

HOW IRELAND AND THE EU CAN PROMOTE PEACE IN ISRAEL-PALESTINE

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Overview

In 2017, Palestinians and Israelis mark several milestones: 100 years since the Balfour Declaration; 70 years since the UN Partition Plan; 50 years since Israel began its occupation of the West Bank (including East Jerusalem) and Gaza Strip; and 30 years since the first Palestinian intifada. 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 (MEPP), as configured by the Oslo Accords, to deliver a peace agreement. Without an effort to correct structural flaws in the Oslo process, the MEPP is sure to end in failure 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 sovereignty 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 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 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 have thereby served to entrench an occupation they were meant to end.

Three dominant features are defining the emerging reality on the ground today, and are placing Palestinians and Israelis on a path towards open-ended conflict:

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.

Ireland and other 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. If Europe truly believes that preserving the chance of a two-state solution is a strategic and moral imperative, it must rethink the current peace-making model.¹

¹ This memo is based on ECFR's July 2017 report: "Rethinking Oslo: How Europe can promote peace in Israel-Palestine" by Omar Dajani and Hugh Lovatt, available at: www.ecfr.eu/publications/summary/rethinking_oslo_how_europe_can_promote_peace_in_israel_palestine_7219

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").

To that end, Ireland must follow through with differentiation practices to ensure that its policies towards Israel are consistent with its own domestic legal order.² It will need to more boldly invest political capital to realign Israel's incentives with the goal of ending its violations of international law and 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

A framework for unilateralism

The agreements comprising the Oslo 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 has morphed into an entrenched regime that has done little to constrain unilateral action by Israel, instead providing effective political cover for its creeping annexation.³

Israel did not acknowledge in the Oslo Accords that the West Bank and Gaza Strip were occupied territory, nor did it explicitly recognise the Palestinians' right to self-determination or statehood.⁴ 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 towards de-occupation on the ground.

Displacing and obfuscating international law

The Accords supplanted international law on conflict resolution with a system that effectively formalised the inherent power imbalance between the occupier and the occupied. 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. Israel has also used the Accords to obscure the legal clarity of international law. 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]".⁵

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 EU-funded structures have been demolished or seized by Israel.

² 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").

³ 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."

⁴ "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.

⁵ "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/>.

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.⁶ 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.”⁷

Bankrolling Israel's occupation

Since 1993, the EU has contributed €6 billion in bilateral cooperation assistance to Palestine,⁸ including the Palestinian Authority and various UN agencies, making it the largest aid donor to Palestinians. International assistance has helped to provide a modicum of stability – and at times critical sustenance – to the Palestinian economy, and has helped Palestinian institutions to become “statehood ready”. But international assistance also creates a perverse 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.

For example, even though Israel committed in the Oslo Accords to facilitate “free and normal” movement of people and goods, in accordance with international humanitarian law and international human rights law, Israeli restrictions remain 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.⁹ Continuing such practices without a clearly attainable political goal therefore eliminates any financial incentives for Israel to end its occupation.

Towards open-ended conflict

Annexing Palestinian territory

Israeli leaders argue that retention of large parts of the West Bank is a strategic and ideological imperative, predicated on the vision of ‘maximum land, minimum Arabs’.¹⁰ This vision informed decisions about where to erect civilian settlements, including over locations of military, historical, or religious importance. Oslo’s complex jurisdictional scheme closely resembles these Israeli policy blueprints. In contravention of international humanitarian law, Israel has used the Oslo Accords to facilitate the *de facto* annexation of West Bank territory (in addition to the Jerusalem-area territory Israel has already annexed *de jure*), and to appropriate resources there – water, stone, minerals – for the use of its own population. It has also restricted Palestinians’ economic access to and development of Area C.

⁶ 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>.

⁷ “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/>.

⁸ “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-2016-008996&language=EN>.

⁹ 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/893700PUB0978100Box385270BooPUBLICo.pdf>, p.3. (hereafter, Orhan Niksic et al, “Area C and the Future of the Palestinian Economy”).

¹⁰ Adam Hanieh 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/>.

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 1993.¹¹ Israel has invested roughly €16 billion in the construction of the settlements, along with transport infrastructure linking them back to Israel.¹² 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.

The growth and absorption of Jewish settlements in the West Bank make it increasingly difficult for the Israeli government to take steps to allow for the establishment of a viable and contiguous Palestinian state. If anything, political trends in Israel point in the opposite direction. Recent plans put forward by officials from both the right and the left of Israeli politics would allow Israel to act unilaterally to formalise its 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.

Legal limbo for Palestinians

Palestinians in the occupied territory live under 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, because of the blockade enforced by Israel and Egypt, Palestinians in the Gaza Strip are barred entirely from travelling to the West Bank, and are subject to sweeping restrictions on the movement of goods both into and out of the Strip.¹³

In tandem with the process of separation and *de facto* annexation, 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.¹⁴ Palestinians therefore 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”.¹⁵

Holding the line: the contours of a new European strategy

Instilling clarity, consolidating the normative foundation for further action

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

¹¹ “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.

¹² 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/papershaurieli.pdf>.

¹³ “Separating land, separating people”, Gisha, June 2015, pp. 4-6, available at <http://gisha.org/publication/4379>.

¹⁴ “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>.

¹⁵ Valentina Azarova, “Israel’s unlawfully prolonged occupation”, pp.9-10.

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.

A new Irish and European policy will be most effective (and more politically acceptable) if it is built upon these elaborated normative foundations. However, more needs to be done to determine and enforce the consequences of Israel's violation of the *jus ad bellum*. Israel must be pressed 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 and broadening EU and international differentiation: UNSCR 2334

European states have played an important role in broadening the process of differentiation inside and 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".¹⁶ This clause builds on the EU's own differentiation practice, echoing language found in its own Foreign Affairs Council (FAC) Conclusions and statements.¹⁷ In line with these principles, ECFR recommends that Ireland as an EU Member State 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.¹⁸ Similarly, Ireland and other member states should 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.¹⁹
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 Ireland and 17 other EU member states; as well as on the recent answer given by Vice-President Federica Mogherini on behalf of

¹⁶ "United Nations Security Council Resolution 2334", UN Security Council, 23 December 2016, available at <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>.

¹⁷ For a detailed overview of relevant EU FAC language see Hugh Lovatt, "EU differentiation and the push for peace in Israel-Palestine", p.6.

¹⁸ 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_israel_settlements.

¹⁹ For more information about how Europe funds Israeli settlements see: Hugh Lovatt, "EU differentiation and the push for peace in Israel-Palestine".

the Commission relating to financial transactions between EU-based financial institutions and those based in Israel linked to settlement entities or activities.²⁰

Incentivising de-occupation, disincentivising annexation

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] In contrast, the international community has been far more willing to impose conditions and sanctions on Palestinians. Third states should instead work together to develop a coherent and targeted programme of incentives conditional on the fulfilment of tangible steps towards ending the occupation in accordance with international law, including:

- 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.

Ireland and other EU member states should also 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 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).

Additional measures available to Ireland and other third states have been identified by the yearly EU Heads of Mission reports on Jerusalem, and the EU's Maghreb-Mashreq Working Group, 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;
- 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.

The first recommendation has in fact begun to be implemented. In October 2017, Belgium mobilised a handful of like-minded EU states (reportedly including France, Spain, Sweden, Luxembourg, Italy, Ireland and Denmark) to demarche Israel over its confiscations of EU

²⁰ 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>.

funded material in Jubbet al-Dhib and Abu Nuwar, and is reportedly preparing to present a bill for €31,252 should Israel fail to return confiscated EU material.²¹

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 steps by the EU and its member states to:

- Prohibit 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);
- Prohibit EU-based companies from providing tourism services in the settlements; and,
- Impose 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]

Such recommendations illustrate how much more the EU and its member states can do – and indeed have done in other contexts of annexation – when there has been political appetite to act. In this case, however, the unlawful situation that has arisen through Israel's illegal use of force to prolong its occupation also creates a legal obligation for third-party States to intervene under the international law on state responsibility.²² To do this, the EU and member states such as Ireland should bring into play a more robust set of disincentives such as the above in order to end Israel's unlawfully prolonged occupation.

²¹ Piotr Smolar, "Des pays d'Europe se retournent contre Israël après des destructions en Cisjordanie", *Le Monde*, 17 October 2017, available at : http://www.lemonde.fr/international/article/2017/10/17/des-pays-d-europe-s-appretent-a-demander-compensation-a-israel-apres-des-destructions-en-cisjordanie_5201945_3210.html.

²² Valentina Azarova, "Israel's unlawfully prolonged occupation", p 11.