

## EDITORIAL COMMENTS

### *Gaza*

At one level, the situation in Gaza is a continuation of a long series of injustices that Palestinians have suffered for decades. It is inseparable from a long-standing Israeli project to empty the Palestinian territory and subject Palestinians to forced displacement and occupation.<sup>1</sup> Yet, at another level, Gaza is the name of a new reality, the reality following ‘October 7’ – a date that has taken on the form of a historical event:<sup>2</sup> an attack of Hamas fighters who killed 1,195 persons including 736 civilians on the Israeli territory, mostly Jewish Israelis but also a number of Arab Israelis, and abducting about 250 people, including women, children and babies; a massacre that far exceeded the scale of previous attacks in the history of Israeli-Palestinian conflict; a ‘revenge’, a mass violence that cannot be classified as mere act of armed resistance.<sup>3</sup> An event to which the Israeli government and the Israeli Defence Forces decided to immediately respond with unbridled violence, and to which a name was given: ‘Operation Iron Swords’, a campaign of destruction of Hamas and encirclement, displacement, and bombing of the Gaza population. The resulting mass killing of more than 67,000 Palestinians, the mass destruction of conditions of living (homes, vital infrastructure, lands and fields, cultural sites, ecosystems) and the revelation of systemic atrocities (forced evacuation, sexual violence, starvation, looting, targeting of journalists and healthcare personnel), which are not simply mistakes or excesses but a planned and integral part of the military response, numb the imagination of any thoughtful human being.<sup>4</sup> This is a catastrophe that is more profound than that wrought so far in the region.

To address ‘Gaza’ as a question for Europeans, it is important to strive to comprehend, as thoroughly as possible, the origins, facts, and particulars

1. Elias Sanbar, *La Palestine expliquée à tout le monde* (Seuil 2025); Gilles Deleuze, ‘The Grandeur of Yasser Arafat’ (1998) 20 Discourse 30, first published in French in (1984) 10 Revue d’Etudes Palestiniennes 41, doi: 10.3917/repa.010.0041.

2. On the notion of ‘September 11’ as a date, event, and concept see Jacques Derrida and Jürgen Habermas, *Philosophy in a Time of Terror* (University of Chicago Press 2004).

3. Adam Shatz, ‘Vengeful Pathologies’ (2023) 45(21) London Review of Books.

4. On 21 November 2024, the International Criminal Court’s Pre-Trial Chamber issued warrants of arrest for Israeli Prime Minister Benjamin Netanyahu and former Israeli Defence Minister Yoav Gallant for crimes against humanity and war crimes committed from at least 8 October 2023 until at least 20 May 2024: <[www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges](http://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges)> (all websites last visited 29 October 2025).

of the situation.<sup>5</sup> And yet, this is not enough. We must remember that Gaza has opened an abyss in the reality of two peoples: October 7 constantly relived and conceptualized by the Jews in the form of a threat to annihilation of their 'refuge-State', and more broadly, a threat to their place in the world; October 7 as the continuation of the slow agony for the people of Palestine, concretely experiencing the irretrievable loss and destruction of their conditions of living, reliving the trauma of the Nakba. Gaza is a question that we cannot formulate adequately if we do not account for the coexistence of two sociological, mental and existential realities that are largely blind to each other. To speak of it in a just way implies addressing the profound gap that exists between the deeds, words, memories and thoughts of these two peoples, building on the echoes it finds in us.

The difficulty in apprehending this plural and often irreconcilable reality may be one of the reasons for the silence and paralysis of a large part of the people in European societies. Those who are vocal in the media and the political arena readily intervene to fill the gap, focusing exclusively on the people and suffering they have taken on the task to represent, silencing and denying the other people's sufferings and often disregarding their own contradictions.<sup>6</sup> These voices contribute to creating – and are prone to exploit – a schism within European societies: between Arabs and Jews, left and right, young and old. On the other hand, Europe is also a place where people march through the streets and encamp in universities. In many European cities, including all the individual cities and universities to which the Editors of this journal are affiliated (Edinburgh, Florence, Leiden, Liverpool, Madrid, Milan, Munich, Oslo, Tilburg), marches against the destruction of Gaza have taken place.<sup>7</sup> Many of these protesters have no trouble in identifying this as a genocide perpetrated by a State with colonial legacies and supported by imperialist powers. They suggest that to avoid being complicit with genocide and the failure of humanity in Gaza there is no other choice but to support Palestine. These solidarity protests with Palestinians have faced restrictions and bans in many EU countries.<sup>8</sup>

5. Agnès Levallois (ed), *Le livre noir de Gaza* (Seuil 2024).

6. Oded Na'aman, 'A Menacing Silence. Why Is the Reality of Palestinians Denied in the Israeli Consciousness?' *Boston Review* (4 March 2024).

7. This is not just in Europe and it is not just about Palestine: a strong feeling of sympathy and a form of identification is found with all the 'excluded' in the world, associating Palestinians' sufferings with other social, racial or spatial injustices: Enzo Traverso, *Gaza Faces History* (Other Press 2024); Sylvaine Bulle, 'Retour sur les campements étudiants "Palestine". À la recherche d'une vraie intersectionnalité' (2024) 96 *Multitudes* 24, doi: 10.3917/mult.096.0024.

8. European Forum's Civic Space Report 2024, 'Escalating Restrictions on Organisations and Individuals Expressing Solidarity with the Palestinian People' (<civic-forum.eu/wp-content/uploads/2024/05/CIVIC-SPACE-REPORT-2024-RESTRICTIONS-ON-PALESTINE-SOLIDARITY.pdf>).

This is not only in particular situations where protests against Israel descend into harassment, discrimination and exclusion against Jewish students.<sup>9</sup> These are general restrictions which evidence a new conception of security as the ‘enemization’ of certain non-State actors.<sup>10</sup> They also testify to the difficulty of some European States to accept the ‘scandal’ of a European-inspired State – the Israeli State that, while being composed of a people whose oppression and destruction they recognized and established as the basis of their post-war reconstruction, is engaged in the concrete oppression and destruction of another people.

The EU institutions have adopted a different language, one that seeks to avoid the political division that splits Member States into opposite camps. Since 7 October, different political lines have emerged, based on premises and positions that were already there: the pro-Israeli camp, backing Israel’s military campaign, embodied most notably by Hungary, Austria, and Germany;<sup>11</sup> the ‘peace camp’ criticizing Israel, voiced by Belgium, Spain and Ireland; the third camp, siding with Israel but calling for a ceasefire, like France and Italy.<sup>12</sup> To bring together divided Member States on the question of Gaza, an agreement could only be found by retreating to the abstract and value-laden language of law. The EU institutions found this language from international law, which respect is considered an EU value.<sup>13</sup> In this case, the respect of the principles of international law is derived from Articles 3(5) and 21(1) TEU, read together with Article 2 TEU.<sup>14</sup> On the one hand, the conflict is regarded, in general international law terms, as a competition between claims to Statehood. In its conclusions of 27 October 2023, the European

9. European Commission, *First Progress Report of the EU Strategy on Combating Antisemitism and Fostering Jewish Life*, COM(2024) 476 final of 14 October 2024. The Commission refers to a report conducted by the European Union of Jewish Students on ‘the rise of antisemitism at European Universities since October 2023’ published on 2 February 2024.

10. Editorial Comments, ‘The Passion for Security in European Societies’ (2024) 61 CML Rev 283, doi: 10.54648/COLA2024022.

11. On the genealogy of the German position see Christoph Schult and Claus Weigrefe, “Reason of State”. The True Story Behind Merkel’s Promise to Israel’ *Der Spiegel International* (24 January 2024).

12. Martin Konečný, ‘The EU’s Response to the Gaza War Is a Tale of Contradiction and Division’ (Winter 2024) 49 The Cairo Review of Global Affairs.

13. Enzo Cannizzaro, ‘The Value of EU International Values’ in Wybe Douma and others (eds), *The Evolving Nature of EU External Relations Law* (TMC Asser Press 2021).

14. Art 3(5) reads: ‘In its relations with the wider world, the Union shall uphold and promote its values and interests ... It shall contribute ... to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’. Art 21(1) TEU provides that ‘the Union’s action on the international scene shall be guided by the ... respect for the principles of the United Nations Charter and international law’. See, for a reference to Art 2 TEU in the context of international relations, Case T-188/15, *Ezz*, EU:T:2018:619, paras 57 and 58.

Council reiterated its clear yet abstract commitment to the ‘revitalization of a political process based on the two-State solution’. On the other hand, it is analysed, under international humanitarian law, as a problem of protection and assistance of civilians. After a long period of silence about the violation of international humanitarian law by Israel, the European Council declared its concern for the ‘deteriorating humanitarian situation in Gaza’ and called for continued humanitarian access and aid.<sup>15</sup>

This language relies on the corrective and constitutive power of EU law. If Israel does not comply with its international obligations, restrictive measures may be taken.<sup>16</sup> Thus the European Commission has recently proposed the suspension of certain trade-related provisions of the Association Agreement between the EU and Israel, on the grounds of the breach of the ‘essential elements clause’ of the agreement and with a view to ending the violations of human rights by Israel.<sup>17</sup> Furthermore, the EU assumes that the recognition of Palestine as a State, predicated on the satisfaction of a set of legal conditions, will pave the way for the creation of a ‘sovereign, secure and peaceful State of Palestine alongside a sovereign, secure and peaceful State of Israel’.<sup>18</sup> These conditions are set out in the New York Declaration on the Peaceful Settlement of the Question of

15. European Council Conclusions, 27 October 2023, EU CO 14/23.

16. For a review of EU law, following this approach, see Gleider Hernández and Ramses A Wessel, ‘Expert Legal Opinion on the Implications for the European Union of the July 2024 International Court of Justice Advisory Opinion regarding the Policies and Practices of Israel in the Occupied Palestinian Territory’ (European Parliament 19 June 2025) <[research.rug.nl/en/publications/expert-legal-opinion-on-the-implications-for-the-european-union-o/](http://research.rug.nl/en/publications/expert-legal-opinion-on-the-implications-for-the-european-union-o/)>. A group of lawyers from the Association of Jurists for the Respect of International Law (JURDI) recently filed an action for failure to act against the Commission and the Council under Art 265 TFEU: see Order of the President of the General Court, Case T-482/25 R, *JURDI v Council and Commission*, EU:T:2025:836.

17. European Commission, Proposal for a Council Decision on the suspension of certain trade-related provisions of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, COM(2025) 890 final of 17 Sept 2025. The clause enshrined in Art 2 of the EU-Israel Agreement provides that ‘relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement’. Art 79 allows the parties to take ‘appropriate measures’, which could involve suspension of the Agreement in full or in part. See also Note of the Office of the EU Special Representative for Human Rights on Israel’s compliance with Article 2 of the EU-Israel Association Agreement, Council of the EU, 10 June 2025 (10499/25). For a broader perspective see Christophe Hillion, ‘EU External Action as Mandate to Uphold the Rule of Law Outside and Inside the Union’ (2023) 29 *Columbia Journal of European Law* 228.

18. Statement of the EU Special Representative for the Middle-East at the Security Council of the United Nations (9608<sup>th</sup> meeting, 18 April 2024).

Palestine and the Implementation of the Two-State Solution of 29 July 2025, recently endorsed by the EU Council.<sup>19</sup>

One basic problem with this legal approach is that it is faced with the desire of the main actors involved – Israel, the United States and the Arab States – asymmetric in terms of economic power and military capacity, to ignore the law and play other games. But the crux of the problem is elsewhere. The EU's reliance on international law has the effect of abstracting us from the reality of Gaza. Palestine has become, in the past century, the land of two peoples with unyielding claims to live and stay within the same territory, with opposing histories and genealogies, and with two exclusive senses of loss. This intractable reality creates a sort of blurring in the space of meaning, a sort of 'mirror trap' whereby any discourse or term that attempts to do justice to the situation of one people – be it 'persecution', 'catastrophe', 'land' or 'nation' – may be genuinely used to account for the situation of the other people. This is not a case of 'a people without a land';<sup>20</sup> it is not even a case of presumptive coexistence of two States. This is an extreme case of two peoples living on the same land.

How to reckon with this reality? How much can we, European lawyers, contribute to this reckoning? At present it is important to recognize the tangible reality of one people suffering from oppression (Palestinians in occupied territories) and de facto segregation (Palestinian Israelis), as well as the existence of Israel's overwhelming war machine dedicated to the destruction of the culture, structures, and people of Gaza. But this is not enough. Our responsibility is to explore the conceptual categories we use to relate to the reality of Palestine and reflect on their entrenched normativity. In the Venice Declaration on the Middle East of 12–13 June 1980, following the Camp David Accords between Egypt and

19. These conditions include: demilitarization of Hamas, the return of hostages, the transfer of power to the Palestinian Authority, the scheduling of free elections (New York Declaration on the Peaceful Settlement of the Question of Palestine and the Implementation of the Two-State Solution). See also 'Israel/Palestine: Statement by the High Representative on behalf of the European Union on the Comprehensive Plan to end the Gaza Conflict' (Council of the EU, 10 October 2025).

20. Jamal R Nassar has shed light on the structural ambiguity of this expression. 'Early Zionist leaders described Palestine as "A land without a people for a people without a land." But when Jews arrived in Palestine, they found not a vacant land but a land inhabited by Palestinian Arabs since centuries before. The consequent establishment of Israel resulted in a Palestinian diaspora. Today, the Arabs of Palestine are "a people without a land". The "Jewish problem" was solved by creating a "Palestinian problem". While the United Nations partition plan envisioned both Jewish and Palestinian Arab States in Palestine, only a Jewish State was founded. Moreover, this newly founded State in 1948 occupied not half of the land of Palestine, as the United Nations plan called for, but more than three quarters of it. The Palestinian Arab State, on the other hand, is yet to be created': Jamal R Nassar, 'The Camp David Accords and the Fundamental Rights of the Palestinian People' in *Question of Palestine: Legal Aspects (Doc 3). A Compilation of Papers Presented at the United Nations Seminars on the Question of Palestine in 1980–1986* (United Nations 1992).

Israel, the representatives of the Member States of the European Community approached Palestine as a ‘problem, which is not simply one of refugees’, recognized the existence of ‘the Palestinian people’ endowed with a political representation in the form of the Palestine Liberation Organization, and called to ‘put an end to the territorial occupation’.<sup>21</sup> The declaration admits that Palestine is more than a group of refugees: a real society, a people, and a land. The pressing question is whether EU law intersects with the three elements of Palestine’s existence and whether it does so in a just and accurate way.

### *More than refugees*

In its Order of 26 January 2024, the International Court of Justice noted that ‘the Palestinians appear to constitute a distinct “national, ethnical, racial or religious group”, and hence a protected group within the meaning of Article II of the Genocide Convention’.<sup>22</sup> A substantial part of this group consists of displaced persons who were granted a special protection status following the creation of the United Nations Relief and Works Agency in the Near East (UNRWA).<sup>23</sup> UNRWA was set up to provide humanitarian aid to those affected by war. The special status first benefits persons ‘whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost home and means of livelihood as a result of the 1948 conflict unleashed by Jewish forces and which resulted in the establishment of the State of Israel’.<sup>24</sup> In 1948, more than 700,000 Palestinians were forced to leave home. But the status is also granted to Palestinians who are descendants of the original Palestinian refugees and those who were displaced by later conflicts.<sup>25</sup> This amounts to approximately 1.7 million persons out of 2.1 million Gaza residents. According to the Geneva Convention, Palestinians under UNRWA’s special protection are excluded from the protection of general refugee law.<sup>26</sup>

21. Declaration of the Heads of State and Government and the Ministers of Foreign Affairs of the European Community, Venice, 12–13 June 1980.

22. International Court of Justice, Order on Provisional Measures of 26 January 2024, Genocide in the Gaza Strip (*South Africa v Israel*) para 5.

23. UN General Assembly, Resolution 302, 8 December 1969. The mandate of UNRWA has been regularly renewed and extended by the UN General Assembly since then.

24. UNHCR, ‘Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees’ <[unispal.un.org/pdfs/UNHCR\\_PalRefugees-1951Conv.pdf](http://unispal.un.org/pdfs/UNHCR_PalRefugees-1951Conv.pdf)>.

25. See UNRWA’s ‘Consolidated Eligibility and Registration Instructions’, referred to in Case C-31/09, *Bolbol*, EU:C:2010:119, para 45.

26. Art 1D of the Geneva Convention related to the Status of Refugees reads: ‘This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.’

What happens when this special protection ceases? The European Court of Justice has already had occasion to confirm that, in this case, a Palestinian eligible for refugee protection automatically falls under the Geneva Convention and EU refugee law.<sup>27</sup> But what does 'the protection ceases' mean? This question was raised recently in the *SN, LN* case.<sup>28</sup> In July 2018, a young mother and her minor daughter, both stateless Palestinians, left Gaza and irregularly entered Bulgaria, after travelling through Egypt, Turkey and Greece. Upon entering Bulgaria, they were immediately detained as irregular migrants. Their application for international protection was rejected on the grounds that they had not been forced to leave Gaza by a real risk of persecution and that the situation in the Gaza Strip could not be assimilated to that of an armed conflict. The Court clarified that UNRWA's protection ceases:

'where it becomes evident ... that the personal safety of the stateless person of Palestinian origin concerned is at serious risk and that it is impossible for UNRWA ... to guarantee that the living conditions of that individual would be compatible with its mission, and that person is forced to leave UNRWA's area of operations owing to circumstances beyond his or her control and independent or his or her volition'.<sup>29</sup>

It then felt compelled to specify that 'the condition relating to the personal state of serious insecurity of the applicant implies that that applicant must be personally confronted with serious insecurity ..., without however requiring that that state of serious personal insecurity presents particular characteristics, specific to that applicant, or is caused due to the particular situation of the latter'.<sup>30</sup> In this connection, due account should be taken 'of the applicant's specific situation and degree of vulnerability', with particular attention to be given to 'the possible circumstance that that stateless person is a minor'.<sup>31</sup> In this decision, the Court recognizes the situation of persons having their 'habitual residence' in the Gaza Strip, yet experiencing the absence of a domicile characterized by the impossibility of 'staying there with dignified conditions of living and minimum security'.<sup>32</sup> It acknowledges the risk of 'domicide'.<sup>33</sup>

27. Case C-364/11, *El Kott*, EU:C:2012:826; Case C-349/20, *NB and AB*, EU:C:2022:151.

28. Case C-563/22, *SN, LN*, EU:C:2024:494. See previously Case C-294/22, *Office français de protection des réfugiés et apatrides*, EU:C:2023:733.

29. *ibid*, para 71.

30. *ibid*, para 72.

31. *ibid*, para 73.

32. *ibid*, paras 77 and 83.

33. On this concept and reality see Khalid Dader and Mikko Joronen, 'Fitful Infrastructures: Dwelling with the Infrastructural Elimination in Gaza' (2025) 57

This is not all, though. The Court insists that the granting of refugee protection cannot solely depend on ‘the general conditions of life prevailing in the Gaza Strip’.<sup>34</sup> It further requires ‘an individual examination’ of the applications of the persons concerned. Practically, this means that protection is based on the demonstration of ‘a situation of extreme material poverty that does not allow him or her to meet his or her most basic needs, such as, *inter alia*, food, personal hygiene and a place to live, and that undermines his or her physical or mental health or puts him or her in a state of degradation incompatible with human dignity’.<sup>35</sup> This is an express reference to its *Jawo* judgment, issued in another context, not that of refugee protection but that of the system of transfers of asylum seekers between Member States under the Dublin Regulation. In *Jawo*, the Court stated that the transfer shall be excluded in any situation where there are substantial grounds for believing that the asylum seeker will face a real risk of inhuman or degrading treatment. However, a ‘high degree of insecurity or a significant degradation of the living conditions of the person concerned’ is required to meet the threshold.<sup>36</sup>

What is striking in *SN, LN* is not only the shifting away from the concept of persecution traditionally applied in the field of refugee law but the lack of reference to the social and political background of the case. The life of Palestinians is reduced to the satisfaction of their individual basic needs, that is, namely housing, food, clothing and personal hygiene. This reference to material conditions and personal safety may be seen as a reflection of UNRWA’s traditional protection mandate. However, the high and individualized threshold to benefit from refugee protection is instrumental in preventing a massive influx of Palestinians. Moreover, the obfuscation of the nature and source of their persecution is most intriguing. For Palestinians are not simply a collection of vulnerable individuals looking for refugee protection: it is a social and national group subject to oppression. Their existence as a genuine social group – a category enshrined in refugee law – is silenced in the case law.

Antipodes 886, doi: 10.1111/anti.70013; Moriel Ram and Ariel Handel, ‘Violent Dwelling: Settler Colonialism and Domicide’ (2024) 114 Political Geography 103079, doi: 10.1016/j.polgeo.2024.103179.

34. Case C-563/22, *SN, LN*, para 85. See further Declaration of President Salam in International Court of Justice, Order on Provisional Measures of 26 January 2024, *Genocide in the Gaza Strip (South Africa v Israel)*, para 7: ‘We are therefore faced with a situation in which the conditions of existence of the Palestinians in Gaza are such as to bring about the partial or total destruction of that group.’

35. *ibid*, para 84.

36. Case C-163/17, *Abubacarr Jawo*, EU:C:2019:218, para 93.

*Less than a people*

But Palestine is not just a social group. It is a people divided into three parts – Israeli Arabs, Gaza, East Jerusalem and West Bank residents, and refugees scattered around the world – which finds its unity in its connection to a land from which they have been expelled and which has been partly turned into ‘occupied territories’.<sup>37</sup> Under Article 42 of the Hague Regulations, ‘Territory is considered occupied when it is actually placed under the authority of the hostile army.’ As is made clear by the International Court of Justice in its Advisory Opinion of 19 July 2024, the Palestinian territory occupied since 1967 ‘encompasses the West Bank, East Jerusalem and the Gaza Strip’. Importantly, the Court also recalled that, from a legal standpoint, ‘the Occupied Palestinian Territory constitutes a single territorial unit, the unity, contiguity and integrity of which are to be preserved and respected’.<sup>38</sup> This is the basis for the recognition of the political existence of the Palestinian people and its right to self-determination.<sup>39</sup> The EU has recognized the existence of this territory in the EU-PLO Association Agreement. Article 73 of the agreement states that it applies to ‘the territory of the West Bank and the Gaza Strip’. Moreover, following the Advisory Opinion of the International Court of Justice of 9 July 2004, the Court of Justice has expressly affirmed the right to self-determination of the Palestinian people.<sup>40</sup>

What kind of territory is this? In *Brita*, the Court made clear that the EU-Israel Association Agreement did not apply to the import of goods from the West Bank occupied territory.<sup>41</sup> It insisted that the Palestinian authorities are to be considered as a ‘third State’ under the Vienna Convention on the Law of Treaties and, more specifically, according to the principle of the relative effect of treaties. Therefore, their consent is required to approve exports originating from the territory under their administration. It means that the Court opposes Israel’s exploitation, extraction and use of resources of the occupied territories. In turn, it attributes to the Palestinian people a certain form of political agency.

37. Habib Gherari, ‘L’évolution du statut territorial de la bande de Gaza’ (2024) *Revue belge de droit international* 55.

38. International Court of Justice, Advisory Opinion of 19 July 2024, *Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, para 78 referring to General Assembly Resolution 77/247.

39. International Court of Justice, Advisory Opinion of 19 July 2024, para 272.

40. Case C-386/08, *Brita*, EU:C:2010:91, para 35; International Court of Justice, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para 162.

41. Case C-368/08, *Brita*.

The Court of Justice substantiated its position in the recent *Front Polisario* case.<sup>42</sup> Western Sahara shares some basic features with Palestine: it is a territory occupied by Morocco since 1975, whose population largely fled this territory and found refuge in neighbouring Algeria.<sup>43</sup> According to the Court, the Saharawi people must be regarded as a 'third party' affected by the EU-Morocco Association Agreement in the event that the territory of Western Sahara is included in the scope of that agreement. As a result, the application of the agreement to this territory would require the consent of the Saharawi people, expressed through their representative, the Front Polisario. As a result, the Saharawi people are understood not just as a group inhabiting the territory, but as a 'political unit which holds the right to self-determination' and legitimately seeks to establish an independent State.<sup>44</sup>

This is not all, however. Addressing the issue of the nature of the consent in this context, the Court took the perplexing view that consent of the Saharawi people does not have to be express. Indeed, it might be presumed so long as two conditions are satisfied: first, the agreement does not give rise to obligations for this people; second, the people 'receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory's natural resources which is proportional to the degree of that exploitation'.<sup>45</sup> This is with a view to contributing to the economic development of Western Sahara. But, practically, this means denying the political capacity of the Front Polisario.<sup>46</sup> This seems to be the price to be paid to accommodate the EU's political and economic objectives, turning Western Sahara into a zone of exploitable resources whose extraction is essential to Europe's prosperity.<sup>47</sup>

Such commodification of occupied territories also applies to Palestine. This is reflected in the EU regime concerning the import of goods from the

42. Joined Cases C-779/ and C-799/21 P, *Front Polisario II*, EU:C:2024:835.

43. On this parallel see Eva Kassoti, 'Between Völkerrechtfreundlichkeit and Realpolitik: The EU and Trade Agreements Covering Occupied Territories' (2017) *The Italian Yearbook of International Law Online* 139, doi: 10.1163/22116133-90000161a. On the last development on Western Sahara, see the UN Security Council's Resolution 2797(2025) of 31 October 2025 which considers, in line with UN compliant language, Western Sahara as a 'non self-governing territory under Morocco sovereignty' but also envisions, for the first time, autonomy for the territory on the basis of Morocco's Autonomy Plan.

44. Joined Cases C-779/ and C-799/21 P, *Front Polisario II*, paras 129 and 68.

45. *ibid*, para 153.

46. Jean Félix Delile, 'From Vienna to Luxembourg. The Europeanization of International Law as a Tool for Stabilizing the EU's Relations with Morocco in *Front Polisario II*' (2025) 62 CML Rev 955, doi: 10.54648/COLA2025047.

47. Marise Cremona, 'Values and Interests, Law and Power in EU External Action: Two Perspectives' (2025) EUI Academy of European Law Working Paper 2025/05. See also, for a critical assessment of the Council's attempt to meet the Court's requirements, Andrea Maria Pelliconi and Sebastian von Massow, 'How Not to Trade with Occupying Powers: Western Sahara and the Amendment to the EU-Moroccan Association Agreements' (*EJIL:Talk!*, 16 October 2025).

occupied Palestinian territories. In an Interpretive Notice of 12 November 2015, the Commission clearly stated that the European Union, in line with international law, does not recognize Israel's sovereignty over the territories it has occupied since June 1967.<sup>48</sup> That is not to say that the import of goods originating in Israel or in these territories is prohibited. The EU is committed to be Israel's largest trading partner and Palestine's largest economic support. This only means that the indication of the origin of the products, making clear when they originate from Palestine, is required. This was made explicit in the *Vignoble Psagot* case.<sup>49</sup> The stated aim of EU law is to satisfy a demand for clarity from European consumers in a disputed political environment. A correct labelling, in particular the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law, 'may be the subject of ethical assessments capable of influencing consumers' purchasing decisions'.<sup>50</sup> This amounts to a form of individualization and privatization of an essentially political issue.<sup>51</sup> Palestine is addressed as a distinct trade area for the stated benefit of its autonomous economic development. However, when it comes to the political issue of the independence of its people, it is reduced to a matter of European consumers' individual choice and private responsibility.

#### *Israel as refuge*

It results from the above analysis that EU law, in line with international law, acknowledges that the Palestinian people have a 'right to exist'. It principally refuses the reduction of Palestinians to unprotected colonial subjects, the suppression of their right to self-determination, and the economic exploitation of their territory by Israel. However, it fails to live up to its own values and commitment to the creation of Palestine as 'a sovereign, secure and peaceful State'. It diminishes the Palestinian people's form of existence, making its political agency conditional upon the pursuance of Europe's political and economic objectives and interests. This diminution stands in sharp contrast with the ways in which EU law apprehends European citizens as embedded in a society where they are entitled to guarantees of social

48. European Commission, 'Interpretative Notice on indication of origin of goods from the territories occupied by [the State of] Israel since June 1967' [2015] OJ C 375, 4.

49. Case C-363/18, *Vignoble Psagot*, EU:C:2019:954.

50. *ibid*, para 56. The Court refers here to the Advisory Opinion of the International Court of Justice of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras 155–159.

51. On this point, more generally, see Estelle Ferrarese, *Le Marché de la Vertu. Critique de la consommation éthique* (Vrin 2023).

integration, respect for fundamental values, and political freedom. As evidenced in the recent *Commission v Malta* case, the Court of Justice rejects any form of commodification of Union's citizenship and territory.<sup>52</sup>

In the approach taken under EU law, the Palestinian people are not a people like us. This is all the more striking considering that, at the same time, the EU seems to regard the Jewish people as a people like no other. This is clearly reflected in the relation between the EU and Israel. This relation is complex: it is torn between the EU's political commitment to compel Israel to respect its international obligations and its historical guilt towards the Jewish people – in addition to, perhaps, its secret yearning for the strength and resilience shown by the Israeli State throughout its history. Part of this ambiguity relates to the fact that the violence in Gaza is committed by the descendants of those who were victims of persecution in Europe and, relatedly, from the fact that the stigma associated with this persecution constitutes one of the normative foundations of post-war Europe, rebuilt in the form of a democratic society guaranteeing freedoms and rights – first and foremost those of Jews and other minorities in Europe, including in the context of the 'integration programme' for Europe.<sup>53</sup> This background may help explain the coexistence of a 'special status' granted to Israel, as testified by a strengthening of security cooperation as well as continuous development of commercial, cultural and scientific relations with Israel – alongside a clear condemnation of Israeli unlawful occupation, repression and settlements expansion.<sup>54</sup> From suffering Gaza, this may legitimately be seen as 'hypocrisy' on the part of the EU;<sup>55</sup> this is equally an ambivalence – the simultaneous presence of opposite responses towards the same object.

52. Case C-181/23, *Commission v Malta*, EU:C:2025:283. See Eleanor Spaventa, 'A Very Valuable Citizenship? European Values and Citizenship after *Commission v Malta*' in this issue. On the notion of European territory as non-commodified 'home' for Union citizens, see Niamh Nic Shuibhne, 'The "Territory of the Union" in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives' (2019) 38 Yearbook of European Law 267, doi: 10.1093/yel/yez006.

53. On the 'integration programme' see Antoine Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (CUP 2015). On post-Holocaust Europe and its relation to minority rights see Bruno Karsenti, *Les paradoxes de l'intégration. L'Europe et les juifs* (Calmann Lévy 2025).

54. Caroline du Plessix, 'The European Union and Israel. A Lasting and Ambiguous "Special" Relationship' (2011) 22 Bulletin du Centre de recherché français à Jérusalem; Isabel Ruck, 'The Shifting Sands of European Diplomacy: The EU's Evolving Alignment with Israel' (*Arab Center Washington DC*, 24 June 2025).

55. 'EU Governments' Hypocrisy is Fuelling Suffering in Gaza' (*Doctors without borders*, 16 June 2025); Jennifer Rankin, 'EU Risks Breaking International Law over Israel Gas Deal, Say Campaigners' *The Guardian* (12 July 2025).

This ambivalence has perhaps to do with the evolving way in which Europe understands itself. What is remarkable is that this self-understanding echoes with the way in which Europe imagines Israel. While the psycho-social and geopolitical context of European societies has little in common with that of Israeli society, Israel touches a notion found in the deepest strata of Europe's social life and ethos.<sup>56</sup> It is the image of Israel as shelter, home for Jews, but one that is constantly threatened and at risk of collapsing. It is the image of Israel as a State committed to the defence of Jewish life and to collective safety.<sup>57</sup> This image resonates with the transformation of the EU into an entity concerned with the defence of the 'European way of life' and the protection of its basic assets, that is, critical infrastructures and foundational values. There is indeed a shift in EU institutional imaginary from Europe as a 'common market' and an 'area of freedom' to Europe as a 'safe place' and 'resilient society'.<sup>58</sup> This shift assumes that European society is constantly at risk of being destabilized and fragmented due to a 'continuum of threats', from war and external threats, to terrorism and, according to this narrative, uncontrolled migration.<sup>59</sup>

The reverberations of this shift are easily traced in the EU's changing attitude towards Israel and Palestine. This is apparent in the semantic variation of the European Parliament's resolutions: they moved from condemnation of violence on both sides and support for Palestinians' 'civil disobedience' against the 'maintenance of military rule' imposed by Israel to a focus on 'Israel's legitimate security concerns', concern for 'increasing settler violence' by Israeli settlers, and the classification of Hamas as a terrorist organization that 'needs to be eliminated'.<sup>60</sup> Arguably, this is not just a reflection of the evolution of the situation in

56. Note, however, that the identification with the Israel/Palestine situation may be intriguing and carried out very far in some parts of Europe: this is notably the case in Northern Ireland, where Irish Catholics identify their experience with that of Palestinians, and Protestant Unionists identify theirs with Israel.

57. Danny Trom, *L'Etat de l'exil: Les juifs, l'Europe, Israël* (PUF 2023).

58. Editorial Comments, 'Europe is Trembling. Looking for a Safe Place in EU Law' (2020) 57 CML Rev 1675, doi: 10.54648/COLA2020764.

59. European Commission, 'Sixth Report on the implementation of the EU Security Union Strategy', COM(2023) 665 final of 18 October 2023.

60. See and compare European Parliament, Resolution of 21 January 1988 on the situation of the Israeli-occupied territories, Resolution of 18 January 1990 on repression in the Israeli-occupied territories, Resolution of 10 September 2015 on the EU's role in the Middle East peace process, Resolution of 19 April 2018 on the situation in the Gaza Strip, Resolution of 14 December 2022 on the prospects of the two-State solution for Israel and Palestine, and Resolution of 19 October 2023 on the despicable attacks by Hamas against Israel, Israel's right to defend itself in line with humanitarian and international law and the humanitarian situation in Gaza. On the classification of Hamas as a terrorist organization, see Case C-833/19 P, *Council v Hamas*, EU:C:2021:950.

Palestine. This mirrors collective fears about terrorism and other threats felt in European society and given expression by EU institutions.

### *Ambivalent Europe*

From this brief reflection, three points arise. First, EU law does not fully align with the view that Gaza is the result of European and Western colonialism exported and amplified through the colonial nature of the Israeli State.<sup>61</sup> On this view, settler colonialism originates in Europe-based Zionism and has been applied to Palestine on the assumption that this land had to be emptied of its inhabitants, many of whom would have to be displaced, transferred and replaced.<sup>62</sup> To be sure, some European States are economically involved in the development of Israel and its colonial project in Palestine, as well as engaged in arms trading with Israel.<sup>63</sup> However, what we find in EU law is different and more ambivalent: the reduction of Palestine to a humanitarian issue and a matter of Europeans' ethical choices, in discordant parallel with the imagination of Israel as a model of resilient society.

Second, it should be clear that the conceptual basis upon which EU law resonates with Israel is flawed. By contrast with the 1948 Declaration of Independence, declaring the attachment of the new Israeli State to Europe's post-war liberal principles, today's Israel does not exist as a liberal democracy in the Arab world.<sup>64</sup> The new Basic Law passed in 2018 stating that Israel is 'the national home of the Jewish people' marked a shift, with a willingness of the coalition majority which passed the law to turn Israel into an ethno-nationalist and religious State.<sup>65</sup> This shift has come with a heavy militarization of Israeli economy and society as well as policies and military

61. For a nuanced and thoughtful account in making this case see Etienne Balibar, 'Penser Gaza: entretien de Luca Salza avec Etienne Balibar' (*Le Club de Mediapart*, 17 September 2025).

62. Rashid Khalidi, *The Hundred Years' War in Palestine: A History of Settler Colonialism and Resistance, 1917–2017* (Metropolitan Books 2020); Ilan Pappé, *A Very Short History of the Israel-Palestine Conflict* (Oneworld Publications 2024).

63. See Albanese report, 'From Economy of Occupation to Economy of Genocide – Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967' (A/HRC/59/23); Timothy Barnes, 'Is Europe Turning Its Back on Arming Israel?' (*AOAV*, 16 October 2025).

64. The European historian Tony Judt famously portrayed Israel as 'anachronism' from the start: 'Israel: The Alternative' (23 October 2003) *The New York Review of Books*.

65. Suzie Navot, 'A New Chapter in Israel's "Constitution": Israel as the Nation State of the Jewish People' (*Verfassungsblog*, 27 July 2018) <[verfassungsblog.de/a-new-chapter-in-israels-constitution-israel-as-the-nation-state-of-the-jewish-people/](http://verfassungsblog.de/a-new-chapter-in-israels-constitution-israel-as-the-nation-state-of-the-jewish-people/)>.

operations that deny Palestinians' basic rights.<sup>66</sup> This is without prejudice to the persisting internal plurality and divisions of Israeli society.

Third, EU law's difficulty in grasping the situation in Gaza echoes issues internal to European society itself. Despite its commitment to respect minority rights and to fight against persecution and discrimination, EU law struggles with the recognition of particular social groups and their integration into European society. This difficulty is illustrated in the Court of Justice's judgment on the ritual slaughter of animals intended for human consumption.<sup>67</sup> In a case concerning both Jewish and Muslim communities in Belgium, the Court held that the welfare of animals as sentient beings legitimately prevails over 'Jewish and Islamic religious precepts'. This was justified by the 'social context' and the ethical preferences of national citizens. This individualization and privatization of the issue strikingly parallel the way in which EU law relates to Palestine and its territory. The life of religious minorities in Europe is reduced to consumption habits of particular social groups following rites deemed to be alien to the European value order. In Europe too, there is a difficulty in recognizing the agency and normativity of genuine social groups. The Jewish and Muslim communities embody Europe's embarrassment with social plurality.

While insisting that it is the biggest aid provider to the Palestinians, the EU has been the major absentee during the last two years of atrocities. It has watched helplessly while other actors prevaricated, oscillated, and then put pressure on Israel and Hamas: the United States on one side, Turkey, Qatar, Egypt and Saudi Arabia on the other. The EU is clear on its position for a two-State solution. However, given its internal disunion and lack of influence in the Middle East, it is likely that it will be sidelined from the so-called 'Gaza peace plan'. In this context, besides providing humanitarian support for Palestinians, the EU may prove helpful in another way: by reminding political actors of the reality of 'Gaza', and by forging tools and concepts to accord with the singularity of Palestine. EU law could help challenge the process by which Palestine risks being reduced to a zone of extractive capitalism and an area of militarized surveillance. This requires a thorough reconsideration of its conceptual engagement and the ways in which its concepts materialize into concrete interpretations and actions. In this, EU law may rely on some of its normative resources: its commitment to international law, its defence of self-determination, and its conception of social and political freedom. It may develop and implement its punitive

66. Peter Beinart, *Being Jewish after the Destruction of Gaza. A Reckoning* (Knopf 2025).

67. Case C-336/19, *Centraal Israëlitisch Consistorie van België e.a.*, EU:C:2020:1031. In the same way and with a similar reasoning, see ECtHR, *Executief van de Moslims van België et al v Belgium*, Appl no 16760/22, 16849/22, 16850/22 and others, judgment of 13 February 2024.

function through a set of sanctions and suspension measures against Israel.<sup>68</sup> But, in any case, it cannot avoid a more fundamental questioning of its reductionist conception regarding Palestinians' conditions of existence, its infatuation with the Israeli State, but also its obfuscation of social plurality inherent in Israeli, Palestinian as well as European societies. And in a context of a dramatic rise of antisemitism and anti-Muslim sentiments in Europe, EU lawyers will have to do this with rigour and a clear sense of responsibility to the present.<sup>69</sup>

68. European Commission's press release, 'Commission proposes suspension of trade concessions with Israel and sanctions on extremist ministers of the Israeli government and violent settlers' (17 September 2025); European Commission, *Proposal for a Council decision on the partial suspension of the Agreement between the European Union, of the one part, and Israel, of the other part, on the participation of Israel in the Union programme Horizon Europe*, COM(2025) 620 final of 28 July 2025. So far, due to divisions among Member States, the Council has not been able to adopt these proposals.

69. 'Jewish People's Experiences and Perceptions of Antisemitism. EU Survey of Jewish People' (EU Agency for Fundamental Rights, 11 July 2024); 'Being Muslim in the EU. Experiences of Muslims' (EU Agency for Fundamental Rights, 25 October 2024).