

## **With or without a State**

### **EU aid to state-building and development in the Occupied Palestinian Territory in light of the Palestinian UN initiative**

There is a near-universal consensus at State level that a resolution to the Israel-Palestine conflict lies in a viable and independent State of Palestine living in peace and security alongside the State of Israel, a solution which will allow Israelis and Palestinians to exercise their recognized rights to self-determination. While the recognition of Israeli self-determination culminated in international recognition of the State of Israel and its admission to the UN in 1949, the process on the Palestinian side has still not come to fruition today. This is despite UN and EU recognition of the Palestinian right to self-determination for over 30 years, Israeli recognition of the need for a Palestinian State, and US President Obama's stated desire to see a Palestinian state by September 2011. This is also despite the considerable donor aid put towards the state-building project based on the Fayyad Plan (295 million Euro having been allocated by the EU for 2011 alone)<sup>i</sup> and donors' subsequent assessments of Palestinian institutions' readiness for Statehood in terms of their level of development.

Today, the full realization of Palestinian and Israeli self-determination through a two-state solution, as well as human dignity and development in the occupied Palestinian territory (OPT), continue to be threatened by measures which constitute violations of international humanitarian law (IHL) and international human rights law (IHRL). The state-building process can make little further progress under these constraints, and there is a very real danger that violations of IHL and IHRL could indeed reverse the process and even destroy the possibility of establishing a viable and independent Palestinian State. With peace negotiations having stalled over the past two years and finally broken down again in late 2010, the Palestinian Liberation Organization (PLO), the representative body of the Palestinian people, will attempt to seek international recognition of a Palestinian State in the UN General Assembly (UNGA) in September 2011.

Although it is uncertain where many EU Member States will stand on recognition of Palestine in the UNGA, the UN initiative represents a turning point in the political context which defined the EU-aided state-building programme of the past years. As such, this needs to be a moment of reflection on the future of the EU's aid to the state-building project and the political framework in which it is to take place. CIDSE, the international alliance of 17 Catholic development organizations, some of which work with partners in Israel and the OPT, is convinced that development objectives can only be further pursued in a context where Palestinian self-determination is effectively realized, in parallel to Israeli self-determination. Such a context should allow for Palestinians to pursue their own development agenda independently and exercise the necessary powers and capacities, both on the international level and on the ground. CIDSE is further convinced that enabling the creation of such a context is a matter of urgency, considering the substantial threats to a meaningful two-state solution on the ground, and that the EU has a significant role to play through its aid commitments and through using its leverage with all parties to ensure respect for international humanitarian and human rights law.

This paper outlines the significance of the Palestinian UN bid and the debate surrounding it, takes stock of factors which impede development and threaten a two-state solution, outlines potential

scenarios following the UN initiative, and draws conclusions regarding the future context of EU aid to the occupied Palestinian territory (OPT).

## **1. The Palestinian UN initiative: objectives and possible international implications**

In May 2011, PA President and PLO Chairman Mahmoud Abbas announced that the PLO would pursue two objectives at the September 2011 session of the UNGA: full UN membership and recognition of a State of Palestine within the 1967 lines.<sup>ii</sup> This plan was confirmed in August 2011, with the Arab League announcing that it would back the initiative in the Security Council and General Assembly simultaneously.<sup>iii</sup>

The objective of full UN membership is more than likely out of reach for Palestine at this time, as admission of a new UN member requires a Security Council recommendation in addition to a two-thirds majority approval in the UNGA,<sup>iv</sup> and the US State Department has confirmed that the US will veto the Palestinian Statehood initiative in the Security Council.<sup>v</sup> While the possibility was raised of overriding the veto through the Uniting for Peace procedure,<sup>vi</sup> UNGA President Joseph Deiss clearly responded that this is not possible, as the UNGA can in no case initiate the admission of a new member without a Security Council recommendation.<sup>vii</sup> However, as UN membership is not a prerequisite for statehood (but rather vice versa), the second objective of obtaining international recognition may still be feasible by passing a resolution in the UNGA recognizing the statehood of Palestine. It is estimated that between 130 and 140 UNGA member States may vote in favour.<sup>viii</sup>

Such recognition is not generally regarded as legally necessary to constitute a State,<sup>ix</sup> nor does it need to take place within the context of the UN. Indeed, recognition usually takes place on a bilateral basis, and approximately 130 States have already granted such recognition to Palestine in this way. In practice, however, recognition allows a State to participate on an equal basis in international relations bilaterally, while majority acceptance into international fora allow it to do so in a multilateral context (as has already been the case for Palestine in intergovernmental organizations such as the Arab League and the Organization of the Islamic Conference). A resolution recognizing statehood passed by a universal body such as the UNGA may well go even further in its legal and political consequences. In the Palestinian case, this could give access to a greater range of tools to act against the occupation and resultant violations of IHL/IHRL, as well as give access to additional multilateral fora where Palestinian representatives can pursue an independent development agenda for Palestine. Finally, it could create a paradigm where Palestine has a protected stake in peace negotiations and is able to take part on a basis of greater equality with Israel.

### *1.1. Access to international fora and treaty mechanisms*

A resolution recognizing Palestine as a State could have the effect of allowing Palestine to participate in certain UN specialized agencies and other international fora which only require a majority of their members to accept a new member, and are not subject to the UNSC veto.<sup>x</sup> Full participation in these fora is generally only open to States, and the definition of 'State' is generally defined with regard to the UN position (de jure in the case of UN agencies, and often de facto in other intergovernmental bodies).<sup>xi</sup> Therefore, the UNGA's collective recognition of Palestinian statehood can certainly not be discounted, as it could mean that a range of multilateral bodies would have to give serious consideration to Palestine's application for full membership. This would in turn give the PLO greater power to participate and negotiate in international discussions and processes which affect the wellbeing and development of its population.

Recognition as a State in the UNGA would also give the PLO a stronger case in adhering to international treaties, which would allow it to claim rights in terms of those treaties and avail itself of the associated enforcement mechanisms on behalf of Palestinians. The example which has garnered the most attention is the Statute of the International Criminal Court (ICC), under which the PLO has lodged a declaration accepting jurisdiction of the Court.<sup>xiii</sup> The court's acceptance of this declaration

would hinge on whether Palestine can be considered a State for purposes of the Statute, a decision which could be affected by a UNGA resolution recognizing Palestine. This would have important repercussions, as Palestinian membership would enable the ICC to exercise jurisdiction over alleged war crimes committed on Palestinian territory. Other relevant instruments would include the Geneva Conventions and human rights treaties such as the International Convention on Civil and Political Rights and the UN Convention Against Torture. Adherence to such treaties would give Palestinians access to a broader framework of international mechanisms to provide international scrutiny over (and redress for) IHL and human rights violations, whether committed by Israeli or Palestinian actors.<sup>xiii</sup> According to Palestinian human rights organization Al Haq, there are indeed plans for Palestine to accede to a range of treaties, as well as to apply for membership in various international organizations.<sup>xiv</sup>

Outside the realm of IHL and human rights treaties directly relevant to addressing the effects of the Israeli occupation, Palestine could also gain access to other treaty frameworks related to development, such as those aimed at protecting Palestine's resources and natural environment, the health of its population, and trade.<sup>xv</sup> Even if the PA is currently limited in its ability to exercise certain capacities throughout its territory, Palestinian participation at international level would enable Palestinians to claim rights and safeguard interests in areas where they could otherwise be jeopardized.

Another step which the UNGA would be competent to take is the upgrading of Palestine to the status of an observer State to the UN. Currently, the PLO (using the official designation 'Palestine') is classified under 'entities having received a standing invitation to participate as observers in the sessions and work of the General Assembly and maintaining permanent observer missions at Headquarters',<sup>xvi</sup> a status which - although differentiated from other non-State observer entities - is not equal to that of a non-member observer State. The PLO has already been extended a wide range of participation rights in the UNGA (including in respect of issues other than the question of Palestine),<sup>xvii</sup> and it is therefore difficult to envisage a significant extension of these rights unless full membership is granted, which would then confer the right to vote.<sup>xviii</sup> Nevertheless, this change in Palestine's UN status to that of a State rather than a non-state entity may further strengthen its case for admission to other multilateral bodies and accession to treaties.

At the same time, concern has also been raised about the possibility that the upgrade to observer State status would transfer Palestinian UN representation from the PLO (representative of all Palestinians, whether in the OPT or the diaspora) to the PA, which has more limited representative scope and powers. This move could therefore see Palestinian refugees lose their representation in the UN.<sup>xix</sup> The PLO and UNGA members therefore need to be aware of this risk and find a formulation which does not prejudice the representation of refugees and diaspora Palestinians currently represented by the PLO. Considering that it is generally each State's prerogative to choose its UN representative, and considering that the Cairo Unity Agreement between Fatah and Hamas recognizes the PLO as the representative of Palestinians in foreign affairs, this should be achievable.

While the UN initiative cannot end the occupation of the OPT on the ground - which remains the greatest obstacle to development and self-determination - it can increase the means of leverage and the mechanisms available to Palestinians to work towards this goal. In the process, allowing the accession of Palestine to international treaties and granting it full participation rights in international organizations would increase Palestinian agency at the international level in pursuing development and shaping relevant policies.

### *1.2. Political implications: future of peace negotiations*

The US and the EU reacted to the Palestinian UN initiative by indicating that negotiations between Israel and the Palestinians are the preferred means of achieving a two-State solution.<sup>xx</sup> This was also the view expressed by Israel, which sees the UN initiative as a rejection of the peace process.<sup>xxi</sup>

The PA position expressed by President Mahmoud Abbas is that recognition of Palestinian statehood in the UN does not exclude peace negotiations.<sup>xxii</sup> This approach is supported by Norway, which affirmed the legitimacy of Palestinians turning to the UN, while at the same time indicating the need for continued negotiations.<sup>xxiii</sup> As Palestinian analyst Youseff Munayyer points out, negotiations alone are no longer seen as sufficient, as the past two decades of negotiations have only resulted in a tripling of the settlement population and a loss of Palestinian confidence in US mediation.<sup>xxiv</sup>

Further implications of a UNGA resolution for the peace process would depend largely on its content, but could include an unambiguous recognition of the 1967 lines as the basis for border negotiations, as well as the status of Jerusalem as a future shared capital, in line with the EU position. This, as well as the fact that Palestinians could then be represented by their own State internationally (rather than by a non-State liberation movement) would change the dynamics of peace negotiations and allow for greater equality between the parties. Hitherto, the dynamic has been one of negotiations between a State recognized by the international community and a non-State entity whose rights and interests are viewed as entirely negotiable. Formal recognition of both parties as States could then serve to bring the process more squarely and unambiguously into the framework of international law.

In the end, the effect of the UN initiative on the peace process will be determined by the parties themselves - for now, there appears to be fundamental disagreement on the role of the UN initiative, but it can be argued that this is just one more in a string of fundamental disagreements which have left the peace process currently moribund in any event. In the longer term, recognition of a Palestinian State may prove to be the game-changer which is required to move forward. For Palestinians, recognition of Palestinian statehood could restore confidence in negotiations by breaking the previous paradigm and giving them a protected stake in the process. Meanwhile, for Israelis, international recognition of a Palestinian state could be an incentive to move ahead with negotiating final borders that preserve the possibility of two viable States, in the process ensuring continued Israeli self-determination and independence west of the Green Line.

## **2. Debate around the UN initiative**

### *2.1. Unilateralism versus multilateralism*

The UN initiative has been viewed as a unilateral measure by representatives of Israel, the US and some EU Member States.<sup>xxv</sup> In support of this approach, Israeli representatives have invoked the clause of the Israeli-Palestinian Interim Agreement (Oslo Accords) which states that “[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations”.<sup>xxvi</sup>

On the contrary, some commentators hold that turning to the UN is not a unilateral measure but a return of the Israeli-Palestinian issue to its rightful place in a multilateral forum. Their analyses takes into consideration that the UN's purposes are to address issues of international peace and security and to protect the right to self-determination, as well as the fact that in the Israeli-Palestinian context, the UN itself set the legal points of reference for peace efforts in Security Council Resolutions 242 and 338, and was considered an appropriate venue to seek recognition of the State of Israel.<sup>xxvii</sup> Regarding compatibility with the Oslo Accords, Al Haq further emphasizes that the Accords cannot constitute a waiver of the Palestinian right to self-determination, and that the UN initiative is merely a means of claiming this right.<sup>xxviii</sup>

### *2.2. International law: statehood and Palestinian unity*

According to the Montevideo Convention, an authoritative statement of the international legal requirements for Statehood, a State must have a permanent population, a defined territory, a government and the capacity to enter into relations with the other states.<sup>xxix</sup> These four facets of statehood were confirmed by the Badinter Arbitration Committee, which informed the position of the

European Community.<sup>xxx</sup> Palestine clearly has a permanent population and is capable of entering into relations with States, as evidenced by its conduct of diplomatic relations through embassies and missions worldwide, as well as its membership of some intergovernmental bodies. However, it has been argued that Palestine does not meet the territorial and governmental requirements to be considered a State, due to the PA's lack of de facto control in Gaza, as well as Israel's control in Area C of the West Bank. According to Israel's Ambassador to the UN, "[e]ven the most basic condition for statehood does not exist. The Palestinian Authority does not maintain effective control of all its territory nor does it hold a monopoly on the use of force".<sup>xxxii</sup> The West Bank/Gaza political divide, including the incapacitation of the Palestinian Legislative Council and lack of elections, has also been cited as a factor precluding Palestinian Statehood (albeit accompanied by the assertion that the West Bank and Gaza could each separately qualify for Statehood).<sup>xxxii</sup>

With regard to governance arrangements between Hamas and Fatah, it should be noted that according to the Badinter Committee, the formal internal political organization of a State is merely a fact to be taken into account in determining the government's control.<sup>xxxiii</sup> For external purposes, the entire OPT will *de jure* be under the control of an independent unity government in terms of the Cairo unity agreement, which contains a commitment to hold elections and reaffirms the status of the PLO as the representative of Palestinians in foreign affairs.<sup>xxxiv</sup> The reportedly independent, technocratic nature of this government should also solve the separate legal hurdle the US and EU would face in having to recognize Hamas, which they have designated as a terrorist entity.

Regarding the lack of territorial control caused by occupation, it should be noted that occupation does not negate Statehood, but merely limits the sovereign's ability to exercise authority<sup>xxxv</sup> (the sovereign in this case being the representative of a people whose right to self-determination is recognized). However, practice shows a host of examples of States being admitted to the UN while a foreign power was in effective control of the territory.<sup>xxxvi</sup> In the case of Palestine, placing such a barrier to the recognition of Palestinian Statehood would create a situation where Palestinians' ability to act on the international plane on a basis of equality would be denied until such time as Israel decides to withdraw from the OPT. This would then allow a continuation of the current situation which precludes Palestinians from securing and protecting their rights, while Israel creates further facts on the ground which will eventually render the two-state solution impossible, thus denying independent self-determination to both Palestinians and Israelis.

### 2.3. Security

One major concern on the Israeli side is that recognition of a Palestinian State would ignore Israel's legitimate security concerns.<sup>xxxvii</sup> The core concern is made explicit by Israeli Prime Minister Netanyahu, who asserted that the 1967 borders are indefensible and therefore Israel would never withdraw to these lines.<sup>xxxviii</sup> However, former Israeli diplomats and army officials disagree with this assessment,<sup>xxxix</sup> and it is also worth noting that rather than territorial control, the progress made in building up the West Bank security sector has been a major factor in improving the West Bank security situation (and consequently, the security situation of neighbouring Israelis).<sup>xl</sup> It should also be pointed out that the security of Palestinians from IHL violations brought on by a continuing occupation is a concern equally deserving of consideration.

## 3. Main obstacles to development and state-building in the OPT

Although this is not strictly speaking a requirement for statehood, Palestinian institutions' readiness for statehood has been cited by the UN Special Coordinator for the Middle East Peace Process and the World Bank. However, these institutions further indicate that the potential for continued development under current constraints imposed by the Israeli occupation is severely limited.<sup>xli</sup>

The main obstacles to development and state-building in the OPT are primarily violations of IHL and IHRL, which can be said to stem from two root causes: the occupation of the West Bank and Gaza by Israel, and a paralysis of democratic processes on the Palestinian side. Both point back to the issue of

the non-independence of Palestine, which hampers the functioning of an internal democratic system, and does not allow external violations to be addressed within the framework of the equality of States.

Reducing donor dependency is one way of reinforcing effective Palestinian self-determination, and should be a priority. However, this cannot be done in isolation from acting against systematic violations of IHL and IHRL, as donor dependency is in part also a symptom of these violations. This is best illustrated by economist Raja Khalidi, who states:

*“The idea that reliance on donor support must be reduced as a matter of principle - despite the conditions of occupation, with no Palestinian sovereignty or national rights on the horizon - is a bit of a diversion and is in fact unfair to an economy that has been deprived of its capacity to produce, trade, grow and develop for over 40 years. Before donor aid can be effectively and usefully removed, the economy needs to be equipped with the productive means, the infrastructure and the freedom to build and grow, which have been denied in various ways in Gaza and the West Bank. And as long as Israel sits on Palestinian trade routes and captures up to half of the potential import taxes that should be destined for the PA and its strained public revenues - then there is no alternative to sustained donor aid.”<sup>xlii</sup>*

Although IHL and IHRL violations should be addressed for their own sake (and indeed, as part of the obligation to ensure respect for IHL under the Geneva Conventions<sup>xliii</sup>), this again underscores the importance of the EU using its leverage to insist on a cessation of these violations, including through measures available under the EU Guidelines on Promoting Compliance with IHL.<sup>xliv</sup>

### 3.1. Closures

The illegal closure of Gaza, particularly the severing of movement between Gaza and the West Bank contrary to the Access and Movement Agreement, affects the rights to family life, a livelihood, access to healthcare and education, and the right to move freely within one’s territory (as the West Bank and Gaza are recognized as integral parts of a united OPT). The closure of Gaza has been recognized as collective punishment,<sup>xlv</sup> and the promised easing has been marginal at best.<sup>xlvi</sup> Closure measures also constitute serious obstacles to development in Gaza, where civil society actors have expressed that the population wants a normal economy rather than a continuing humanitarian situation.<sup>xlvii</sup> The closure, aggravated by Operation Cast Lead, resulted in the collapse of Gaza’s industries and widespread unemployment – today, 40% of the population is unemployed and 80% remains aid-dependent.<sup>xlviii</sup> More than two years after Cast Lead, recovery is still largely blocked by the continued ban on the entry of reconstruction goods and raw materials, as well as the near-total ban on exports – in particular to the West Bank, which is traditionally the largest and most viable market for Gazan products. Israel cites security concerns in blocking access of people and goods from Gaza to the West Bank via Israel, yet a small number of goods and persons from Gaza currently cross Israel in order to reach foreign countries, subject to security procedures.<sup>xlix</sup> If individual security checks are performed, there is no reason why civilian persons and goods could not cross Israel to reach the West Bank instead.<sup>l</sup> In addition to the impact on the dignity and rights of Gaza’s civilians, the isolation of Gaza from the West Bank also threatens the self-determination of Palestinians, as the severing of traditionally strong social, economic and political ties endangers the unity of the future State by “pushing the West Bank further towards Jordan and Gaza further towards Egypt”.<sup>li</sup>

Within the West Bank, internal movement restrictions (including those imposed by the Wall and its permit regime) are also significant factors which limit individuals’ access to employment, education and healthcare, thus directly impacting on the basic rights of the occupied population. The closure and permit regime which isolates East Jerusalem from the rest of the West Bank, as well as the connected residency permit system, aim to consolidate the Israeli annexation of East Jerusalem and have had a particularly serious effect on the abovementioned rights, as well as the right to family life owing to the refusal of family unification requests.<sup>lii</sup> Movement and access restrictions also limit Palestinians’ access to both internal and external markets, hampering further growth and development.<sup>liii</sup> IHL only allows the right to freedom of movement to be limited in cases where this becomes necessary due to circumstances – however, this is by no means a general suspension of that right, as the laws of occupation with regard to civilians are based on the principle of “personal freedom of civilians

remaining in general unimpaired”<sup>lv</sup>. The Wall’s route within the OPT, as well as settlements, are in violation of IHL,<sup>lv</sup> and therefore movement restrictions placed as a result of these illegal phenomena cannot be considered as necessary. As for other movement limitations, considering their grave effects on the population’s rights, it is clear that the criterion of necessity must be interpreted strictly. However, the broad and indefinite nature of most West Bank movement restrictions means that they would not meet this standard<sup>lvi</sup> - as at July 2011, there were 523 permanent obstacles to movement in the West Bank (excluding permanent access restrictions related to the Wall).<sup>lvii</sup>

Aside from the dire effect on the occupied population, closure policies have also taken their toll on donor aid and its effectiveness, not only in Gaza but in the West Bank as well. Research by the Association of International Development Agencies, an association of 90 humanitarian and development NGOs working in the OPT, shows that restrictions on aid projects (mainly caused by closure policies) cost donors an added \$4.5 million every year and seriously decrease the effectiveness and sustainability of aid interventions.<sup>lviii</sup> One example of these added costs is the fact that UNRWA will have to spend 20% extra on aid sent to Gaza through the Kerem Shalom crossing, following the closing of Karni crossing in pursuance of the illegal closure policy.<sup>lix</sup> An example of longer-term reduced sustainability is the modification of projects from optimal effectiveness owing to restrictions on access of materials or staff.<sup>lx</sup>

### 3.2. Israeli land policy in the West Bank: settlements, demolitions, displacements

Overall, Israeli land and planning policies in Area C can be described as a system of *de facto* annexation, contrary to international law.<sup>lxi</sup> In East Jerusalem, which has already been annexed *de jure* under Israeli law,<sup>lxii</sup> there are indications that land and planning policies are intended to implement demographic change - minimizing the presence of the occupied population while maximizing the presence of Israeli settlers - with a view to cementing the Israeli claim to all of Jerusalem.<sup>lxiii</sup> In combination, such policies (in themselves contrary to IHL and human rights) are not only impeding and reversing the development of Palestinian West Bank communities – they point to an extension of Israeli control over the OPT beyond a military occupation (which may only be temporary in nature) in order to appropriate land, in the process blocking the establishment of a viable Palestinian State.

The establishment and expansion of Israeli settlements in the West Bank, in violation of the Geneva Conventions,<sup>lxiv</sup> is a particularly prevalent and serious form of *de facto* annexation which shows no sign of abating. New construction plans have recently been approved in order to expand settlements in East Jerusalem and Ariel,<sup>lxv</sup> and subsequent to its commitment to evacuate all outposts built on private Palestinian land,<sup>lxvi</sup> the Israeli government has officially confiscated private Palestinian land for the first time in three years in order to “legalize” a settlement outpost by declaring the area as “state land”.<sup>lxvii</sup>

The implications of settlement construction for the rights of the occupied population are severe and touch upon almost all aspects of life. The near-impossibility of Palestinians obtaining a building permit for Area C or East Jerusalem (areas where the majority of land is reserved for settlements) has resulted in 383 demolitions and 752 displacements in 2011 alone, in violation of the laws of occupation.<sup>lxviii</sup> The right to an adequate standard of living is equally denied by these demolitions (which include residential, agricultural and water infrastructure), as well as the overarching fact that settlements are established in such a way that they prevent Palestinian urban and agricultural development.<sup>lxix</sup> Overall, this has had serious consequences for the sustainability of agriculture and livelihoods, as well as food security, particularly among vulnerable Bedouin herding communities which live under severe restrictions and risk of displacement in Area C,<sup>lxx</sup> and are reportedly soon to be entirely removed from Area C to facilitate settlement expansion.<sup>lxxi</sup>

The human rights impact of settlements is not only socio-economic in nature: a rise in violence by settlers against Palestinians and their property has resulted in 237 reported incidents as at July 2011.<sup>lxxii</sup> The lack of accountability for such acts is a serious concern - according to Israeli human rights organization Yesh Din, of a sample of 642 reports of settler violence against Palestinians, only 9% resulted in an indictment.<sup>lxxiii</sup>

The expansion of settlements also jeopardizes the collective Palestinian right to self-determination, as over 60% of West Bank land (Israeli-controlled Area C) is used for settlements and their infrastructure, in such a way that Palestinian-controlled areas are reduced to a few isolated enclaves. The resources necessary for the development of an independent, viable Palestinian State and its infrastructure - particularly water and land reserves - are held within Area C.<sup>lxxiv</sup> The freedom to access and use natural resources - an important element of the right to self-determination - has been systematically denied. Israeli control over water, mineral and land resources in the West Bank has greatly prejudiced the development and even the subsistence of Palestinian communities, as Israel has exploited these resources for the benefit of settlements and limited the occupied population's access, in contravention of IHL and IHRL.<sup>lxxv</sup>

EU aid interventions have offered some short-term relief on the individual level, but under the current circumstances cannot do more in the longer term or at the collective level. Indeed, restrictions on activities which humanitarian and development organizations may conduct (e.g. building agricultural infrastructure in Area C) has led to an overall less sustainable short-term "emergency" approach, which is based more on what is possible in terms of restrictions (mainly caused by IHL violations) rather than being responsive to the most serious rights issues affecting development.<sup>lxxvi</sup> The latter can only be addressed by tackling at the political level the illegal appropriation of natural resources (including but not limited to land) which has come about through Israeli settlement and control in Area C.

### *3.3. Internal Palestinian challenges to democracy and the rule of law*

Apart from obstacles to development posed directly by Israeli occupation measures, there are also various internal challenges to the quality of the Palestinian state institutions being developed under the State-building plan as far as their basis in the rule of law is concerned. These issues can largely be attributed to the political split between Gaza and the West Bank (in which donor policies and occupation measures have also played a part).<sup>lxxvii</sup> The lack of a functioning, united parliament has created a situation where it is not possible to enact necessary judicial reforms through a democratic mandate or provide democratic oversight over the functioning of security forces or of government policies.<sup>lxxviii</sup> Violations of human rights by security forces (torture, arbitrary detention and repression of freedom of assembly), many incidents of the latter two being politically-motivated, remain a concern.<sup>lxxix</sup> This situation has not been significantly changed by the Cairo unity agreement between Fatah, Hamas and other factions. EUPOLCOPPS is engaging with the civil police on human rights issues and giving training to avoid abuses, apparently with a measure of success. However, there is still a range of other actors in the Palestinian security sector whose actions are impacting upon the lives and rights of the population. Some Palestinian civil society members remain skeptical about security sector reforms, as they are concerned that there is insufficient focus on making durable improvements in the human rights situation. Indeed, the fact that policies are currently enacted by presidential decree means that reforms - including those which entail positive progress for human rights and development - are not entrenched in Palestinian governance structures and could therefore be reversed if the context becomes more volatile.<sup>lxxx</sup>

Limits on the autonomy of Palestinian institutions also reinforce donor dependency and curtail these institutions' ability to govern democratically and pursue the interests of the Palestinian population, including in the realms of ensuring respect for IHL and IHRL and achieving self-determination. Reactions to the internal Palestinian unity deal highlighted the PA's dependence on the goodwill of the occupying power, as Israel withheld tax revenues it collected on behalf of the PA,<sup>lxxxii</sup> while US representatives threatened to cut aid (a threat which has repeated in response to the UN initiative).<sup>lxxxii</sup> It is important for the EU and its Member States to avoid using aid to restrict expressions of Palestinian self-determination which fall within the boundaries of IHL and IHRL, and to encourage other donors where possible to take this approach.

## 4. Possible scenarios on the ground following the UN initiative<sup>lxxxiii</sup>

### 4.1. Tightening of occupation measures, annexation of land

As a reaction to the UN initiative, there are indications that Israel may tighten occupation measures such as movement restrictions and the closure of Gaza, which will further stunt development and even reverse it. Furthermore, the possibility has been raised of voiding the Oslo Accords,<sup>lxxxiv</sup> which could give Israel a pretext for *de jure* land annexation in the West Bank, in contravention of international law.<sup>lxxxv</sup> Such annexations (which have been advocated by the Israel Defence Force Civil Administration),<sup>lxxxvi</sup> as well as a possible upswing in private settler land-grabs, will also further jeopardize a viable two-state solution to the point of impossibility. Should that become the case, Israel would be left with the choice outlined by Israeli Defence Minister Ehud Barak: one State which grants equal rights to Palestinians and Israelis, or a *de facto* single State with an apartheid system.<sup>lxxxvii</sup>

### 4.2. Popular resistance and repression

Regardless of the outcome of the UN initiative, the Palestinian population will face a situation of frustration if Israeli occupation measures remain unchanged (or are tightened as a response to the initiative); in addition, frustration over a lack of success at the UN may be directed at the PA. Non-violent popular resistance has gained in prominence in the OPT over the past few years in locations near the Wall such as Bi'lin and Nabi Saleh, and there have been calls by both popular movements and the PA itself to follow this model across the OPT in September.<sup>lxxxviii</sup> There is a danger that respect for IHL and human rights could further deteriorate in this scenario, even if demonstrations are non-violent. There is a risk that the party to which demonstrations are addressed (Israel or the PA) may repress freedom of assembly through the use of violence and arbitrary detention, as has been seen from the Israeli response to anti-Wall protests,<sup>lxxxix</sup> as well as the PA response to Egypt solidarity rallies.<sup>xc</sup> Furthermore, there is always a possibility of the situation giving rise to violence, which could result in civilian deaths and injuries and the destruction of civilian infrastructure.

### 4.3. Dissolution of the Palestinian Authority

Following the UN initiative, there is a possibility that the PA may collapse or dismantle itself, the latter being an option which the PA leadership has raised in the past.<sup>xci</sup> The result would be that Israel, as occupying power, would once again have to take on its full responsibility for the civilian population and for security in the West Bank, reassuming the competences which were transferred to the PA under the Oslo Accords. This would then entail Israeli control over security and governance institutions which are being built up through EU and other foreign aid. Under such circumstances, continued EU aid to these institutions would directly contribute to enabling and sustaining the occupation of the OPT.

### 4.4. Loss of credibility of the international community

Lack of political support for Palestinian statehood – and, importantly, lack of action on IHL and human rights violations stemming from the backlash to the UN initiative – may be seen as a failure on the part of the international community to back financial support for a future Palestinian State with political support, and may reinforce the perception that the EU and other donors are maintaining the occupation rather than working actively to end it. Moreover, if Palestinian rights and aspirations are treated as an exceptional case in the context of the Arab Spring, this could undermine the credibility of the EU's support for democratization in the wider region.

## 5. Conclusions

If EU Member States were to back the recognition of a Palestinian State in the UN, this would be a means of giving visible political support to the two-state solution - and thus, both Palestinian and Israeli rights to self-determination. It would help to bring the state-building and political processes into alignment, and support the possibility of a peace process within a paradigm of greater equality. Regionally, it would give tangibility and credibility to the EU's support for democratization in the Maghreb/Machrek region.

Regardless of positions taken on the UN vote, this needs to be a moment for the EU and Member States to recognize that **development and state-building progress cannot continue under current limitations** where there is no prospect of changing the political context. Accordingly:

- **The EU, as well as member States which refrain from doing so at the UNGA, should consider setting a clear timeline for recognizing Palestinian statehood**, outlining realistic criteria to be met and steps to be taken in this regard. Thus, a clear prospect for greater political support to state-building efforts can be offered.
- EU Member States should **facilitate Palestinian participation in international fora**, thus increasing Palestinian agency at the international level

The EU and its Member States should further **examine plans for future aid commitments, in order to ensure their contribution towards the effective realization of Palestinian self-determination alongside Israel**. In particular:

- There should be an emphasis on **reducing institutional and individual aid dependency**. Financial responsibility should be placed on the occupying power which is commensurate with its duties in terms of IHL.
- **Aid should be provided in a manner which challenges violations of IHL/IHRL and does not accommodate them**. In particular, the model of providing mainly emergency aid to Area C needs to be revised, with appropriate leverage being brought to bear on the occupying power.
- As a first step, the EU should **systematically monitor and follow up instances where aid delivery and programming are directly or indirectly obstructed by violations of IHL/IHRL**, and demand accountability from the parties responsible.

Finally, at this crucial moment, the EU and its member States need to take steps to salvage the two-state solution by **stepping up diplomatic and other measures within their power against violations of IHL and IHRL, including those contained in the EU Guidelines on Compliance with IHL**. This objective should be a priority in the EU's bilateral relationship with Israel and its aid to the OPT. In particular, the EU should insist on:

- **An end to the illegal closure of Gaza**, and in particular ensuring the free movement of goods and persons between Gaza and the West Bank, subject only to individual security checks.
- **Removal of West Bank movement restrictions** which are not strictly justified by military necessity, particularly those which cut Jerusalem off from the rest of the West Bank.
- **An end to demolitions and displacements in the West Bank (including East Jerusalem)**.
- **Respect for the rights to freedom of assembly and freedom from arbitrary detention** by all parties, and accountability for violations by the security agencies responsible.
- **Protection of the freedom of association and expression of civil society** by all parties, as well as full implementation of the UN Declaration on Human Rights Defenders.
- **Immediate cessation and reversal of the settlement enterprise**, including the return of private Palestinian land and transfer of control over Area C, particularly with regard to building, planning, and natural resources.

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- <sup>vi</sup> Where the UN Security Council (UNSC) fails to act against a “threat to the peace, breach of the peace, or act of aggression” because of a permanent member’s veto, the “Uniting for Peace” resolution (A/RES/5/377, 3 November 1950) empowers the General Assembly to recommend collective measures to maintain international peace and security.
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- <sup>ix</sup> Recognition is not considered a constitutive element of a State by the Montevideo Convention on the Rights and Duties of States, (26 December 1933, Art 1, [http://avalon.law.yale.edu/20th\\_century/intam03.asp](http://avalon.law.yale.edu/20th_century/intam03.asp)), which is generally regarded as setting the standard requirements for statehood. The Badinter Arbitration Committee, which informed the position of Foreign Ministers of the European Community, explicitly stated that recognition is not required to constitute a State - Badinter Arbitration Committee, Opinion No. 1, para. 1(a), reprinted in Alain Pellet, “The Opinions of the Badinter Arbitration committee: A Second Breath for the Self-Determination of Peoples?”, *European Journal of International Law*, Vol. 3, No. 1, 1992, p. 182, <http://ejil.org/pdfs/3/1/1175.pdf>
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- <sup>xii</sup> Office of the Prosecutor of the International Criminal Court, “Communications, Referrals and Preliminary Examinations: Palestine”, <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine/>
- <sup>xiii</sup> The PLO, “entrusted with the functions of the Government of the State of Palestine”, already attempted to adhere to the Geneva Conventions in 1989, but Switzerland, the depositary, held that it was not able to take a decision on allowing the accession because of uncertainty in the international community over the existence of a State of Palestine – see ICRC, “Annual Report”, 2010, p. 578, <http://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-2010-states-party.pdf>. A UNGA resolution recognizing Palestine could certainly change that assessment, as it would provide strong evidence of the international community’s conviction that Palestine should now be considered a State.
- <sup>xiv</sup> Al Haq, above note 7, p. 1.
- <sup>xv</sup> Palestine’s application for the World Trade Organization (WTO) is reportedly in preparation: see Saed Bannoura, “PA Seeks WTO Membership”, *International Middle East Media Centre*, 7 June 2011, <http://www.imemc.org/article/61389>. While either a State or a “separate customs territory possessing full autonomy in the conduct of its external commercial relations” may be admitted to the WTO (Marrakesh Treaty Establishing the WTO, Art. XII(1)), Palestine’s inclusion in the same ‘customs envelope’ as Israel, as well as near-total Israeli control over Palestinian borders and trade with third States, could be an obstacle to meeting the “separate customs territory” criteria. The restriction of Palestinian trade by the occupying power has placed one of the most significant burdens on Palestinian development – recognition of Palestine as a State could be a decisive factor in allowing WTO admission, which could contribute further to bringing Palestinian trade into the remit of international law.
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- <sup>lxxv</sup> See: B'tselem, "Dispossession and Exploitation...", above note 61, p. 45 – 46. According to the Hague Regulations (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907) the occupying power may only act as administrator of public resources of the occupied territory on behalf of the occupied population. This rule safeguards occupied population's right to self-determination, which entails that "[all] peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence" (Article 1 of the International Convention on Civil Political Rights).
- <sup>lxxvi</sup> See AIDA, above note 58, p. 8 – 9.
- <sup>lxxvii</sup> See Deborah Casalin and Brigitte Herremans, "Palestinian Unity Government: EU Should Find Ways to Cooperate", *Egmont Security Policy Brief No. 25*, May 2010, pp. 2 – 3, <http://www.egmontinstitute.be/papers/11/sec-gov/SPB25-Palestine.pdf>; Richard Youngs, "Europe should rethink its aid to Palestine", *Financial Times*, 18 March 2010, <http://www.ft.com/intl/cms/s/0/c7967fce-32c7-11df-a767-00144feabdc0.html#axzz1WQwFzBli>
- <sup>lxxviii</sup> See Casalin and Herremans, above note 77, p. 4.
- <sup>lxxix</sup> See e.g. Independent Commission on Human Rights Ombudsman, "Violation of Human Rights and Public Freedoms in the Palestinian-controlled Territory", July 2011, pp. 2 – 4, <http://home.ichr.ps/en/2/5/600/July-Report-on-violations-of-HR-July-Report-on-violations-of-HR.htm>.
- <sup>lxxx</sup> Based on discussion during CIDSE roundtable meeting with West Bank civil society actors, Ramallah, 14 June 2011.
- <sup>lxxxi</sup> "UN chief urges Israel not to withhold tax revenue", *Ma'an News*, 7 May 2011, <http://www.maannews.net/eng/ViewDetails.aspx?ID=385439>
- <sup>lxxxii</sup> Josh Rogin, "29 US Senators: No aid for Palestinian unity government", *Foreign Policy*, 6 May 2011, [http://thecable.foreignpolicy.com/posts/2011/05/06/29\\_senators\\_no\\_us\\_aid\\_for\\_a\\_palestinian\\_unity\\_government](http://thecable.foreignpolicy.com/posts/2011/05/06/29_senators_no_us_aid_for_a_palestinian_unity_government); "US: We will stop aid to Palestinians if UN bid proceeds", *DPA/Ha'aretz*, 26 August 2011, <http://www.haaretz.com/news/diplomacy-defense/u-s-we-will-stop-aid-to-palestinians-if-un-bid-proceeds-1.380901>
- <sup>lxxxiii</sup> In addition to the references cited, this section also draws on contributions to a CIDSE roundtable meeting with West Bank civil society actors (Ramallah, 14 June 2011) and a teleconference with Gaza civil society actors (Ramallah/Gaza City, 16 June 2011).

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<sup>lxxxiv</sup> Barak Ravid, “Israel looking into revoking Oslo Accords in response to Palestinian UN bid”, *Ha’aretz*, 25 July 2011, <http://www.haaretz.com/print-edition/news/israel-looking-into-revoking-oslo-accords-in-response-to-palestinian-un-bid-1.375060>

<sup>lxxxv</sup> “Occupation as a result of war... cannot imply any right whatsoever to dispose of territory. As long as hostilities continue the Occupying Power cannot therefore annex the occupied territory, even if it occupies the whole of the territory concerned.” ICRC, “Commentary on Article 47 of Fourth Geneva Convention of 1949”, par. 4, <http://www.icrc.org/ihl.nsf/COM/380-600054?OpenDocument>. This is reaffirmed in the preamble to UNSC Resolution 242 (S/RES/242, 22 November 1967), which emphasizes “the inadmissibility of the acquisition of territory by war”.

<sup>lxxxvi</sup> Akiva Eldar “IDF Civil Administration pushing for land takeover in West Bank”, *Ha’aretz*, 22 July 2011, <http://www.haaretz.com/print-edition/news/idf-civil-administration-pushing-for-land-takeover-in-west-bank-1.374564>

<sup>lxxxvii</sup> Rory McCarthy, “Barak: make peace with Palestinians or face apartheid”, *The Guardian*, 3 May 2010, <http://www.guardian.co.uk/world/2010/feb/03/barak-apartheid-palestine-peace>

<sup>lxxxviii</sup> Marc Gopin and Aziz Abu Sarah, “President Abbas calls for a Palestinian Spring in September”, *972 Magazine*, 12 August 2011, <http://972mag.com/president-abbas-calls-for-a-palestinian-spring-in-september/>

<sup>lxxxix</sup> See e.g. B’tselem, “Show of Force: Israeli Military Conduct in Weekly Demonstrations in a-Nabi Saleh”, September 2011, [http://www.btselem.org/download/201109\\_show\\_of\\_force\\_eng.pdf](http://www.btselem.org/download/201109_show_of_force_eng.pdf). According to this report, “[t]he manner in which security forces handle the demonstrations in a-Nabi Saleh can indicate how the security establishment is preparing for events that are expected in September [following the UN bid]” (p. 26). See also Uri Zaki, “Freedom of Speech and Assembly under Attack in Bil’in”, *Foreign Policy*, 3 March 2010, [http://mideast.foreignpolicy.com/posts/2010/03/30/freedom\\_of\\_speech\\_and\\_assembly\\_under\\_attack\\_in\\_bilin](http://mideast.foreignpolicy.com/posts/2010/03/30/freedom_of_speech_and_assembly_under_attack_in_bilin).

<sup>xc</sup> See e.g. Human Rights Watch, “Palestinian Authority: end violence against Egypt demonstrators”, 2 February 2011, <http://www.hrw.org/en/news/2011/02/03/palestinian-authority-end-violence-against-egypt-demonstrators>;

Human Rights Watch, “Palestinian Authority: Thugs, police, abuse peaceful protesters”, 16 February 2011, <http://www.hrw.org/en/news/2011/02/16/palestinian-authority-thugs-police-abuse-peaceful-protesters>

<sup>xci</sup> Mohammed Assadi, “Abbas says may dissolve PA if no peace deal”, *Reuters*, 3 December 2010, <http://www.reuters.com/article/2010/12/03/us-palestinians-israel-idUSTRE6B26EW20101203>



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**Document contact:** Deborah Casalin, [deborah.casalin\(at\)broederlijkdelen.be](mailto:deborah.casalin@broederlijkdelen.be), +32 2 213 04 32

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