would be freed, and whether settlement activity would continue during the interim period – gave Israeli leaders discretion to interpret their commitments as broadly or narrowly as they liked. Third, the Accords' lack of a third-party dispute resolution mechanism left the Palestinians with few avenues

4 As provided in Article 7 of the Fourth Geneva Convention, parties may conclude "special agreements" defining arrangements during occupation in greater detail than those set out in the Convention. However, in no circumstances may such agreements "adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."

5 "Article 3:3", the Oslo Accords, 1993, available at http://cis.uchicago.edu/oldsite/sites/cis.uchicago.edu/files/resources/CIS-090213-israelpalestine_38-1993DeclarationofPrinciples_OsloAccords.pdf.

for challenging bad faith interpretations of the agreements.

Although some Israelis pressed for scrupulous adherence to both the letter and spirit of the Oslo Accords, these three features of the agreements gave opponents of the peace process manifold opportunities to limit and stall implementation. Minimal territory and heavily restricted powers were transferred to the PA's jurisdiction, while Israel steadily absorbed the areas that remained under its full control through the accelerated construction of settlement housing, roads, and other infrastructure.

Displacing and obfuscating international law

The Oslo Accords further contributed to entrenching Israel's occupation by marginalising international law as a tool of conflict resolution and supplanting it with a system that effectively formalised the inherent power imbalance between the occupier and the occupied. Every change to the 'status quo' had to be negotiated between the two sides, with the Palestinians usually cast in the role of supplicant. Even clear obligations under international law, such as the prohibition of settlement activity and the requirement to hold an occupied territory's resources in trust for the local population, were characterised as matters for negotiation requiring compromise from the Palestinians.

In addition, Israel has used the Oslo Accords to obscure the legal clarity with which international law views its status and obligations as an occupying power, Palestinians' right to self-determination, and the extent of third state responsibilities. For instance, Israeli officials now argue that: "the term 'occupied territories' is a politically motivated term and does not reflect a binding legal determination about the status of the territory or the factual situation on the ground [created by the Oslo Accords]".⁶ Moreover, it has claimed that, since the Oslo Accords did not transfer either civilian or security authority over Area C – around 60 percent of the West Bank – to the PA, ongoing settlement activity and displacement of the local Palestinian population there is permitted.

A particular bugbear for the Israeli government has been the provision of international humanitarian support and development aid for vulnerable Palestinian communities in Area C. Since 2009, at least 236 European Union-funded structures have been demolished or seized by Israel. And, according to the EU, a further 600 structures (worth almost €2.4 million) are subject to orders for demolition, eviction, or to stop ongoing work.⁷ Most recently, in June 2017, Israel destroyed and confiscated €40,000-worth of equipment belonging to an electrification project sponsored by the Dutch government in the Area C village of Jubbet

6 "Comments submitted by the Israeli Football Association (IFA) to the draft report of the Chairman of the Monitoring Committee", 24 April 2017. See also statements by Israel's deputy foreign minister Tzipi Hotovely that the term "occupation" is a distortion: Raphael Ahren, "Israelis cry foul as UN leaders lament 50 years of 'occupation'", the *Times of Israel*, 6 June 2017, available at <http://www.timesofisrael.com/israelis-cry-foul-as-un-leaders-lament-50-years-of-occupation/>.

7 ECFR calculation based on data provided by Vice-President Federica Mogherini on behalf of the European Commission and UN OCHA. See "UN OCHA Demolition Monthly Report to the EU", May 2017 (on file); and "Answer given by Vice-President Mogherini on behalf of the Commission in response question from the European Parliament", 9 August 2016, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-005067&language=EN>.

Adh-Dhib.⁸ In each case the reason has ostensibly been a lack of Israeli building permits, as the prime minister, Binyamin Netanyahu, explained: “they’re building without authorisation, against the accepted rules, and there’s a clear attempt to create political realities there.”⁹

Pro-settler organisations have likewise built international campaigns around such arguments, portraying the EU as “acting illegally by funding unauthorised Palestinian building in areas placed under Israeli control by international law”.¹⁰

This distortion of international law has created uncertainty regarding the legal responsibilities of Israel and third states, including among some members of the US Congress and various parliaments in Europe. For example, there have been repeated questions from members of the European Parliament about whether EU funding for activities in Area C is being carried out in violation of the Oslo Accords and against the will of the State of Israel.¹¹

The muddying of the legal waters has left many government and private actors equally unsure of the extent of their own responsibilities when dealing with settlement-linked entities. In its ongoing deliberations on the contentious issue of Israeli settlement teams, FIFA has, for example, blamed repeated delays in resolving the matter on the supposed lack of legal clarity relating to Israel’s exclusive control over security and civil affairs in Area C.¹²

While a full rebuttal of the historical, factual, and legal revisionism of such arguments is beyond the scope of this paper, it suffices to note that “the Accords neither absolve Israel of its IHL [international humanitarian law] obligations as an Occupying Power, nor constitute an act of consent by Palestinian representatives to waive rights that have been subsequently undermined by Israel’s violation of international laws”.¹³

8 Amira Hass, “Dutch Protest Israeli Seizure of Palestinian Solar Panels They Funded in West Bank”, *Haaretz*, 1 July 2017, available at http://www.haaretz.com/middle-east-news/palestinians/_premium-1.798792.

9 “Aid or political meddling? Israel, EU spar over Palestinian buildings”, the *Times of Israel*, 8 April 2016, available at <http://www.timesofisrael.com/aid-or-political-meddling-israel-eu-spar-over-palestinian-buildings/>.

10 Jake Wallis Simons, “European Union is ‘breaking international law by funding illegal West Bank building projects’”, the *Daily Mail*, 5 February 2015, available at <http://www.dailymail.co.uk/news/article-2874883/EU-funding-illegal-building-West-Bank-says-report.html#ixzz4kXboKHGW>.

11 See, for example, question for written answer to the Commission by MEP Franz Obermayr (ENF), E-006709-16, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bWQ%2bE-2016-006709%2bo%2bDOC%2bXML%2bVo%2f%2fEN&language=EN>; and a similar question by MEP Petr Mach (EFDD), E-007846/2016, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2016-007846+0+DOC+XML+Vo//EN&language=pl>.

12 For more, see Martin Konecny and Hugh Lovatt, “Why FIFA bottled out of enforcing its own rules on Israel”, *Middle East Eye*, 23 May 2017, available at <http://www.middleeasteye.net/columns/fifa-has-three-options-deal-israeli-settlement-clubs-only-one-legitimate-821972348>.

13 Valentina Azarova, “Israel’s unlawfully prolonged occupation”.

Marginalising multilateral institutions

The Oslo Accords could have avoided entrenching the occupation had the international community been prepared to hold Israel to account for violations of the agreements and, more broadly, of international law. Instead, the international community’s reticence gave Israeli leaders a green light to determine the speed and scope of any move towards de-occupation and to impose politically unpalatable conditions on their Palestinian interlocutors when they wanted to stymie peace talks.

Multilateral institutions like the UN General Assembly, UN Security Council, UN Human Rights Council, and the International Court of Justice (ICJ) have at times undertaken to clarify the applicable legal framework and its implications. The EU institutions have done so too, and have been firm in explaining the applicability of international humanitarian law and international human rights law to the OPT. Palestinians too have sought recourse to international mechanisms for accountability such as the International Criminal Court (ICC) to uphold their legal rights and enforce accountability over Israel’s unlawful actions.

All too often, however, it is third party governments themselves that have disregarded – and in some cases actively blocked – such processes. From the dawn of the Oslo Accords until 2016, the United States vetoed four draft UN Security Council resolutions censuring Israel for settlement construction.¹⁴ American officials took the position that the United Nations was an inappropriate forum for addressing issues being negotiated by the two parties. Similarly, attempts to convene parties to the Geneva Convention on this topic were defeated or defused by governments anxious to avoid poisoning the political atmosphere for negotiations.

Some EU member states have even attempted to dissuade Palestine from joining the ICC and criticised UN Human Rights Council resolutions focusing on Israel’s international law violations. Most recently, the United Kingdom explained its abstention from a UN Human Rights Council resolution in March 2016 on Israel’s settlement activities arguing that such a “disproportionate and biased” focus on Israel was “hardening positions on both sides”.¹⁵

14 See the Jewish Virtual Library’s list of draft UN Security Council resolutions critical of Israel vetoed by the US, available at <http://www.jewishvirtuallibrary.org/u-s-vetoes-of-un-security-council-resolutions-critical-to-israel>.

15 “Human Rights Council 34: UK explanation of voting on the resolution regarding Israel and the Occupied Palestinian Territories”, gov.uk, 24 March 2017, available at <https://www.gov.uk/government/world-location-news/human-rights-council-34-uk-explanation-of-voting-on-the-resolution-regarding-israel-and-the-occupied-palestinian-territories>.

Bankrolling Israel's occupation

The Oslo Accords have entrenched the occupation by creating a situation of moral hazard: even as Israel continues to exercise control over the West Bank and Gaza Strip, the PA relieves it of the burden of providing services to the Palestinian population, while donors of international aid relieve it of the costs of administering the territory.

This has turned the Palestinian territory into the largest recipient per capita of international aid in the world,¹⁶ with development assistance per person exceeding that of the other top ten aid recipients combined.¹⁷ As the largest aid donor to Palestinians, the EU alone has contributed €6 billion in bilateral cooperation assistance to Palestine since 1993,¹⁸ including the Palestinian Authority and various UN agencies, among them, in particular, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

International assistance has helped, of course, to provide a modicum of stability – and at times critical sustenance – to the Palestinian economy, and it has helped Palestinian institutions to become “statehood ready”. But there is a limit to what security sector reform and technocratic capacity building can achieve in the fragmented and constrained space created by Israel’s occupation.

In addition, international assistance creates a perverse incentive structure in which donors absorb the costs of Israel’s unlawful conduct but rarely take coordinated action to challenge it – or even to characterise it as unlawful. Take, for example, the response to Israel’s imposition of restrictions on Palestinian movement, access, and trade. Even though Israel committed in the Oslo Accords to facilitate “free and normal” movement, in accordance with international humanitarian law and international human rights law, and even though Israeli restrictions are the leading impediment to Palestinian private sector growth and cost the Palestinian economy billions of euros each year, costs that are routinely (if only partially) covered by international assistance. In addition, international donor coordination mechanisms such as the Ad Hoc Liaison Committee focus more on what Palestinians should do than on Israeli obligations.¹⁹

The provision of international aid from the international community has continued to be tightly linked to progress on the diplomatic track. But as the proportion of humanitarian aid has increased in relation to development assistance, and prospects for bringing the conflict to an end have decreased,

international donors are finding themselves faced with a dilemma. By cutting and reducing their aid to Palestinians, donors would cause humanitarian suffering, undermine the PA, and create instability in the OPT. Yet continuing such practices without a clearly attainable political goal eliminates any financial incentives for Israel to end its occupation and reduces Israel’s stake in the success of the Palestinian economy or political institutions.

The Israeli bubble

For many Israeli Jews, the status of the territories and the Green Line itself have become increasingly obfuscated, with 62 percent no longer viewing the West Bank as occupied territory.²⁰ Yet a majority of Jewish Israelis still support a two-state solution in principle, given the demographic implications of absorbing an additional 4.4 million Palestinians. Most – including among settlers – also reject a one-state outcome for the same reason, because Israel may be faced with the choice between being a democracy and a Jewish state. These dilemmas, however, appear far removed from the present.

If anything, Israelis feel that the “status quo” benefits them. The Oslo Accords have created a situation that has insulated Israelis from the negative consequences of prolonged occupation: with a few exceptions, their security situation has been stable since the end of second intifada, and they have faced minimal costs in their international relations. Indeed, the international and regional climate seems to be shifting in Israel’s favour. Despite occasional hiccups, Israel has continued to develop a process of normalising relations with Sunni Arab states through back-channels and is making diplomatic inroads in Africa and Asia.

Israel consequently feels little urgency to secure a two-state solution, and has little appetite for the sort of steps that would be needed to bring one to fruition, whether that relates to territorial withdrawal, a just settlement of the Palestinian refugee problem, or the establishment of a sovereign Palestinian capital in East Jerusalem. Nor have Israelis so far been asked to choose between either a one-state or two-state outcome.

Without some sort of *deus ex machina*, it is difficult to envisage the Israeli government stepping away from its active promotion of settlement expansion, let alone taking the measures necessary to achieve a two-state solution in line with international expectations. As such, counting on a self-induced moment of clarity in which Israel moves of its own volition towards de-occupation and a real two-state solution is a mistake. Instead, Israelis will continue to prefer what looks to them like the least risky option – consolidation of the current reality.

16 Zinaida Miller, “Perils of Parity: Palestine’s Permanent Transition”, *Cornell International Law Journal*, vol. 47, (2014), pp. 332-414.

17 Mikkel Bahl, “Verdens vildeste bistandseksperiment” [The world’s wildest assistance experiment], *Udvikling*, June/July 2012, p.10, available at <http://ipaper.ipapercms.dk/Udenrigsministeriet/Udvikling/2012/Udvikling32012/?Page=12>.

18 “Answer given by Mr Hahn on behalf of the Commission, in response question from the European Parliament”, 7 March 2017, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-008096&language=EN>.

19 Orhan Niksic, Nur Nasser Eddin, and Massimiliano Cali, “Area C and the Future of the Palestinian Economy”, World Bank, 2014, available at <http://documents.worldbank.org/curated/en/257131468140639464/pdf/893700PUB0978100Box385270B00PUBLICCo.pdf>, p.3. (hereafter, Orhan Niksic et al, “Area C and the Future of the Palestinian Economy”).

20 “62% of Jewish Public: Holding onto Territories in Judea, Samaria Not An Occupation”, Israeli Democracy Institute, 4 June 2017, available at <https://en.idi.org.il/press-releases/15728>.

Towards open-ended conflict

Annexing Palestinian territory

From the occupation's very inception, Israeli leaders argued that retention of large parts of the West Bank was a strategic and ideological imperative. Influential policy blueprints such as the Allon Plan and Sharon Plan were predicated on the vision of 'maximum land, minimum Arabs', with a view towards thwarting the creation of a Palestinian state.²¹ Although this vision was not unanimously shared among Israel's political and security establishment, it informed decisions about where to erect civilian settlements. As late prime minister Ariel Sharon candidly admitted in a 2001 interview, "it's not by accident that the settlements are located where they are,"²² their placement having been intended to perpetuate Israeli control over the Jordan Valley, the mountain aquifer, and other locations of military, historical, or religious importance.

It is also no coincidence that Oslo's complex jurisdictional scheme so closely resembles these earlier blueprints from the Israeli state. The Oslo Accords may have been devised to allow Israel to keep its options open pending the conclusion of peace talks, but, they have facilitated Israel's *de facto* annexation of West Bank territory (in addition to the Jerusalem-area territory Israel has already annexed *de jure*). Instead of transferring most of Area C to Palestinian jurisdiction, as envisaged in the Oslo Accords, Israel has retained full control over it. And in contravention of international humanitarian law, it has continued to appropriate resources there – water, stone, minerals – for the use of its own population. It has restricted Palestinians' access to and development of Area C, designating less than 1 percent of the territory for their use,²³ and only rarely granting building permits even within that 1 percent. And it has sharply limited the access of the Gaza Strip's 1.9 million Palestinian residents to the West Bank in general, keeping the population, which largely comprises refugees, boxed into a tiny territorial enclave as Israel absorbs large swathes of West Bank land.

Israel's settlement enterprise has also ramped up in recent years. The West Bank settler population currently stands at around 386,000 in Area C (and the Israeli-controlled H-2 Area in Hebron) and 208,000 in East Jerusalem – more than double the number in 1993.²⁴ Israel has invested roughly €16 billion in the construction of the settlements, along with

transport infrastructure linking them back to Israel.²⁵ The settlements are not only connected to Israel by extensive physical infrastructure, but robust legal infrastructure too. Israelis who reside and do business in the occupied territory are largely governed by Israeli law. In addition, the Knesset has recently asserted authority to regulate even private Palestinian land in the West Bank.

As ECFR's "Two-State Stress Test" noted, each individual settlement operates at a range of levels to impede resolution of the conflict, representing:

"a community of Israeli citizens naturally tending to be opposed to their eviction; a core of a multi-layered security zone that affects Palestinians' freedom of movement, their housing, and their daily lives in a radius far beyond the settlement's physical boundaries; a hub on a network, necessitating links with other settlements and Israel proper through often segregated roads, infrastructure, and military patrols; and it is a progenitor of further points of settlement, with many existing settlements throwing out extensions beyond their original residential areas."²⁶

The growth of Jewish settlements in the West Bank (including East Jerusalem) and their gradual absorption into Israel make it increasingly difficult for the Israeli government to take steps to allow for the establishment of a viable and contiguous Palestinian state. Were Israel to withdraw to the Green Line (with, at most, minor and equal land exchanges) in line with internationally endorsed parameters for achieving a two-state solution, it would have to evacuate over 100,000 settlers and provide them with housing elsewhere. If anything, political trends in Israel point in the opposite direction, towards gradual formalisation of what has until now been *de facto* annexation of West Bank territory.

This trajectory – towards outright (or *de jure*) annexation – is reflected in the convergence of voices on both the right and the left of Israeli politics in support of a "unilateral separation" from the Palestinians. Recent plans put forward by officials from the Labor, Likud, Yesh Atid, and Bayit Yehudi parties are premised on the assumption that there are no imminent prospects for achieving a two-state solution, and that Israel should therefore act unilaterally to shape realities on the ground in its favour to avoid sleepwalking into a one-state reality. While the percentage of West Bank land to be annexed by Israel varies under each plan, all would formalise Israel's hold over large swathes of the West Bank, and promote continued Palestinian self-governance in Areas A and B under overriding Israeli security control. Such steps also allow Israeli leaders to defer any conversation on de-occupation until a later date.

21 Adam Hamieh and Catherine Cook, "Sharon's Road Map", MERIP, 1 June 2013, available at http://www.merip.org/newspaper_opeds/oped060103-1; and Noam Sheizaf, "This is Netanyahu's final status solution", *972 Magazine*, available at <https://972mag.com/this-is-netanyahus-final-status-solution/94938/>.

22 Peter Hirschberg, "Blow to efforts to renew security cooperation, as Sharon outlines contours of future settlement", *Haaretz*, 14 April 2001, available at <http://lists.mcgill.ca/scripts/va.exe?A2=indo104b&L=fogfognet&F=&S=&P=10080>.

23 Orhan Niksic et al., "Area C and the Future of the Palestinian Economy", World Bank, p. 4, available at <http://documents.worldbank.org/curated/en/257131468140639464/Area-C-and-the-future-of-the-Palestinian-economy>.

24 "Human rights situation in the Occupied Palestinian Territory, including East Jerusalem", United Nations High Commissioner for Human Rights (U.N. doc. A/HRC/34/38), March 2017, p. 4.

25 Shaul Arieli, Roby Nathanson, Ziv Rubin, and Hagar Tzameret-Kertcher, "Historical Political and Economic Impact of Jewish Settlements in the Occupied Territories", Israeli European Policy Network, 2009, available at <http://just250.net/iepn/images/stories/papers/papershaularieli.pdf>.

26 "Israel-Palestine: Two-State Stress Test", European Council on Foreign Relations, 2013, available at <http://www.ecfr.eu/mena/tsst>.

Legal limbo for Palestinians

Palestinians in the occupied territory are stuck in legal limbo – denied both the rights possessed by citizens of Israel and the protections guaranteed to them by international humanitarian law as people living under occupation.

In tandem with the process of *de facto* annexing Area C, Israel has imposed *de jure* a regime of systematised discrimination across the occupied territory. In some parts of the West Bank, Palestinians and Israeli settlers live within metres of one another, yet the law grants them markedly different rights and benefits.²⁷

Contrast, for example, the situation of a Palestinian residing in a village in Area C with a resident of a neighbouring Israeli settlement:

- The settler's house cannot lawfully be searched without a warrant, but any Israeli officer or authorised soldier may search the Palestinian's without a warrant;
- The Israeli settler is subject to Israeli criminal law and, if arrested, would stand trial before a court in Israel. If arrested after an altercation with an Israeli, the Palestinian would stand trial in an Israeli military court under military law instead, which offers few procedural safeguards;
- While the Israeli settler must be brought before a judge within 24 hours of being arrested, the Palestinian must sometimes wait up to 96 hours;
- The settler may stage a demonstration involving up to 50 persons without a permit, but the Palestinian must obtain a permit if more than ten are involved;
- The settler has a right to make their voice heard in town/land planning processes that affect his property or livelihood, but the Palestinian lacks any access to those communication channels and for decades has had no opportunity to seek alteration of their village's planning documents;
- If the Israeli settler, under the recently passed "Regularisation Law", builds illegally on land privately owned by Palestinians, the land may be appropriated by military authorities and allocated to that person. The Palestinian has no such right and their property is likely to face demolition for this infringement;
- The Israeli settler may lawfully enter Jerusalem to receive medical care, worship at holy sites, or simply go shopping any time they like, but the Palestinian is required to apply for a permit to enter even occupied

East Jerusalem; and,

- While the Israeli settler is able to vote in elections that determine who will represent them in the Knesset – and possess the authority to make or change these rules – the Palestinian is not.

Palestinians may of course vote in PA elections if and when they occur. This right, however, is of limited consequence because the PA lacks effective sovereignty over Palestinian territory. More importantly, the PA does not have authority over Israel's army, which controls salient aspects of the lives of Palestinians throughout the occupied territory and which frequently enters areas under Palestinian jurisdiction (including Palestinian-controlled Area A) at will. It is estimated that since the beginning of the occupation in 1967, 40 percent of the total male Palestinian population has been detained under Israeli military orders.²⁸ Israel decides whether Palestinian residents of the occupied territory can move across international borders and even, in the West Bank, between cities. It also decides which goods reach Palestinians and to what extent they can exploit their own water and other natural resources, which international law gives them permanent sovereignty over.

Although international law does not oblige an occupying power to allow the population of the occupied territory to vote in their national elections, it clearly prohibits them from settling their own citizens in that territory, and establishing a legal regime that privileges its own citizens over the local population. Similarly, while international law allows an occupying power considerable latitude with respect to how an occupied territory is administered for the benefit of the local population and what civil and political rights the territory's residents enjoy, that latitude is premised on the temporary character of occupation and scrupulous adherence to the protections afforded by humanitarian law.²⁹

The stark inequalities between Israelis and Palestinians are compounded by the restrictions placed on the movement of Palestinian persons and goods. In a territory about half the size of Cyprus, Palestinians live under an array of different legal regimes. In the West Bank, the territory is divided not only into Areas A, B, and C, but also into enclaves in which special restrictions apply: East Jerusalem neighbourhoods inside the wall and outside the wall are subject to different rules, for example, and special restrictions also apply in the Jordan Valley and in seam zones along the border with Israel, as well as for nature reserves and military firing zones.

In addition, pursuant to the "separation policy" Israel has imposed, Palestinian residents of the Gaza Strip are barred entirely from travelling to the West Bank, and vice versa, with only a few exceptions.³⁰ Because of the blockade, which is enforced by Israel and Egypt, Palestinian residents of the

²⁷ "One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank", Association for Civil Rights in Israel, 1 August 2012, available at <http://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>.

²⁸ "Palestinian Political Prisoners in Israeli Prisons", Addameer, January 2014, available at [http://www.addameer.org/files/Palestinian%20Political%20Prisoners%20in%20Israeli%20Prisons%20\(General%20Briefing%20January%202014\).pdf](http://www.addameer.org/files/Palestinian%20Political%20Prisoners%20in%20Israeli%20Prisons%20(General%20Briefing%20January%202014).pdf).

²⁹ Valentina Azarova, "Israel's unlawfully prolonged occupation".

³⁰ "Separating land, separating people", Gisha, June 2015, pp. 4-6, available at <http://gisha.org/publication/4379>.

Gaza Strip are also subject to sweeping restrictions on the movement of goods – both into and out of the Strip from the West Bank and global markets. Such measures isolate the Gaza Strip (and its 1.9 million inhabitants) from the rest of the OPT, and arguably facilitate Israel’s annexation of West Bank territory by minimising access to the territory for the many Palestinians living in Gaza.

The regime imposed on the OPT upends Israel’s commitment outlined in the Oslo Accords (and under international humanitarian law) not to alter the status or integrity of the territory pending a final peace agreement. Israeli practices also exacerbate divisions and inequalities among Palestinians, undermining their capacity to realise their right to self-determination as a people.

The international community has repeatedly affirmed that the Palestinian people have the right to self-determination, as well as the protections afforded by the law of occupation. Palestinian residents of the occupied territory instead find themselves stuck in legal limbo – enjoying neither the rights assured to protected persons by the law of occupation nor those accorded to citizens of a sovereign state under human rights law. The result has been “the maintenance of a systematic practice of racial discrimination in the occupied territory” which can only be resolved by bringing an end to the occupation.³¹

The future of the Palestinian liberation movement

For now, the two-state solution remains the preference of the PLO and a plurality of the Palestinian public.³² Even Hamas has indicated its willingness to accept a Palestinian state based on the pre-June 1967 borders.³³ However, polling suggests that growing scepticism over the prospects of a diplomatic breakthrough has translated into growing Palestinian support for a one-state solution (OSS) through which “Palestinians and Jews will be citizens of the same state and enjoy equal rights”.³⁴

Without tangible progress towards de-occupation, and with prospects for independence rapidly evaporating, it would be wrong to assume that the Palestinian liberation strategy will forever remain predicated on blind faith in the two-state solution and the Oslo peace process. Palestinian leaders can only sell their domestic audiences the idea of self-governance predicated on a tantalising yet always-out-of-reach independent state for so long, and it is worth recalling that the Palestinian liberation movement pre-dates the idea of a two-state solution.

³¹ Valentina Azarova, “Israel’s unlawfully prolonged occupation”, pp.9-10.

³² See poll by the Palestinian Center for Policy and Survey Research, 16 February 2017, available at <http://www.pcpsr.org/en/node/678>.

³³ For analysis of Hamas’ policy positions towards Israel and the two-state solution, see: Hugh Lovatt, “Time to bring Hamas in from the cold”, *Middle East Eye*, 3 May 2017, available at <http://www.middleeasteye.net/columns/time-bring-hamas-cold-1168619508>.

³⁴ See poll by the Palestinian Center for Policy and Survey Research, 16 February 2017, available at <http://www.pcpsr.org/en/node/678>.

The continued absence of any real prospects for ending the occupation will inevitably impact on Palestinian strategic calculations, which for now remain focused overwhelmingly on diplomatic engagement, multilateralism, and arguments in international law. The belief that sovereignty through diplomacy is untenable is leading to growing popular support for alternative Palestinian liberation strategies for ending the occupation. The Boycott, Divestment, Sanctions (BDS) movement is a prominent example of this trend.

Less certain is the shape of a future Palestinian strategy – even more so given the real possibility of a succession crisis within the Palestinian leadership. A post-Mahmoud Abbas Palestinian liberation strategy could place greater emphasis on grassroots rights-based mobilisation within the current two-state paradigm, or pivot towards a call for equal rights for all “between the river and the sea”, directly challenging the premises of Zionism as the movement for Jewish self-determination in Israel. Alternatively, what emerges could be greater public support for a return to armed resistance to the occupation, or the ascendancy of the nihilistic violence currently perpetrated by Palestinians in Israel and the OPT. Or it could be a mixture of all these things.

Europe has dismissed frequent threats by President Mahmoud Abbas to tear up the Oslo Accords, hand the keys of the PA to Israel, or walk away from security cooperation entirely. But the international community has paid little attention to what will come after the 82-year-old leader’s inevitable departure, nor has it done anything to help lay the groundwork for a smooth leadership transition that could provide renewed legitimacy for peace-making efforts.

Whatever the direction, a new and unstable reality is likely to emerge in the wake of Abbas’s departure. The new reality will likely be combined with steady fragmentation of the Palestinian national movement and seemingly inevitable Israeli military operations in Gaza – not to mention the ever-present risk of regional spill-over. Such a situation could create far harder political and moral choices for Israel and its friends in the international community than those faced today.

Holding the line: the contours of a new European strategy

While a two-state solution remains the preferred outcome for resolving the conflict, the diplomatic path leading to such an end-game has been steadily eroded by developments on the ground. In theory, Israel’s creeping annexation remains reversible. However, every new settlement unit increases the political and financial cost of achieving peace. In addition, Israel’s steady assault on Palestinian national institutions may eventually turn claims that it lacks a Palestinian partner into a self-fulfilling prophecy, producing an even more fragmented political reality and a far less manageable security situation than we see today.

Given the unlikelihood of any move towards de-occupation coming from within Israel, concerted international

engagement is crucial. But with the best of intentions, Europe has prioritised peace negotiations within the Oslo framework over all else – including efforts to end the occupation. In so doing, it has created a perverse incentive structure that has helped to entrench the occupation and Israelis’ support for it. Tinkering at the margins will not therefore alter the dangerous trajectory the two sides are on. Nor can providing palliative care to Palestinians ensure long-term stability in the OPT.

Current US attempts to get both parties to resume negotiations make it tempting for Europe to step back and cheerlead American efforts. But if Europe is firm in its conviction that preserving the possibility of a two-state solution is a strategic and moral imperative, it must be prepared to hold the line against efforts by Israel to irrevocably change the political geography and demographic character of the OPT. The EU should stop reinforcing the status quo and work to bring about positive change on the ground. It must also act with renewed self-confidence and exhibit greater willingness to work independently from the Trump administration.

A simple litmus test for EU policy should be whether it either supports Palestinian sovereignty and moves Israel towards de-occupation, or sustains Israel’s prolonged occupation. Europe will not only need to ensure that its policies in Israel/Palestine are consistent with obligations arising from its domestic legal order in accordance with the legal obligation of all states to bring the occupation of Palestine to an end.

Consolidating EU differentiation

The time has come for European states to lead a strategy that harnesses the normative framework of international law in support of foreign policy objectives. The starting point for such efforts remains the necessity of shielding the EU’s domestic legal order from Israel’s internationally unlawful practices. Given the EU’s positions and commitments on the status and consequences of Israeli actions in international law, it must not allow its actions to confer recognition of Israeli sovereignty over the OPT or give effect to Israel’s internationally unlawful acts.

Ensuring the proper functioning of European law in this way can also serve to alter Israel’s incentive structure and, thereby, feed a national debate about priorities among Israelis. To the extent that Israeli institutions and projects are required to exclude settlement entities to qualify for grants, participate in programmes, or otherwise deepen relations with the EU, Israelis will be better placed to internalise the costs of the settlement enterprise. Israelis should understand that there is a choice to be made between broadening and enhancing relations with the EU – its leading trading partner – and maintaining an occupation that defies fundamental norms of international law.

Such an effort would build on and reaffirm the EU’s existing

differentiation practices.³⁵ To their credit, the European Commission and European External Action Service have made incremental progress in this regard. They can also take credit for supporting a legal requirement that has contributed towards the preservation of the two-state solution. To be effective, however, there needs to be commensurate participation by EU member states at the level of their bilateral relations with Israel.

ECFR’s previous reports on EU differentiation have outlined a number of steps that EU member states should consider, but it is worth once again recalling some of the main recommendations. EU member states should:

1. Identify areas in their bilateral relations with Israel where EU and national law is deficiently implemented by conducting a review of existing agreements with Israel to ensure these effectively exclude all settlement-based entities and activities.
2. Adopt their own national guidelines prohibiting the disbursement of public funds to Israeli settlement-linked entities or activities, modelled on the practices already put in place by the EU and Germany.
3. Ensure that their citizens and businesses act in full accordance with domestic and international law in their dealings with Israeli settlement entities, and implement business guidance through domestic regulatory measures.³⁶ Similarly, member states should actively engage with businesses established under their national jurisdiction to ensure they are fully aware of the legal status of the OPT, and the legal risks that arise from their economic and financial activities in, and in relation to, the settlements, given the fact that they are built on unlawfully appropriated land in occupied territory that is not recognised as part of Israel’s territory.³⁷
4. Encourage the European Commission to inform EU nationals operating and/or investing in settlement-linked entities of the risks entailed by such activities, building on the common messaging adopted by some 18 member states; as well as on the recent answer given by Vice-President Federica Mogherini on behalf of the Commission relating to financial transactions between EU-based financial institutions and those based in Israel linked to settlement entities or activities.³⁸

³⁵ For an overview of EU and EU member state measures to differentiate between Israel and the settlements, see ECFR’s work on the topic: Valentina Azarova, “Israel’s unlawfully prolonged occupation”, pp.11-13; Hugh Lovatt, “EU differentiation and the push for peace in Israel-Palestine”; Hugh Lovatt and Mattia Toaldo, “EU differentiation and Israeli settlements”, European Council on Foreign Relations, 22 July 2015, available at http://www.ecfr.eu/publications/summary/eu_differentiation_and_israeli_settlements3076.

³⁶ A list of countries that have so far issued such business advisories can be found here: Hugh Lovatt, “EU member state business advisories on Israeli settlements”, European Council on Foreign Relations, 2 November 2016, available at http://www.ecfr.eu/article/eu_member_state_business_advisories_on_israeli_settlements.

³⁷ For more information about how Europe funds Israeli settlements see: Hugh Lovatt, “EU differentiation and the push for peace in Israel-Palestine”.

³⁸ See: “Answer given by Vice-President Mogherini on behalf of the Commission”, European Parliament, 13 June 2017, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-002582&language=EN>.

Deepening and broadening differentiation: UNSCR 2334

European states have played an important role in broadening the process of differentiation outside of Europe. EU members of the UN Security Council supported Resolution 2334 in December 2016 which, in paragraph 5, calls on all states “to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”.³⁹ This clause builds on the EU’s own differentiation practice, echoing language found in its own Foreign Affairs Council (FAC) Conclusions and statements.⁴⁰

In March 2017, five EU members of the UN Human Rights Council – with the support of an additional four EU member states not currently members of the UNHRC – also helped pass a resolution on Israeli settlements containing some of the strongest differentiation language to date.⁴¹ It not only echoed the UN Security Council’s call for member states to implement a territorial distinction between Israel and the OPT, but also emphasised “the importance for States to act in accordance with their own national legislation on promoting compliance with international humanitarian law with regard to business activities that result in human rights abuses”, such as those that result from Israeli practices in the OPT.⁴²

As by far the most advanced actor on this front, the EU and its member states can encourage other states to implement clause 5 of UNSCR 2334 by drawing attention to efforts that it and other third parties (such as the US and China) have undertaken to insulate their relations with Israel from its settlement activities.⁴³ Taken together, these pre-existing differentiation measures can act as a guide for others interested in ensuring that their relations with Israel are conducted in accordance with international law and UNSCR 2334.

Instilling and demanding clarity

By shielding Israel from accountability, third states have not only enabled the continuation of its unlawful practices, but also undermined the very instruments that were meant to prevent such a situation from arising in the first place. Protecting any state from the legal consequences of its actions undermines the functioning of the international legal order to the detriment of all. Apparent backtracking on consensus positions and commitments towards the conflict

39 “United Nations Security Council Resolution 2334”, UN Security Council, 23 December 2016, available at <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>.

40 For a detailed overview of relevant EU FAC language see Hugh Lovatt, “EU differentiation and the push for peace in Israel-Palestine”, p.6.

41 The five EU member states voting in favour of the resolution were: Belgium, Germany, the Netherlands, Portugal, and Slovenia (in addition to non-EU member Switzerland). The resolution received the external support of four EU member states not currently sitting on the UNHRC: Spain, Ireland, Luxembourg, and Malta. (ECFR correspondence with UNHRC delegation member).

42 Human Rights Council Resolution, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, UN Doc HRC/A/34/L.41, 21 March 2017, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/4130476E4C2172CF852580ECO0510FA3>.

43 China has sought to ensure that its workers are not employed in Israeli settlements as part of a bilateral agreement with Israel signed in April 2017. For an overview of US “differentiation” measures, see “What is EU Differentiation?”, European Council on Foreign Relations, 31 October 2016, available at http://www.ecfr.eu/article/eu-differentiation_faqq2.

also allows Israelis and Palestinians to more easily dismiss the EU as a political player.

Europe cannot impose a peace settlement, but it can continue to defend the possibility of a two-state solution and create the conditions for future negotiations. To that end, EU policy should use international law as its guiding star.

Unilateral attempts to obscure, or change outright, the legal status of the OPT must continue to be met with firm and consistent reaffirmation of the long-established normative framework for managing and resolving armed conflicts in international law.⁴⁴ That framework has three pillars: the inadmissibility of the acquisition of territory by force and of the illegal use of force to maintain a situation of occupation for that purpose (*jus ad bellum*); the law of belligerent occupation under international humanitarian law (*jus in bello*); and the law governing the self-determination of peoples.

In tandem with a clear articulation and defence of its own position, the EU must continue tirelessly demanding that Israel clearly align its own positions with the longstanding and universal international consensus over the legal framework applicable to its actions, no matter how futile or awkward such démarches may seem in the current political climate. It must also continue to hold fast to internationally supported parameters for resolving the conflict – as articulated by the EU itself in its July 2014 FAC Conclusions.⁴⁵

In recent years, the Netanyahu government has managed to have its cake and eat it too. On the one hand, it has placated constituencies on the far-right by implementing the recommendations of the 2012 Levy Committee report on the legal status of building in the West Bank – including that the laws of occupation do not apply in the West Bank – without formally adopting its conclusions.⁴⁶ On the other hand, it has placated members of the international community by expressing nominal support for a two-state solution, albeit with so many caveats that it is difficult to discern what it means by the phrase.

It bears recalling that demanding clarity from the parties to this conflict is far from unprecedented. Over the last three decades, the international community has insisted that Palestinian leaders unequivocally embrace UNSC Resolution 242 (and its land for peace formula), that they recognise Israel, revise the PLO Charter, and accept the “Quartet Principles”, making compliance with these demands conditions for diplomatic engagement and international assistance.

44 Valentina Azarova, “Israel’s unlawfully prolonged occupation”.

45 “European Council Conclusions on the Middle East Peace Process”, Council of the European Union, 22 July 2014, available at www.consilium.europa.eu/en/workarea/downloadasset.aspx?id=27404.

46 “From Occupation to Annexation: the silent adoption of the Levy report on retroactive authorization of illegal construction in the West Bank”, Yesh Din, 2 February 2016, available at <https://www.yesh-din.org/en/from-occupation-to-annexation-the-silent-adoption-of-the-levy-report-on-retroactive-authorization-of-illegal-construction-in-the-west-bank/>.

Similarly, Israel must be pressed – firmly and consistently – to explicitly disavow the Levy report’s conclusions regarding the status of the OPT and the inapplicability of international humanitarian law. Israel must also be called upon to recognise the Palestinians’ right to self-determination in a contiguous state based on the 1967 Green Line, and agree to clear terms of reference for future negotiations.

Consolidating the normative foundation for further action

The notion that a parallel process in the UN or in regional bodies to elaborate on third states’ obligations somehow adversely affects conflict resolution ignores the very *raison d’être* of these international mechanisms. In fact, processes such as differentiation can support conflict resolution efforts because “States are expected to adopt and further determinations by international institutions commensurate with the gravity of the [occupier’s] conduct.”⁴⁷ The EU and its member states should also acknowledge the broader stake they have in defending a rules-based international order.

A new European policy will be most effective (and more politically acceptable) if it is built upon a thoroughly elaborated normative foundation and within well-established institutional frameworks. The applicability of international humanitarian and human rights law to the OPT – and Israel’s violation of these norms – is well established. However, more needs to be done to determine and enforce the consequences of Israel’s violation of the *jus ad bellum*.

Although the UN Security Council represents one avenue for taking action of this kind, its permanent members are unlikely, for political reasons, to allow such measures to pass. Nor are they likely to impose sanctions against Israel should its practices be deemed to constitute acts of aggression or a threat to international peace and security.

The UN General Assembly, however, could exercise its own authority to recommend collective action. This could include requesting an advisory opinion from the ICJ to further clarify the legality of Israel’s continued presence in the Palestinian territory and its effects on third state responsibilities, as was done in relation to South Africa’s presence in Namibia in 1971.⁴⁸

In addition, the EU should make its own determination of the consequences of Israel’s continued presence in the Palestinian territory and EU responsibilities under international law, especially in light of Israel’s illegal use of force to maintain its control over the OPT (in violation of *jus ad bellum*).

Revisiting Oslo: From capacity building to sovereignty building?

Given the extent to which the Oslo Accords impact on almost every facet of Palestinians’ daily lives, including their interactions with Israel and the outside world, tearing them up completely is neither feasible nor desirable. But following a quarter-century of failed diplomacy choreographed by the Accords, it would be similarly imprudent to see them as sacrosanct or immutable.

There is a question about whether the jurisdictional scheme devised in Oslo, as applied over a period five times longer than initially envisaged and often interpreted in bad faith, is fundamentally at odds with international humanitarian law and the protection of Palestinians’ right to self-determination. Instead of debating whether the PA should or should not exist, donor focus should shift to how Palestinian public institutions can be unshackled from the jurisdictional restraints and broader restrictions imposed through the Oslo Accords that make further state building impossible.

In addition, the framework for assistance should be revisited by international donors. As the prospects for a peace settlement grow increasingly remote, the focus of donor coordination efforts should shift from capacity building to sovereignty building. Such a shift might involve three complementary initiatives:

1. The EU should explore how aid can be used to support Palestinian economic independence. This might include support for Palestinian accession to the World Trade Organization and revisions to the Paris Protocol, which has contributed to stunting the Palestinian economy in the West Bank.
2. Donor coordination mechanisms should be reconfigured to facilitate a concerted effort to address the primary challenge to Palestinian sovereignty: restrictions on movement and access – particularly in Area C. Too often donors focus on what Palestinians should do and not what Israel is obliged to do. This dynamic needs to change. Promoting greater Palestinian access to, and control over, their natural resources in Area C (in line with the recommendations made by the Quartet in their July 2016 report)⁴⁹ could help bolster the Palestinian presence there amid Israeli efforts to displace the local population through a concerted policy that results in socioeconomic suffocation.
3. Drawing on the legal obligations of an occupier under international humanitarian law to provide for the basic needs of citizens living under occupation, international donors should consider seeking a contribution from Israel for the cost of providing services to the Palestinian population of the West

47 Valentina Azarova, “Israel’s unlawfully prolonged occupation”, p.9.

48 Valentina Azarova, “Israel’s unlawfully prolonged occupation”, p.9.

49 “Report of the Middle East Quartet”, July 2016, available at http://www.un.org/News/dh/infocus/middle_east/Report-of-the-Middle-East-Quartet.pdf.

Bank and Gaza Strip, until the occupation is successfully brought to an end.

In coordinating these efforts, donors, whether from the EU or elsewhere, should be careful not to give effect to Israel's internationally unlawful acts. The EU itself should match its financial efforts to alleviate the harms caused to Palestinians by Israel's unlawful practices (such as in Area C and the Gaza Strip) with proportionate political and legal measures.

Action of this kind cannot be expected to prompt immediate positive action by Israel, so a sustained effort will be necessary. Such an approach, in any case, is far more likely to produce constructive results over the long term than continuation along the current trajectory is. The EU and its member states should, however, bear in mind that only once Israel's occupation has been brought to an end can effective state building be accomplished in Palestine.

Incentivising de-occupation, disincentivising annexation

Ultimately, it will be the Israeli public that decides whether to end the occupation, and the EU can only hope to encourage action rather than force Israel's hand. But a decision to end the occupation will not come unless it is driven by far more powerful incentives than those that have so far been brought to bear. Responses to polling confirm, moreover, that a combination of positive and negative incentives will be necessary to create a shift in policy.⁵⁰

But the single-minded fixation on getting parties to the negotiating table and keeping them there – even if no real progress is possible – has made European states and others reluctant to pursue measures that can successfully challenge the increasingly entrenched reality in the OPT, and chip away at Israeli public support for continued occupation, settlement activity, and the violation of Palestinian rights. While European governments have offered Israel generous positive incentives contingent on making steps towards de-occupation, they have largely been reluctant to establish negative incentives for Israeli violations of international norms.⁵¹

As a result, Israel has found that integrating settlement entities and activities into its political and economic fabric, while maintaining an unlawfully prolonged occupation, causes few problems, even in its bilateral relations with third parties.

In contrast, the international community has been far more willing to impose conditions and sanctions on Palestinians: for example, the EU and US imposed financial sanctions on the PA following the election of a Hamas-led government in 2006, and have repeatedly pressed Palestinian negotiators to accept Israeli demands such as recognising Israel as a

Jewish State, ending “incitement” as well as payments to Palestinians involved in attacks on Israelis.

As one means of cooperating to bring the occupation to an end, third states should work together to develop a coherent and targeted programme of incentives conditional on the fulfilment of tangible steps towards ending the occupation. Those steps have been enumerated repeatedly by the international community under international law, and include:

- Halting restrictions on Palestinian access to and development of Area C and East Jerusalem;
- Permitting Palestinian social and political institutions in East Jerusalem to function;
- Allowing free and normal movement of Palestinian persons and goods across the OPT, including between the West Bank and Gaza Strip; and,
- Freezing the construction of settlements and related infrastructure.

Softening or reformulating these demands in response to Israeli intransigence is a tactic that has never resulted in Israel complying with its obligations. Europe should therefore attach consequences to Israel's failure to do so.

EU member states could consider following the example set by some 136 states – including Sweden – to recognise the State of Palestine. This would be the ultimate expression of support for the ailing two-state solution and go a small way towards redressing the current asymmetry between the two sides. Such a step need not prejudice the outcome of final status negotiations in the future (including the possibility of changes to the 1967 borders through equal land swaps).

There are several additional measures available to third states that can help to ensure they do not give effect to Israel's unlawful practices in the OPT and that can lend appropriate support to victims of such practices. The yearly EU Heads of Mission reports on Jerusalem, and the EU's Maghreb-Mashreq Working Group, have already identified some of these, such as:

- Obtaining compensation from Israel for its demolitions and confiscation of EU humanitarian projects in Area C;
- Reassessing the distribution of funds through the European Neighbourhood Initiative (ENI), in line with the “more for more, less for less” policy;
- Slowing down the future development of bilateral relations, including with regard to EU-Israel twinning projects;

⁵⁰ Survey of Israeli public opinion by the Israeli Democracy Index commissioned by ECFR, 30-31 March 2014.

⁵¹ For more on EU incentives and disincentives see: Hugh Lovatt, “EU differentiation and the push for peace in Israel-Palestine”, pp. 2-3.

- Strengthening financial and political support for legal actions on public interest cases and legal assistance to Palestinian residents facing confiscation, demolition, and eviction orders; and,
- Refusing visas to known violent settlers and those calling for acts of violence.

Other measures could be modelled on the EU's much more forceful reaction to Russia's annexation of Crimea and Sevastopol in March 2014, and could include:

- Prohibiting the import of Israeli products originating in the settlements, as well European investments in the settlements (meaning that no Europeans or EU-based companies can buy real estate or entities located in the settlements, finance settlement-based companies, or supply related services);
- Prohibiting EU-based companies from providing tourism services in the settlements; and,
- Imposing targeted sanctions upon persons and entities providing support to or benefitting from Israel's unlawful practices in the OPT, including its illegal annexation of Palestinian territory.⁵²

The EU and its member states will no doubt find many of the above measures politically unpalatable, and there is little chance of achieving the necessary consensus to implement most of them at present. But such recommendations illustrate how much more the EU can do – and indeed has done in other contexts when it mustered the political willingness. They also demonstrate that 'differentiation' measures represent an exceptionally modest step given the seriousness of the situation on the ground.

Acknowledging future realities

Ultimately, it is for Palestinians to decide for themselves which path to self-determination to pursue – a point that bears emphasis as we mark 100 years of the Balfour Declaration. There continue to be good reasons for the EU, and the international community, to support a two-state solution – not least because it remains the preference for most Israelis and Palestinians. However, the EU can no longer avoid considering how it would respond to alternative futures in view of the emerging reality on the ground.

Beginning a European discussion about alternatives does not constitute a repudiation of the two-state solution, nor would a shift away from a two-state solution alter Israel's responsibilities under the law of occupation. But a conversation of this kind could help sharpen European and Israeli minds as to the inescapable implications of current policy trajectories.

⁵² For more details on EU sanctions against Russia over Ukraine crisis see "EU sanctions against Russia over Ukraine crisis", Europa.eu, available at https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en.

Voices in Israel have already spoken about the consequences of prolonged occupation. Former Israeli prime ministers Ehud Barak and Ehud Olmert have both warned that Israel faces either losing its Jewish majority or apartheid, should it fail to make peace with the Palestinians.⁵³ Israeli intelligence chiefs have echoed the same warnings, such as the former head of Mossad Tamir Pardo who argued that the future prospect of a binational state is the only existential threat facing Israel.⁵⁴

Similarly, President Barack Obama and Secretary of State John Kerry justified US engagement based on the same concerns, with the former US president warning that "today, Israel is at a crossroads...Given the demographics west of the Jordan River, the only way for Israel to endure and thrive as a Jewish and democratic state is through the realization of an independent and viable Palestine".⁵⁵ In his last speech before leaving office, Kerry elaborated further, noting that the US "cannot properly defend and protect Israel – if we allow a viable two state solution to be destroyed before our eyes...That's what we were standing up for: Israel's future as a Jewish and democratic state".⁵⁶

In view of the above, the EU and its member states should develop and adopt the following common messaging:

1. Rejection of a situation that formalises discrimination against Palestinians.

Israeli leaders are using the diplomatic vacuum caused by the absence of meaningful peace talks to deny Palestinian statehood while working to formalise Israel's annexation of large settlement blocs in the West Bank. Such dynamics will contribute to the simmering instability in the Palestinian territories, weaken the PA, and create what EU High Representative Federica Mogherini has referred to as a "one-state reality of unequal rights". European officials should start talking about Israel's *de facto* annexation of West Bank territory and its maintenance of a bifurcated legal system in the OPT that privileges the rights of Israeli settlers over those of Palestinians.⁵⁷

2. Clearly state opposition to Israel's open-ended occupation.

European officials must clearly speak out against Israeli efforts to entrench a reality in which Israelis benefit from greater rights than Palestinians. They should also oppose attempts by Israel (and President Abbas's PA) to isolate and decouple the Gaza Strip from the rest of the OPT,

⁵³ Rory McCarthy, "Barak: make peace with Palestinians or face apartheid", the *Guardian*, 3 February 2010, available at <https://www.theguardian.com/world/2010/feb/03/barak-apartheid-palestine-peace>; "Olmert Blasts Netanyahu's Foreign Policy, Warns of Risk of Apartheid in Israel", *Haaretz*, 2 October 2015, available at <http://www.haaretz.com/israel-news/1.678606>.

⁵⁴ Gili Cohen, "Ex-Mossad Chief Says Occupation Is Israel's Only Existential Threat", *Haaretz*, 22 March 2017, available at <http://www.haaretz.com/israel-news/1.778650>.

⁵⁵ "Remarks of President Barack Obama To the People of Israel", Obama White House Archives, 21 March 2013, available at <https://obamawhitehouse.archives.gov/the-press-office/2013/03/21/remarks-president-barack-obama-people-israel>.

⁵⁶ "Kerry Blasts Israeli Government, Presents Six Points of Future Peace Deal", *Haaretz*, 28 December 2016, available at <http://www.haaretz.com/israel-news/1.761881>.

⁵⁷ Valentina Azarova, "Israel's unlawfully prolonged occupation", p.10.

and stress the need for the reactivation of Palestinian governance structures.

3. **Frame the consequences of a one-state solution.** If the will-power or ability to achieve a two-state solution no longer exists, then the EU should be explicit in its indication that the only acceptable alternative is the extension by Israel of equal rights to all residents of the OPT. Raising such a prospect would help Israelis internalise the fact that undermining the potential for a Palestinian state jeopardises Israel's future as a democracy with a Jewish majority.
4. **Align European positions on the consequences of Israel's violations of *jus ad bellum* with international law.** In such a situation, third states must cooperate to bring to an end Israel's unlawfully prolonged occupation, and return full and effective control of the territory to the Palestinian sovereign. In addition, the EU should actively work to disincentivise Israel's perpetuation of this situation through the illegal acquisition of Palestinian territory and the establishment of a system of racial discrimination by holding it accountable for its actions under international law.
5. **Maintain Israel's obligations as an occupying power.** The absence of tangible progress towards a two-state solution may lead Palestinians to demand equal rights within a binational state, including potentially through a stepped-up civil rights campaign. However, pending a final agreement between Israel and the PLO and a formal end of conflict, the EU should continue to treat the Palestinian territories (East Jerusalem, Gaza, and the West Bank) as occupied territory in line with the applicable international law, including through continued differentiation measures to ensure full and effective non-recognition of Israeli settlement entities and activities. The EU should also continue to promote adherence by Israel to its obligations as an occupying power under the Fourth Geneva Convention and other applicable international law so long as there is no formal end to the conflict. Removing the protections afforded to Palestinians under the law of occupation and relieving Israel of its responsibilities as an occupying power before the end of conflict would otherwise risk accelerating an outcome in which a Jewish minority enjoys vastly superior rights to a Palestinian majority.

About the authors

Omar Dajani is professor of law and co-director of the Global Center at the University of the Pacific, McGeorge School of Law, in Sacramento, California. Previously, he served as legal adviser to the Palestinian negotiating team in peace talks with Israel (1999-2001) and as a political officer in the Office of the UN Special Coordinator for the Middle East Peace Process (UNSCO). Since that time he has continued to work as a consultant on a variety of legal infrastructure development and conflict resolution projects in the Middle East and elsewhere. He received his J.D. from Yale Law School and his B.A. from Northwestern University.

Hugh Lovatt is policy fellow and Israel/Palestine project coordinator for ECFR's Middle East and North Africa Programme. During his time at ECFR, he has worked extensively to advance the concept of “EU differentiation”, which was enshrined in UN Security Council Resolution 2334 (December 2016). Prior to his he worked as a researcher for International Crisis Group and as a Schuman Fellow in the European Parliament focusing on Middle East policy. His most recent publication is “EU differentiation and the push for peace in Israel-Palestine” (October 2016).

Acknowledgements

The authors would like to thank the many experts and policymakers who generously gave their time to inform the ideas and recommendations presented in this report. We would also like to thank the team at ECFR for their help, in particular, our editor Gareth Davies, and MENA programme director Ruth Citrin. Finally, we owe a special debt of gratitude to Sari Bashi for her extensive feedback regarding earlier drafts of this report, and to Dr Valentina Azarova whose June 2017 report for ECFR on “Israel’s unlawfully prolonged occupation” provided a valuable legal foundation for our work. It goes without saying that any mistakes or omissions are ours alone.

ABOUT ECFR

The **European Council on Foreign Relations** (ECFR) is the first pan-European think-tank. Launched in 2007, its objective is to conduct cutting-edge research, build coalitions for change, and promote informed debate on the development of coherent, effective and values-based European foreign policy.

ECFR has developed a strategy with three distinctive elements that define its activities:

- **A pan-European Council.** ECFR has brought together a distinguished Council of over 250 members – politicians, decision makers, thinkers and business people from the EU's member states and candidate countries – which meets once a year. Through regular geographical and thematic task forces, members provide ECFR staff with advice and feedback on policy ideas and help with ECFR's activities in their own countries. The Council is chaired by Carl Bildt, Emma Bonino and Mabel van Oranje.
- **A physical presence in the main EU member states.** Uniquely among European think-tanks, ECFR has offices in Berlin, London, Madrid, Paris, Rome, Sofia and Warsaw, allowing the organisation to channel the opinions and perspectives of a wide range of EU member states. Our pan-European presence puts us at the centre of policy debates in European capitals, and provides a platform for research, debate, advocacy and communications.
- **Developing contagious ideas that get people talking.** ECFR has brought together a team of distinguished researchers and practitioners from all over Europe to carry out innovative research and policy development projects with a pan-European focus. ECFR produces original research; publishes policy reports; hosts private meetings, public debates, and "friends of ECFR" gatherings in EU capitals; and reaches out to strategic media outlets.

ECFR is a registered charity funded by charitable foundations, national governments, companies and private individuals. These donors allow us to publish our ideas and advocate for a values-based EU foreign policy. ECFR works in partnership with other think-tanks and organisations but does not make grants to individuals or institutions.

www.ecfr.eu

The European Council on Foreign Relations does not take collective positions. This paper, like all publications of the European Council on Foreign Relations, represents only the views of its authors.

Copyright of this publication is held by the European Council on Foreign Relations. You may not copy, reproduce, republish or circulate in any way the content from this publication except for your own personal and non-commercial use. Any other use requires the prior written permission of the European Council on Foreign Relations

© ECFR July 2017

ISBN: 978-1-911544-26-5

Published by the European Council on Foreign Relations (ECFR),
7th Floor, Kings Buildings,
16 Smith Square, London,
SW1p 3HQ, United Kingdom

london@ecfr.eu