

**BADIL POSITION PAPER**

**EUROPEAN UNION CONDITIONAL FUNDING:  
ITS ILLEGALITY AND POLITICAL IMPLICATIONS**

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BADIL Resource Center for Palestinian Residency and Refugee Rights is an independent, non-profit human rights organization working to defend and promote the rights of Palestinian refugees and Internally Displaced Persons (IDPs). Our vision, mission, programs and relationships are defined by our Palestinian identity and the principles of international humanitarian and human rights law. We seek to advance the individual and collective rights of the Palestinian people on this basis.

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## 1. INTRODUCTION

Most funding provided by international, governmental and non-governmental agencies to the non-profit sector is conditional, which implies that the recipient organization should commit to specific objectives and measures as defined with the donor to meet common needs, rights and interests. These conditions may be of an administrative, financial, or political nature. Political conditional funding remains acceptable as long as it does not, in principle or in fact, impose a political or moral dilemma to the recipient organizations, or minimize their agency over their own purpose and projects as protected under international humanitarian and human rights law.

Over the last few decades, Palestinian Civil Society Organizations (CSOs) have endured mounting pressure from the international donor community aimed at interfering with the Palestinian people's legitimate right to determine its political, social, economic and cultural destiny, secured under international law. These unacceptable political conditions have included:

- **Censoring the terminology adopted by Palestinian organizations** in their publications, particularly with issues like the Nakba, colonization, apartheid, and right of return;
- **Defunding projects related to the right of return** of Palestinian refugees and Internally Displaced Persons, or the Boycott, Divestments and Sanctions movement;
- **Reducing the thematic scope of projects** to solely humanitarian aid, or **limiting the geographic scope of projects** to the Palestinian territory occupied in 1967;
- While **putting forward 'conflict resolution' and 'peace-building' projects** that completely disregard the legitimate human rights of the Palestinian people.

Rather than contributing to the empowerment and the promotion of the Palestinian people's legitimate human rights, as recognized under international law, these political conditions have crippled Palestinian civil society's margin for action, disempowered the Palestinian people, and reinforced the political status quo, undermining Palestinian claims for their legitimate human rights.<sup>1</sup>

The post-9/11 era has witnessed the emergence and buttressing of counter-terrorism measures, legislations and regulations that are now wielded as a weapon to stifle Palestinian civil society and encroach on the scope of the Palestinian people's legitimate rights. The European Union (EU) has recently revised its global policy for procurement and grants to introduce a counter-terrorism clause in its contracts for external action. Legally, politically and practically, this clause constitutes unacceptable political conditional funding, and forms part of an effort to interfere with the Palestinian civil society's freedom of action and political orientation, whether intentionally or not.

This position paper addresses the problematic nature of political conditional funding imposed on Palestinian CSOs in general, and in particular of the EU counter-terrorism clause. It argues that such a clause is modeled on increasing counter-terrorism measures implemented in the United States (US) and in Europe, and that this model inherently reflects the powerful western states' counter-terrorism considerations and criminalizes the legitimate right of the Palestinian people to resist oppression (occupation, colonization and apartheid) by any legitimate means. It points out that the amalgamation of the Palestinian people's struggle for their legitimate rights as recognized under international law, with the western, and particularly European understanding of terrorist acts has the effect of

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1 See Palestinian National Campaign Rejecting Conditional Funding, "Understanding Palestinian Rejection of Politically Conditional Funding," position paper, 20 January 2020, available at: <http://www.badil.org/en/publication/press-releases/92-2020/5043-pr-en-200120-04.html> [accessed 1 April 2020]; see also Tariq Dana, "Criminalizing Palestinian Resistance: The EU's Additional Condition on Aid to Palestine," *Al-Shabaka*, 2 February 2020, available at: <https://al-shabaka.org/commentaries/criminalizing-palestinian-resistance-the-eus-new-conditions-on-aid-to-palestine/> [accessed 13 April 2020]; Sherine El Taraboulsi-McCarthy, "'A Humanitarian Sector in Debt' Counter-Terrorism, Bank De-Risking and Financial Access for NGOs in the West Bank and Gaza," *Humanitarian Policy Group*, working paper, August 2018, available at: <https://www.odi.org/sites/odi.org.uk/files/resource-documents/12357.pdf>; see also Saeb Erekat, cited in "PLO Asks EU to Reconsider New Conditions for Funding Palestinian NGOs," *Wafa*, 3 January 2020, available at: <https://www.palestinow.com/plo-asks-eu-to-reconsider-new-conditions-for-funding-palestinian-ngos/> [accessed 13 April 2020]

muzzling Palestinian civil society's right to freely determine the scope of their actions. Finally, it highlights that this approach not only overlooks principles of international humanitarian and human rights law associated with third parties, but also infringes, directly and indirectly, on the legitimate rights of the Palestinian people.

## 2. THE EUROPEAN UNION'S NEWLY IMPOSED COUNTER-TERRORISM CLAUSE

Within the framework of its Common Foreign Security Policy, the EU's external action is guided by principles of democracy, rule of law, human rights, equality, solidarity, as well as respect for principles of international law.<sup>2</sup> To pursue these principles, the EU implements its own restrictive measures regime, based on its own initiative and/or in compliance with the United Nations (UN) Security Council resolutions.<sup>3</sup> These restrictive measures notably target terrorist acts, but also, in principle, human rights violations or annexation of foreign territory.<sup>4</sup> The EU developed a comprehensive range of restrictive measures, in particular diplomatic sanctions, arms embargoes, travel bans, freezing of assets, various economic sanctions including on imports and exports, investment bans in addition to prohibitions on services supply.<sup>5</sup> Financial sanctions have been an important component of the EU counter-terrorism policy, taking the form of a partial or complete suspension or diminution of financial and economic relations<sup>6</sup> aimed at countering terrorism, including the freezing and direct or indirect provision of any "funds, other financial assets and economic resources," or "financial services" to listed

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2 European Union, Consolidated Version of the Treaty on European Union, 2012/C 326/13, Article 21, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF) [accessed 1 May 2020]

3 European Council: Council of the European Union, "Adoption and Review Procedure for EU Sanctions," webpage, last reviewed 14 February 2019, available at: <https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/> [accessed 13 April 2020]

4 European Council: Council of the European Union, "Different Types of Sanctions," webpage, last reviewed 6 June 2019, available at: <https://www.consilium.europa.eu/en/policies/sanctions/different-types/> [accessed 13 April 2020]

5 *Ibid.*

6 European Union, Consolidated Version of the Treaty on the Functioning of the European Union, 2008/C 115/01, Article 215, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT> [accessed 31 March 2020]

individuals, groups or entities.<sup>7</sup> The counterpart of this broad and far-reaching array of restrictive measures is the lack of visibility and foreseeability in the way they are defined and applied to a specific situation. The EU’s “targeted and differentiated approach” to restrictive measures, in the context of Palestine, paves the way for the unpredictable and arbitrary imposition of sanctions on both Palestinian entities and persons.<sup>8</sup>

Restrictive measures target persons and entities designated under sanctions lists, determined by EU Council decisions.<sup>9</sup> They are not only applicable to the EU Commission when implementing the EU budget, but also to Palestinian grant beneficiaries and contractors as entities entrusted with “indirect management” of EU funds.<sup>10</sup> Furthermore, it should be noted that restrictive measures should not affect non-targeted persons and entities.<sup>11</sup>

EU restrictive measures directly rely on the EU understanding of terrorist acts, extensively defined under the EU Council Common Position of 27 December

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7 Council Regulation (EC) no 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, OJEU L 344/70, 28 December 2001, Article 2, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF>

8 “The measures used in a specific situation will vary depending on the objectives of the restrictive measures and their likely effectiveness in achieving these objectives under certain circumstances, reflecting the EU’s targeted and differentiated approach.” European Union: Council of the European Union, “Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy,” 4 May 2018, Sec. II(C) “Targeted Measures,” para.14, 8, available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>

9 European Union: Council of the European Union, “Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy,” 4 May 2018, Sec. II(D) “Lists of Targeted Persons and Entities,” 9, available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>

10 European Union: European Commission, “Financial Regulation Applicable to the General Budget of the Union,” July 2018, Articles 62(1)(c), 155(2)(a) & 155(3), available at: [https://ec.europa.eu/info/publications/financial-regulations\\_en](https://ec.europa.eu/info/publications/financial-regulations_en) [accessed 14 April 2020]; *see also* European Union: European Commission, “Procurement and Grants for European Union External Actions – A Practical Guide,” Version 2019.0, 15 July 2019, para.2.4, available at: <https://ec.europa.eu/europeaid/prag/document.do?nodeNumber=2.4> [accessed 1 May 2020]

11 European Union: Council of the European Union, “Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy,” 4 May 2018, Sec. II(D) “Lists of Targeted Persons and Entities,” para.20, 10, available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>



2001 as “intentional acts, which, given its nature or its context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aim of: (i) seriously intimidating a population, or (ii) unduly compelling a Government or an international organization to perform or abstain from performing any act, or (iii) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization, [...]”<sup>12</sup>

Applicable to Palestinian grant applicants as of July 2019, Article 1.5 bis of Annex II of the general conditions related to EU-financed grant contracts for external actions (Article 1.5 bis) provides that “grant beneficiaries and contractors must ensure that there is no detection of subcontractors, natural persons, including participants to workshops and/or training and recipients of financial support to third parties, in the lists of EU restrictive measures”.<sup>13</sup> Although neutrally worded, Article 1.5 bis has earmarks of an anti-terrorism clause and carries far-reaching implications for Palestinian signatories.

In practical terms, Article 1.5 bis entails far more than a mere nominal checking:

- Palestinian grant recipients, as EU contracting partners, must acknowledge and comply with the EU restrictive measures including the sanctions lists;
- Palestinian grant recipients must ensure that no person involved in their projects is identified under the latest updated EU sanctions lists. These EU sanctions lists are available on the EU Sanctions Map.<sup>14</sup> Under the vague phrasing of “[ensuring] that there is no detection” as required by Article 1.5 bis, Palestinian grant recipients, in principle, must enter the name of their stakeholders in the Sanctions Map database, and make sure they are not recognized as listed persons. In other words, they must actually put the EU restrictive measures into

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12 Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP, 28 December 2001, Article 1(3), available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001E0931> [accessed 31 March 2020]

13 Annex II General Conditions Applicable to European Union-Financed Grant Contracts for External Actions, July 2019, Article 1.5 bis, available at: [https://eeas.europa.eu/sites/eeas/files/e3h2\\_gencond\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/e3h2_gencond_en_0.pdf)

14 See European Union Sanctions Map available at: <https://www.sanctionsmap.eu/#/main> [accessed 14 April 2020]

effect through screening and vetting processes targeting any individual involved in their projects;

- The scope of screening and vetting processes is overly broad and virtually comprises all persons, entities or groups involved in projects with Palestinian CSOs, whether they are immediate staff and board members, participants to workshop or trainings, or beneficiaries of the assistance provided by the organization;
- Distinction criteria between entities identified under the EU sanctions lists and their affiliates and/or sympathizers remain opaque and the EU has not provided conclusive guidance on their criteria;
- Vetting and screening responsibility, which should remain that of the EU, is unduly transferred to Palestinian CSOs that are required to implement them against their own people.

### **3. THE PALESTINIAN ORGANIZATIONS' OBJECTIONS AND CONCERNS AND THE EUROPEAN UNION'S CLAIMS**

In an official clarification letter addressed to the Palestinian NGO Network on 30 March 2020, the EU Representative to the West Bank, Gaza Strip and UNWRA (EU Representative) argued that Palestinian CSOs' concerns stem from a misinformation campaign targeting Article 1.5 bis.<sup>15</sup> The following arguments have been advanced by the EU either within the letter or in the course of discussions with Palestinian CSOs:

1. Recipients of EU funds are required to respect the EU legislation on restrictive measures, and to abide by contractual documents that are applicable to any EU funds recipient worldwide;
2. The legislation on restrictive measures is not new and does not

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15 European Union Representative West Bank and Gaza Strip, UNWRA, Clarification Letter regarding EU-funded contracts, to the Palestinian NGO Network, 30 March 2020, available at: <http://www.pngo.net/wp-content/uploads/2020/04/EU-Clarification-letter-regarding-the-EU-funded-contracts1.pdf>

specifically concern Palestinian CSOs but all recipients of EU funds across the globe;

3. The EU claims to support the Palestinian people's "quest" for freedom, independence and self-determination by "all means allowed under international law" to achieve a "peaceful resolution of the Palestinian-Israeli conflict;"
4. EU law constitutes the applicable law for all recipients of EU funds in the framework of EU-funded projects;
5. Beneficiaries of EU grants are not required to commit to any other clause than those enclosed in the grant contracts for external action and are not asked to change their political position concerning any Palestinian faction.
6. No Palestinian persons are currently designated under the EU sanctions lists, and requests to delist an entity or a person are subject to procedures separate from financial procedures; the exclusion of entities and groups designated under the EU sanctions lists from receiving the benefits of EU-funded activities does not concern natural persons affiliated to, sympathizing with, or supporting them (unless persons are actually on the lists);
7. Article 1.5 is not similar to or patterned after provisions imposed upon grant recipients of the US Agency for International Development (USAID).

These justifications do not convincingly allay legitimate objections and concerns voiced by the Palestinian National Campaign to Reject Conditional Funding, launched on 30 December, regarding the dangerous precedent set by Article 1.5 bis, which include:

- the *de facto* and indirect *de jure* criminalization of the legitimate struggle of the Palestinian people to national liberation;
- the morally unacceptable and legally objectionable amalgamation of the Palestinian legitimate struggle for

national liberation with a European understanding of terrorist acts that is not only applied out of the European context, but also contradicts provisions that ensure the legality of the Palestinian people's right to resist under international law;

- the imposition of a framework that criminalizes certain Palestinian political parties, listed as terrorist entities;
- the transfer of the burden of counter-terrorism checking to Palestinian CSOs, increasing division within Palestinian society, and undermining a truthful relationship between Palestinians and their political parties.<sup>16</sup>

This paper demonstrates that arguments advanced by the EU concerning Article 1.5 bis leave many loopholes open, exceeds a reasonable application of the principle due diligence that could be expected from EU grants recipients, and do not validly justify the imposition of counter-terrorism policies and measures on Palestinian civil society.

### ***3.1. The New Counter-Terrorism Clause is Embedded in the Reinforcement of Counter-Terrorism Measures Worldwide***

The European Commission argues that the counter-terrorism clause on conditional funding is not “new” but was added in the continuity of the EU's measures to fight global terrorism, including the introduction of the EU sanctions lists since 2001.<sup>17</sup>

Article 1.5 bis was included in EU grant contracts for external action in July 2019 while it is admittedly consistent with the buildup of counter-terrorism arsenal at the European and international levels from 2001 onwards. The EU did not immediately follow the path taken by USAID that set a counter-terrorism clause in grant contracts from the early 2000s. Over the past two decades, EU grant criteria applied to Palestinian CSOs' projects had remained rooted in competency, transparency and coherence. The recent inclusion of Article 1.5

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16 See statements of the Palestinian National Campaign to Reject Conditional Funding, available on BADIL's website at: <http://www.badil.org/en/publication/press-releases/92-2020.html> [accessed 6 April 2020]

17 European Commission (Directorate General for Neighborhood and Enlargement Negotiations – DG NEAR) – EEAS meeting with Palestinian human rights organizations, Brussels, 22 January 2020

bis into the EU grant contracts came about as a result of the following context: the intensification of terrorist events in Europe over the last decade; Israel's opportunistic intent to conflate legitimate Palestinian resistance and resilience with terrorist acts; and its ongoing pressure exerted on the EU to prevent the funding of Palestinian CSOs.<sup>18</sup>

With respect to Palestine and Palestinians, any consideration of Article 1.5 bis should be understood in the context of the increasing pressure Israel exerts on the EU, based on false allegations of funding of Palestinian non-profit organizations that are tied with so-called terrorist entities. In its fallacious campaign to discredit Palestinian civil society, Israel deceitfully portrays Palestinian CSOs as infiltrated by so-called "terrorists in suits."<sup>19</sup> It is dishonestly argued that their penetration into the Palestinian CSOs' social fabric constitutes their new strategy that is perceived as more legitimate than armed conflict methods vis-à-vis the international community.<sup>20</sup> Israeli officials directly lure the EU to exclude such Palestinian CSOs from EU funding, calling the Palestinians engaged in CSOs "terrorists," and alleging that EU funding is channeled to Palestinian entities listed in the EU sanctions lists.<sup>21</sup>

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18 The Zionist-Israeli efforts to amalgamate Palestinian acts of resistance against oppression with acts of terrorism has certainly benefited from the reinforcement of the EU counter-terrorism regime in the wake of the series of terrorist attacks that hit Europe over the last fifteen years. Israel diverts the discourse against global terrorism to lure public opinion into thinking of Palestinian resistance in terms of global terrorism, which then undermines the Palestinian legitimacy to pursue acts of resistance. This analysis is clearly reflected in Zionist publications that equate Palestinian acts of resistance to terrorism and blame the EU for not doing so: "The discreet cooperation [between Israel and the EU] in the counter-terrorism field has unfortunately not yet matured into a more balanced position on the part of EU member states regarding the security measures Israel takes to deal with Palestinian terrorism and incitement. The moral double standard of the EU regarding this issue might undermine its own fight against Islamist terrorism." See Tsilla Hershco, "The Impact of the ISIS Terror Attacks on Europe," BESA Center Perspectives Paper No.456, 30 April 2017, available at: <https://besacenter.org/perspectives-papers/isis-terror-europe/> [accessed 22 April 2020]

19 Prime Minister's Office, "Special Report: The Ties Between NGOs Promoting BDS and Terror Organizations," Israel government's website, available at: [https://www.gov.il/en/Departments/General/terrorists\\_in\\_suits](https://www.gov.il/en/Departments/General/terrorists_in_suits) [accessed 4 April 2020]

20 Raphael Ahren, "Israeli Government Report Claims Terrorists Have 'Infiltrated' Palestinian NGOs," Times of Israel, 3 February 2019, available at: <https://www.timesofisrael.com/israeli-report-claims-terrorists-have-infiltrated-palestinian-ngos/> [accessed 4 April 2020].

21 Lahav Harkov, "Erdan to EU: Make Sure Your Funds Don't Go to NGOs with Terror Ties," Jerusalem Post, 2 January 2020, available at: <https://www.jpost.com/middle-east/palestinian-ngos-refuse-cu-funds-after-being-told-not-to-fund-terror-612733> [accessed 4 April 2020]

The European Commission further argues that Article 1.5 bis does not impose any new obligations, but rather renders the prohibition of making available funds, financial assets and economic resources to listed individuals and entities applicable to EU beneficiaries.<sup>22</sup> However, there is a notable difference between considering certain political organizations as terrorist entities, and requiring Palestinian grant beneficiaries to acknowledge and thereby endorse the EU sanctions lists and identify such members or political parties as terrorists, by signing the grant contract. Furthermore, Article 1.5 bis places the policing burden of screening procedures on Palestinian CSOs themselves.

### ***3.2. The EU Counter-Terrorism Clause may not be Designed Intentionally for Palestine but Unjustly Affects the Palestinian People***

The EU Representative argues that Article 1.5 bis is applicable worldwide, does not impose different obligations on Palestinian beneficiaries compared to other countries, and that the general conditions cannot be amended to fit the specific context inherent to Palestine.<sup>23</sup>

While the EU counter-terrorism framework does not single out Palestine *per se*, imposing a counter-terrorism framework on a people struggling for their national liberation is, in itself, significantly problematic. In absence of an internationally agreed definition, the EU has advanced an overly broad definition of terrorist acts, mentioned above, that counteracts the context of the right of peoples to resist colonization, apartheid and oppression. The proper framework applicable to the Palestinian people's struggle for liberation is their right to legitimate resistance against Israeli oppression, foreign domination and institutionalized policies of discrimination in accordance to international law. The EU's all-encompassing definition of terrorist acts potentially covers all acts of political resistance carried out by Palestinian individuals and entities seeking their legitimate rights, or at least holds the potential to indiscriminately do so. Under the banner of "committing terrorist acts," the focus is on criminalizing forms of legitimate armed resistance that are nonetheless legal

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22 European Commission (Directorate General for Neighborhood and Enlargement Negotiations – DG NEAR) – EEAS meeting with Palestinian human rights organizations, Brussels, 22 January 2020

23 European Commission (Directorate General for Neighborhood and Enlargement Negotiations – DG NEAR) – EEAS meeting with Palestinian human rights organizations, Brussels, 22 January 2020; European Union Representative West Bank and Gaza Strip, UNWRA, Clarification Letter regarding EU-funded contracts, to the Palestinian NGO Network, 30 March 2020, available at: <http://www.pngo.net/wp-content/uploads/2020/04/EU-Clarification-letter-regarding-the-EU-funded-contracts1.pdf>

as per the UN General Assembly resolutions, and recognized as owned by the Palestinian people in the particular context of their resistance for liberation from colonial domination.<sup>24</sup> Palestinian legitimate armed resistance directed at legitimate military targets constitutes lawful acts, in compliance with customary humanitarian law provisions.<sup>25</sup>

According to the EU, Article 1.5 bis is formally aimed at preventing the funding of persons and entities that the EU considers as terrorists. In the Palestine context, it is allegedly aimed at ensuring that no EU funds are transferred to

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24 “2. Reaffirms the legitimacy of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, particularly armed struggle,” United Nations General Assembly, Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, A/RES/33/34, 29 November 1978, available at: <https://unispal.un.org/UNISpaL.NSF/0/D7340F04B82A2CB085256A9D006BA47A> [accessed 1 April 2020]; *see also* United Nations General Assembly, Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, A/RES/3246(XXIX), 29 November 1974, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C867EE1DBF29A6E5852568C6006B2F0C> [accessed 1 April 2020]; *see also* UNGA Resolution A/RES/3246 (XXIX; 29 November 1974), UNGA Resolution A/RES/33/24 (29 November 1978), UNGA Resolution A/RES/34/44 (23 November 1979), UNGA Resolution A/RES/35/35 (14 November 1980), UNGA Resolution A/RES/36/9 (28 October 1981)

25 “The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.” J.-M. Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, International Committee of the Red Cross, Volume 1: Rules, 2005, Rule 7, 25, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> ; *see also*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 48, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8A9E7E14C63C7F30C12563CD0051DC5C> [accessed 3 April 2020]. Along those lines, legitimate military targets are “[...] military objectives [that] are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” J.-M. Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, International Committee of the Red Cross, Volume 1: Rules, 2005, Rule 8, 29, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> ; *see also*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 52(2), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F08A9BC78AE360B3C12563CD0051DCD4> [accessed 3 April 2020]

Palestinian political parties listed in the EU sanction lists.<sup>26</sup> Although these are false Israeli allegations, they lead to the alienation and de-politicization of Palestinian civil society, as even persons acting in a personal capacity would be impacted by restrictive measures. In effect, Article 1.5 bis prevents interaction between Palestinian civil society involved in the Palestinian National Liberation movement and Palestinian political parties, and hinders the ability of Palestinian political actors to play an active role in Palestinian society. Furthermore, Palestinian CSOs are faced with the endless dilemma on how to work with Palestinian groups that are more or less closely affiliated with or sympathetic to the listed political parties. How can CSOs engage with and influence Palestinian decision makers if they acknowledge and endorse their classification as terrorists? The margin of action of Palestinian civil society is consequently shrinking to the point of de-politicization, although political engagement is an essential aspect of a liberation movement. This becomes obvious in Palestine where the struggle for political, civil, and socio-economic rights is political by nature.

In sum, Article 1.5 bis, intentionally or unintentionally, contributes to the de-politicization of Palestinian civil society, and to the labelling of legitimate resistance as terrorist acts. It must be noted that Palestinian legitimate resistance to Israeli colonization, oppression and apartheid should never be likened to terrorism in the first place. The inclusion of Palestinian political parties on the EU sanctions lists, as well as the very broad definition of the concept of terrorist acts as endorsed by the EU proves to be problematic, as they imply the criminalization of the Palestinian people's struggle for their right to self-determination. In the context of Article 1.5 bis, the uniqueness of the Palestinian context necessarily requires special treatment. It is both unjust and unfair to handle in the same way both CSOs working in an environment of armed conflict between a colonized people and a colonial power, and CSOs active in sovereign states.

### ***3.3. The EU Counter-Terrorism Clause Violates International Law and EU Obligations***

The EU Representative argues that the EU is fully supportive of “the Palestinian people in their quest for freedom, independence and self-determination,” and

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26 Shadi Othman, Communications and Information Officer from the EU Delegation in East Jerusalem, cited in Megan Giovannetti, “Why EU funds to Palestinian NGOs became a victim of misinformation,” 29 March 2020, available at: <https://www.al-monitor.com/pulse/originals/2020/03/eu-palestine-ngos-try-to-iron-out-discord-over-funding.html> [accessed 15 April 2020]



respects the right of the Palestinian people to mobilize “all means allowed under international law [...] to achieve a peaceful resolution of the Israeli-Palestinian conflict, in line with international agreed principles.”<sup>27</sup>

It is agreed that any resolution related to the ongoing international armed conflict (as defined by the Fourth Geneva Convention) in Palestine is inseparable from justice for the past and current violations of the Palestinian people’s most basic human rights, and the achievement of their legitimate right to self-determination, and that the latter is recognized under international law and a number of resolutions endorsed by the UN. While the EU has made efforts to condemn illegal and criminal Israeli policies, and from time to time denounced Israeli vilification campaigns targeting Palestinian CSOs as terrorist affiliates, these efforts are undermined by Article 1.5 (bis).

The equivocal and misleading language opted for by the EU representative in his official clarification letter says much about the normalizing political stance of the EU regarding the question of Palestine. Whilst the EU confirms its support for the “quest” of the Palestinian people for freedom, independence and self-determination, it links it with “all means” permitted under international law to achieve a “peaceful solution”. At first glance, the formula seems to be in line with the legitimate struggle of the Palestinian people, but upon careful exploration of the text, it appears that:

1. **The EU refers to the “quest for,” as opposed to “the right to” self-determination.** This formula contradicts the EU’s general support for “the right” of the Palestinian people to self-determination, that it officially recognized in 1980.<sup>28</sup> Such a shift in language may be only incidental, but its potential meaning and inner implications are legitimately troubling.
2. **The phrase “all means” refers to two elements: the “quest**

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27 European Union Representative West Bank and Gaza Strip, UNWRA, Clarification Letter regarding EU-funded contracts, to the Palestinian NGO Network, 30 March 2020, available at: <http://www.pngo.net/wp-content/uploads/2020/04/EU-Clarification-letter-regarding-the-EU-funded-contracts1.pdf>

28 The EU recognized the Palestinian people’s right to self-determination in 1980: “A just solution must finally be found to the Palestinian problem, which is not simply one of refugees. The Palestinian people, which is conscious of existing as such, must be placed in a position, by an appropriate process defined within the framework of the comprehensive peace settlement, to exercise fully its right to self-determination.” European Economic Community, Venice Declaration, 13 June 1980, article 6, available at: [http://eeas.europa.eu/archives/docs/mepp/docs/venice\\_declaration\\_1980\\_en.pdf](http://eeas.europa.eu/archives/docs/mepp/docs/venice_declaration_1980_en.pdf)

**for” self-determination, as well as the achievement of a "peaceful resolution" under international law.** Accordingly, "all means" refers to what is known as peaceful means of resolving international conflicts, which is precisely prescribed for governing international relationships among states.<sup>29</sup> These means are: good faith efforts, mediation, negotiation, litigation, and arbitration.<sup>30</sup> These are all mechanisms governing interstate relations as they are diplomatic and judicial mechanisms taking the form of mutual agreement between concerned states and/or between states with the assistance of the international community.

3. Under international law, **the use of all means of struggle in the context of achieving the peoples’ right to self-determination is regulated by rules that differ from the rules governing relations between states.** In regards to people fighting a foreign occupant or colonial and alien domination and racist regimes, the internationally well-established framework governing their right to self-determination is strongly tied with and includes the right to struggle by all means, including

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29 Charter of the United Nations, 1 UNTS XVI, 24 October 1945, article 2(3), available at: <https://www.un.org/en/sections/un-charter/chapter-i/index.html> [accessed 16 April 2020]; *see also* UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625 (XXV), 24 October 1970, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/25A1C8E35B23161C852570C4006E50AB> [accessed 16 April 2020]; *see also* UN General Assembly, Manila Declaration on the Peaceful Settlement of International Dispute, A/RES/3710, 15 November 1982, available at: [https://peacemaker.un.org/sites/peacemaker.un.org/files/GARES\\_ManilaDeclaration\\_ARES3710%28english%29\\_0.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/GARES_ManilaDeclaration_ARES3710%28english%29_0.pdf) ; *see also* UN General Assembly, 2005 World Summit Outcome, A/RES/60/1, 24 October 2005, paras. 73-76, available at: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_60\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf)

30 Charter of the United Nations, 1 UNTS XVI, 24 October 1945, articles 2(2), 33 and 36, available at: <https://www.un.org/en/sections/un-charter/chapter-i/index.html> [accessed 16 April 2020]; *see also* UN General Assembly, Manila Declaration on the Peaceful Settlement of International Dispute, A/RES/3710, 15 November 1982, para.5, available at: [https://peacemaker.un.org/sites/peacemaker.un.org/files/GARES\\_ManilaDeclaration\\_ARES3710%28english%29\\_0.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/GARES_ManilaDeclaration_ARES3710%28english%29_0.pdf) ; *see also* 1907 Peace Conference, Convention for the Pacific Settlement of International Disputes, 1907, articles 37-40, available at: <https://pca-cpa.org/wp-content/uploads/sites/6/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> ; United Nations, Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, preamble and article 66, available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

armed struggle.<sup>31</sup> This framework is not limited to interstate relations and the legal framework associated with peaceful means. Third parties that assist peoples in their struggle to achieve their legitimate right to self-determination are not considered as in breach of their duty of non-intervention in domestic affairs of another state since, conversely, “the use of force to deprive peoples of their national identity constitutes [in itself] a violation of their inalienable rights and of the principle of non-intervention.”<sup>32</sup>

The distinction between the frameworks governing states' conflict resolution by peaceful means on the one side, and the right to resist and struggle by all legitimate means as recognized under international law on the other side, has crucial legal and political consequences. The inclusion of the “quest” for freedom, independence and self-determination by “all means” in the EU’s formula is misleading wording and phrasing that could reveal an attempt, whether intentional or not, to reframe and exclude the Palestinian people’s right to struggle and achieve their right to self-determination, as recognized in international law.

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31 “Recognizes the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all States to provide material and moral assistance to the national liberation movements in colonial Territories,” UN General Assembly, Resolution 2105 (XX). Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 20 December 1965, para.10, available at: [www.worldlii.org/int/other/UNGA/1965/96.pdf](http://www.worldlii.org/int/other/UNGA/1965/96.pdf) [accessed 4 March 2020]; “Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.” UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625 (XXV), 24 October 1970, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/25A1C8E35B23161C852570C4006E50AB> [accessed 16 April 2020]; “Affirms the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal.” UN General Assembly, The Importance of the Universal Realization of the Right of People to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, A/RES/2649, 30 November 1970, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/14DA6ECEAD5F088A8525630A0072450D> [accessed 17 April 2020]; *see also supra* 22.

32 UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625 (XXV), 24 October 1970, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/25A1C8E35B23161C852570C4006E50AB> [accessed 16 April 2020]

The EU's language shift puts forward a normalizing approach at the expense of the Palestinian people's right to self-determination, and is associated with mounting pressure to impose a counter-terrorism framework on Palestinian civil society.

In shaping counter-terrorism policies, states remain bound by international law, and particularly human rights law. To do so, they must ensure that counter-terrorism measures do not contravene with their obligations derived from international law, including human rights, humanitarian and refugee law.<sup>33</sup>

Political conditional funding proves problematic per se because it is not just delineating the terms of the relationship between the EU donor and the beneficiaries, but also imposes the EU counter-terrorism framework to the latter. The labelling of acts of resistance as "terrorist acts" is grounded in the European context that, as demonstrated above, contravenes with international law and the Palestinian situation which is defined by the struggle for national liberation. International humanitarian law recognizes the Palestinian people's struggle against colonial domination and alien occupation in pursuance of their right to self-determination.<sup>34</sup> The Palestinian people's struggle for this right is indivisible from their right to resist, as recognized by the UN

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33 "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt measures in accordance with international law, and in particular, international human rights, refugee and humanitarian law." UN Security Council, Resolution 1456 (2003) Adopted by the Security Council at its 4688<sup>th</sup> meeting, on 20 January 2003, S/RES/1456(2003), para.6, available at: <http://unscr.com/en/resolutions/1456> [accessed 25 March 2020]; reaffirmed in UN Security Council, Resolution 1624 (2005) Adopted by the Security Council at its 5261st meeting, on 14 September 2005, S/RES/1624, 14 September 2005, para.4, available at: <http://unscr.com/en/resolutions/1624> [accessed 25 March 2020]; see also UN General Assembly, Resolution adopted by the General Assembly on 16 September 2005, A/RES/60/1, para.85, available at: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_60\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf) ; UN General Assembly, Resolution adopted by the General Assembly on 8 September 2006, A/RES/60/288, Article IV(2), available at: <https://www.un.org/counterterrorism/un-global-counter-terrorism-strategy> [accessed 25 March 2020]; UN General Assembly, International Convention for the Suppression of the Financing of Terrorism, Res. 54/109 of 9 December 1999, Article 21, available at: <https://www.un.org/law/cod/finterr.htm> [accessed 25 March 2020]

34 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 1, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6C86520D7EFAD527C12563CD0051D63C> [4 April 2020]

General Assembly in its Resolution 2105(XX).<sup>35</sup> Contrary to the EU's claim, Article 1.5 bis *does* require Palestinian grant recipients to discriminate against their stakeholders and beneficiaries based on their political affiliation.<sup>36</sup> The conditions attached to EU funding interfere with the Palestinian people's right to freely determine their political course of action, in an unacceptable manner, and indirectly undermines the Palestinian people's participation rights from which is derived the right to form political parties, including the right to take part in the conduct of public affairs,<sup>37</sup> as well as the right to freedom of association and assembly.<sup>38</sup>

Furthermore, political conditional funding based on counter-terrorism considerations excludes any natural person or entity that the EU would consider as involved in terrorist actions, who are benefiting from their grants. Such discrimination in the allocation of funding contravenes the most basic tenets of humanitarian action as directly endorsed by the EU in the European Consensus on Humanitarian Aid, founded on the principles of neutrality, humanity, independence and impartiality.<sup>39</sup> Political conditional funding is not neutral but obtrusive, as it has the potential to exclude any member of Palestinian civil society, they cripple the Palestinian people's tools for resistance, and allow for the EU's imposition of its own political framework. Moreover, by pushing forward the fight against "terrorism" and the promotion

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35 "Recognizes the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all States to provide material and moral assistance to the national liberation movements in colonial Territories," UN General Assembly, Resolution 2105 (XX). Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 20 December 1965, para.10, available at: [www.worldlii.org/int/other/UNGA/1965/96.pdf](http://www.worldlii.org/int/other/UNGA/1965/96.pdf)

36 Shadi Othman, Communications and Information Officer that the EU Delegation in East Jerusalem, cited in Megan Giovannetti, "Why EU funds to Palestinian NGOs became a victim of misinformation," 29 March 2020, available at: <https://www.al-monitor.com/pulse/originals/2020/03/eu-palestine-ngos-try-to-iron-out-discord-over-funding.html> [accessed 15 April 2020]

37 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, article 25(a), available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 25 March 2020]

38 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, article 22, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 25 March 2020]

39 European Union, The European Consensus on Humanitarian Aid, 30 January 2008, 2008/C/25/01, Article 3, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:42008X0130\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:42008X0130(01)) [accessed 27 March 2020]; European Union: European Commission (European Civil Protection and Humanitarian Aid Operations), European Consensus on Humanitarian Aid, Fact Sheets, 2017, available at: [https://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/consensus\\_en.pdf](https://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/consensus_en.pdf)

of the European approach to the question of Palestine and its “peaceful” resolution, political conditional funding conceals political objectives. This contravenes the principle of independence that entails that humanitarian objectives should remain separate from any other objectives. Lastly, political conditional funding is not impartial, but discriminatory, as humanitarian aid through EU funding is not supplied to anyone on the grounds of need, but potentially on the basis of political activism.

In sum, by imposing a counter-terrorism clause in its grant contract, the EU inadmissibly interferes with the Palestinian people’s right to self-determination, in a manner that even contradicts its own commitment to the Palestinian people’s empowered and pluralistic civil society, and the pursuance of their right to freedom, independence and self-determination.<sup>40</sup> On the contrary, Article 1.5 bis prevents the funding of Palestinian CSOs whose work is decisive in supporting Palestinian communities threatened by Israeli policies of forcible transfer and displacement, colonization, annexation and apartheid. In effect, the EU’s grant approach as well as its intentional or unintentional advancement of political goals are serving these Israeli policies, that are not only at odds with the EU’s own commitment to human rights and international law, but that will also destroy the credibility of Palestinian CSOs and the EU itself among the Palestinian people.

### ***3.4. The EU Counter-Terrorism Clause Contradicts with Palestinian Laws, Including Palestinian Law of Associations***

The EU Representative indicates that EU Law constitutes the governing law for EU grant contracts, including applicable EU legislation on restrictive measures.<sup>41</sup> Article 1.5 bis on conditional funding should therefore be respected as part of the applicable EU legislation.

However, there exists a principled legal prohibition to accept conditional funding under Palestinian law. Article 32 of the Palestinian Law No.1, 2000, stipulates that “[...] associations and institutions are entitled to receive

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40 European Union Representative West Bank and Gaza Strip, UNWRA, Clarification Letter regarding EU-funded contracts, to the Palestinian NGO Network, 30 March 2020, available at: <http://www.pngo.net/wp-content/uploads/2020/04/EU-Clarification-letter-regarding-the-EU-funded-contracts1.pdf>

41 European Union Representative West Bank and Gaza Strip, UNWRA, Clarification Letter regarding EU-funded contracts, to the Palestinian NGO Network, 30 March 2020, available at: <http://www.pngo.net/wp-content/uploads/2020/04/EU-Clarification-letter-regarding-the-EU-funded-contracts1.pdf>

unconditional assistances to perform their work”.<sup>42</sup> Financial assistance, in particular, can take the form of “gifts, grants and unconditional assistance [...]”.<sup>43</sup> Thus, it is derived from Palestinian law that conditional funding is prohibited in principle. However, this general and absolute prohibition does include two exceptions. One, the administrative and financial conditions that aim to fulfill the good governance rule.<sup>44</sup> Examples of these kinds of conditions can be found in conditions requiring the completion of annual financial audit reports or enabling donors to double check and compare original invoices with relevant payments. Such conditions are not only acceptable but welcome by Palestinian associations. Second, the allocation of expenditures through which donors can specify what activities/items of the budget that its donation is designated to cover.<sup>45</sup> Examples of this sort of acceptable conditions are the donor’s coverage of international legal advocacy activities, conducting a specific piece of research, or providing specific humanitarian aid to specific group or categories of beneficiaries. This does not mean that the donor is entitled to impose a condition preventing an organization from conducting other activities that it does not fund such as international and local awareness-raising activities which could be covered by other donors.

Here, it should be noted that the selected activities or items are not created or imposed by donors; rather they are chosen from the already designed plan, approved proposal or budget of the association itself. These activities are usually set in the association’s strategy through a project proposal that has already been approved by the donors themselves. It is understood that both the partner CSO’s strategy and approved proposal are known to donors in advance and constitute the mutual interest of the donor and the CSO. This then leads to the conclusion that the donor can refrain from contracting and funding any organization which does not have activities that address its priorities. Therefore, it is reasonable to affirm that the donor can set a condition to limit its grant to cover specific activities, and to prevent an organization from making its grant available to cover activities that are not within their scope of

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42 Palestinian Law No.1 Concerning Civil Associations and Institutions, 2000, Article 32.

43 Executive Regulations of the Law Concerning Civil Associations and Institutions No.1 of 2000, Cabinet Resolution No.9 of 2003, Chapter II, Financial Affairs, Article 50.

44 “Aids in which the donor requires the association to follow certain accounting rules to ensure transparency and proper use of the aid.” Executive Regulations of the Law Concerning Civil Associations and Institutions No.1 of 2000, Cabinet Resolution No.9 of 2003, Chapter II, Financial Affairs, Article 51(1).

45 “Aids in which the donor requires to spend on a specific activity of the association’s work or to cover a specific item of the budget of the association or funded project.” Executive Regulations of the Law Concerning Civil Associations and Institutions No.1 of 2000, Cabinet Resolution No.9 of 2003, Chapter II, Financial Affairs, Article 51(2).



work. However, the donor cannot impose a general condition preventing the organization from utilizing other financial resources to cover activities that are not covered by its donation. In other words, while the donor has an option to choose which organization it wants to cooperate with and fund, it has no right to impose restrictive or prohibitive conditions that extends to all activities of the organization, namely those covered by other donors. If a donor does not agree on or accept specific activities run by an organization (assuming that they already approved an application/project and are well aware of the organization's strategy), it can choose not to support or fund it in the first place. However, the donor is not within its rights to limit the organization's work. Such conditions that limit CSOs' work or forcibly change their activities amount to imposing the donor agenda upon organizations, which in turn is equivalent to deploying funds for donors' own objectives. Despite the legitimacy of specific objectives that might be for the interests of the organization and final beneficiaries, this type of interference in principle opens the door for the same donor or other donors to impose illegal conditions or conditions that may contradict with the people's ultimate interests.

In sum, Article 1.5 bis and political conditional funding in EU grants in general, raise a legal dilemma for Palestinian CSOs that are bound by legitimate national restrictions on the acceptance of political conditional funding under Palestinian law. Admittedly, Article 13 of the general conditions applicable to EU-financed grant contracts for external actions prescribes that EU grant contracts shall be regulated by European law, and Belgian law if required.<sup>46</sup> However, local law cannot be considered of no relevance, given that Palestinian CSOs remain legally obligated to comply with Palestinian law. Taken in conjunction with the fact that there is no explicit legal obligation under EU, and alternatively Belgian legislation to include a counter-terrorism clause such as Article 1.5 bis in grant contracts, the EU disproportionately exceeds a reasonable degree of discretion as a donor by imposing political conditions to the funding of Palestinian CSOs.

### ***3.5. By Imposing the Counter-Terrorism Clause on Palestinian civil society, the EU Indirectly Reinforces the Allegation that they Support Terrorism***

The European Commission argues that dropping the clause on conditional funding for Palestinian organizations would prove counter-productive, as it

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<sup>46</sup> Annex II General Conditions Applicable to European Union-Financed Grant Contracts for External Actions, July 2019, Article 1.5 bis, available at: [https://eeas.europa.eu/sites/eeas/files/e3h2\\_gencond\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/e3h2_gencond_en_0.pdf)



would be perceived as retreating from combatting terrorism and could backfire on Palestinian civil society.<sup>47</sup>

However, as explained above, the definition of terrorist acts as put forward by the EU is adapted to a general peace paradigm that reflects the state of current international relations in Europe, but with no consistency addressing the unique context of Palestine and the Palestinian people (military occupation, annexation, foreign colonization and oppression, and apartheid). This context is derived from multiple humanitarian law provisions enshrined in the Geneva Conventions that, within the framework of an armed conflict, acts of terrorism target the civilian population or persons not or no longer engaged in hostilities.<sup>48</sup> On the contrary, in a people's pursuance of their liberation/their right to self-determination, legitimate resistance does not constitute terrorist acts under international law. Thus, the Palestinian people have a definition imposed on them that claims that they are committing terrorist acts, combined with attached liabilities that in no way adhere to their legal and political context. As a result, the terrorism label, with all the adverse implications attached, is forced upon the Palestinian people to discredit, delegitimize and defame their acts of national liberation and struggle.

Imposing such a counter-terrorism clause on Palestinian civil society that operates in the context of legitimate resistance is actually reinforcing the stigmatization of Palestinian resistance under the cover of fighting terrorism. Stigmatizing national resistance does not reinforce the fight against real terrorism worldwide, but rather undermines it.

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47 European Commission (Directorate General for Neighborhood and Enlargement Negotiations – DG NEAR) – EEAS meeting with Palestinian human rights organizations, Brussels, 22 January 2020

48 “Acts or threats of violence where the primary purpose of which is to spread terror among the civilian population are prohibited,” J.-M. Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, International Committee of the Red Cross, Volume 1: Rules, 2005, Rule 2, 8, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> ; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 51(2), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750065?OpenDocument> [accessed 3 April 2020]; see also the prohibition of “all measures of [...] terrorism” directed at protected persons, International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, article 33, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=72728B6DE56C7A68C12563CD0051BC40> [accessed 3 April 2020]

This alone casts significant doubt on the EU's underlying intention in promoting and maintaining a counter-terrorism clause with regard to grant contracts that involve Palestinian CSOs. Furthermore, BADIL, through the Secretary of Palestinian Liberation Organization, proposed to replace Article 1.5 bis with the commitment that grant beneficiaries will not "make any funds of the EU grant available to any political group or organization." Such an alternative would have had the merit of conforming with a reasonable principle of due diligence, complying with the EU's alleged objective of preventing the channeling of EU funds to political parties,<sup>49</sup> while not forcing CSOs to recognize the EU sanctions lists and submitting Palestinian civil society to an immoral screening and vetting process. The EU's rejection of this alternative commitment raises further doubt on the real intent behind Article 1.5 bis, given its implications in terms of the de-politicization of the Palestinian people.

### ***3.6.Nothing Proves that the EU Sanctions Lists will not Include Palestinian Individuals in the Future***

The EU Representative points out that no Palestinian persons are currently included in the EU sanctions lists.<sup>50</sup>

The EU Consolidated Financial Sanctions List indeed does not currently name any Palestinian natural person, but does comprise of several Palestinian political and resistance factions, namely, Abu Nidal Organization, Al-Aqsa Martyrs' Brigades, Al-Aqsa e. V., Hamas and Hamas-Izz al-Din al-Qassem, Palestinian Islamic Jihad, Popular Front for the Liberation of Palestine, and Popular Front for the Liberation of Palestine – General Command.<sup>51</sup> The current absence of Palestinian individuals on the EU sanctions lists does

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49 See Shadi Othman, Communications and Information Officer of the EU Delegation in East Jerusalem, cited in Megan Giovannetti, "Why EU funds to Palestinian NGOs became a victim of misinformation," 29 March 2020, available at: <https://www.al-monitor.com/pulse/originals/2020/03/eu-palestine-ngos-try-to-iron-out-discord-over-funding.html> [accessed 15 April 2020].

50 European Union Representative West Bank and Gaza Strip, UNWRA, Clarification Letter regarding EU-funded contracts, to the Palestinian NGO Network, 30 March 2020, available at: <http://www.pngo.net/wp-content/uploads/2020/04/EU-Clarification-letter-regarding-the-EU-funded-contracts1.pdf>

51 Council Implementing Regulation (EU) 2020/19 of 13 January 2020 Implementing Article 2(3) of Regulation (EC) No 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, and Repealing Implementing Regulation (EU) 2019/1337, OJEU L1 8/1, 14 January 2020, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2020.008.01.0001.01.ENG&toc=OJ:L:2020:008:TOC> [accessed 31 January 2020]

not guarantee that this will remain the status quo. It is not disputed that the inclusion of a person or an entity on the EU sanctions lists involves a number of safeguards including the right to judicial review by the EU Court of Justice. However, the existence of such safeguarding judiciary procedures does not challenge Article 1.5 bis in itself, its illegitimacy and immorality. Further, it is not clear whether Palestinian political entities or persons will pass the judicial review test, especially given the increasingly inflammatory counter-terrorism context, through the imposition of a western (European and American) understanding of terrorist acts . The EU sanctions lists are regularly updated, and the listing of Palestinian political factions as terrorist entities tends to support this assumption.<sup>52</sup>

Of particular concern is the risk of US and Israeli interference in the EU's process for creating and updating sanctions lists, as Palestinian persons and entities could be targeted later on. According to the Common Council Position 2001/931, lists of natural persons, groups and entities subjected to restrictive measures must be based on "precise information or material in the relevant file which indicates that a decision has been taken by a competent authority."<sup>53</sup> Competent authorities include judicial authorities or, alternatively, an equivalent competent authority provided that the rights of defense and the right to effective judicial protection are ensured.<sup>54</sup> **Not only has the EU Court of Justice held that national competent authorities do not have to be located in an EU member state,<sup>55</sup> but it has also established a precedent by validating the listing of Hamas as a terrorist entity.** Notably, the precedent referred to US decisions pursuant to section 219 of the US Immigration and Nationality Act, as well as Executive Order 13224. The Court considered these decisions as emanating from "competent authorities" because they are under

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52 Council Regulation (EC) no 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, OJEU L 344/70, 28 December 2001, Article 2(3), available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF>

53 Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP, 28 December 2001, Article 1(4), available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001E0931> [accessed 31 March 2020]

54 Court of Justice of the European Union (Sixth Chamber), Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union, Joint Cases T-208/11 and T-508/11, 16 October 2014, para. 139, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011TJ0208> [accessed 1 May 2020]

55 Court of Justice of the European Union (Sixth Chamber), Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union, Joint Cases T-208/11 and T-508/11, 16 October 2014, para. 136, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011TJ0208> [accessed 1 May 2020]

administrative and judicial review.<sup>56</sup> The EU Court of Justice's reliance on US executive decisions to form its own judgments demonstrates the influence the US has in the framing of EU policies and jurisprudence on terrorism-related matters. Given the current climate of criminalization and increasing labeling of Palestinian organizations as terrorists in the US, as described below, it is expected that the EU will keep adding more Palestinian organizations and eventually persons to its sanctions lists, closely following the US model.

The EU has not referred to Israeli courts' judgments so far, but two elements should be highlighted in this regard. First, considering the current listing process of the EU, **Israeli courts, if not the Israeli executive authorities themselves, could potentially be deemed "competent authorities" on which to rely on.**<sup>57</sup> Second, contrary to what has been argued, there is no compelling reason to believe that the EU Court of Justice will not be relying on Israeli authorities later on, even though "there is awareness about the lack of proper due process guarantees in Israel."<sup>58</sup> **In fact, Israel exerts an ever-growing influence on EU terrorism policies, that is exemplified by the signature of an agreement between the European Union Agency for Law Enforcement Cooperation (Europol) and Israel to fight organized crime and terrorism in 2018, the first of its kind with a non-EU member state.**<sup>59</sup> As such, the growing influence exerted by the US and Israel on the EU's counter-terrorism policy raises concern about its utilization to further muffle Palestinian resistance to colonization, occupation and apartheid.

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56 Court of Justice of the European Union (Grand Chamber), Council of the European Union v. Hamas, Case C-79/15 P, 26 July 2017, para.10, available at: <http://curia.europa.eu/juris/document/document.jspx?text=&docid=193202&doclang=EN> [accessed 15 April 2020]

57 It should be noted that, pursuant to Article 12.2.(d) of Annex II of the general conditions related to EU-financed grant contracts for external actions, the termination of the grant contract can be motivated by "[the establishment] by a final judgment or a final administrative decision or by proof in possession of the contracting authority that the beneficiary(ies) has been guilty of [...] involvement in a criminal organization, money laundering or terrorist financing, terrorist related offences [...]" No precision is given on the nature of the competent authorities issuing such judgments or administrative decisions. It is therefore fair to be concerned that Israeli courts or administrative entities would be considered as competent authorities. See Annex II General Conditions Applicable to European Union-Financed Grant Contracts for External Actions, July 2019, Article 1.5 bis, available at: [https://eeas.europa.eu/sites/eeas/files/e3h2\\_gencond\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/e3h2_gencond_en_0.pdf)

58 See for instance, Andreina De Leo & Giovanni Fassina, "General Conditions Application to EU-Financed Grant Contracts for External Actions: Explanation of the Background Legislation, Meaning of the Clause and Likely Impact on Civil Society Organizations Operating in Palestine," *European Legal Support Center*, 7 March 2020, para.12.

59 "Europol and Israel Sign Arrangement to Tackle Cross-Border Crime," *Europol*, news article, 17 July 2018, available at: <https://www.europol.europa.eu/newsroom/news/europol-and-israel-sign-arrangement-to-tackle-cross-border-crime> [accessed 15 April 2020]

Moreover, while no Palestinian person is currently identified on the EU sanctions lists, the EU does not draw any clear line between entities listed in the EU sanctions lists and individuals associated to these entities. Under the EU Council Common Position of 27 December 2001 that provides the legal framework for sanctions lists, “persons, groups and entities involved in terrorist acts” not only include those “who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,” but also persons, groups and entities “owned or controlled directly or indirectly by” thereof, and/or “acting on behalf of, or under the direction of” thereof.<sup>60</sup>

This framing carries different implications.

- **The restrictive measures could apply to any Palestinian person alleged to be acting on behalf or under the direction of a listed organization, while not being personally listed.** For example, it is uncertain whether Palestinian CSOs would be able to organize a popular march in support of a person convicted by an Israeli court for so called “terrorist acts,” or belonging to one of the listed Palestinian factions, although it can be argued that there is currently nothing in the EU legal framework that explicitly prohibits this kind of involvement or activity.
- **Although Article 1.5 bis prohibits the participation in EU funded activities of individuals associated with entities on the list in their official capacity, it remains unclear whether these persons could participate in their personal capacity, and how such screening could even be implemented in practice.**<sup>61</sup>

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60 Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP, 28 December 2001, Article 1(2), available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001E0931> [accessed 31 March 2020]

61 A legal analysis on Article 1.5 bis published by the European Legal Support Center even admits in a disclaimer that “it cannot be excluded that the EU could adopt a broader interpretation of the clause, thus requiring grant beneficiaries to also make sure that financial resources are not allocated to natural persons affiliated to the entities listed in the restrictive measures,” See Andreina De Leo & Giovanni Fassina, “General Conditions Application to EU-Financed Grant Contracts for External Actions: Explanation of the Background Legislation, Meaning of the Clause and Likely Impact on Civil Society Organizations Operating in Palestine,” *European Legal Support Center*, 7 March 2020, para.28.

For example, it clearly appears that inviting the head of Hamas to a workshop would be considered the same as inviting the Hamas movement itself,<sup>62</sup> but all case scenarios are not as clear-cut, especially if participants to workshops and activities are indirectly acting under the direction of Hamas.

- It is entailed that **non-listed groups or entities owned or controlled by listed persons and entities would also be targeted by the restrictive measures, as EU funds could indirectly be made available to the latter.**<sup>63</sup> For example, a Palestinian CSO would have to refrain from supporting a household victim of an administrative home demolition, because one of the family members is associated to a Palestinian political faction on the EU lists. A further concrete example is that the mere existence of an organization's staff, board or general assembly members having been affiliated to, or sympathetic with, one of the listed factions could be enough to accuse Palestinian CSOs of being owned or controlled by terrorist persons. This allegation is almost systematically advanced by Zionist-Israeli campaigns in order to discredit Palestinian CSOs.
- It remains unclear **whether Palestinian grant recipients would need to veto affiliated, sympathizing and related persons to Palestinian entities listed in the EU sanctions lists**, as they are “not automatically excluded” from getting EU funds.<sup>64</sup> This is inherently problematic as it entails the

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62 Shadi Othman, Communications and Information Officer from the EU Delegation in East Jerusalem, cited in Megan Giovannetti, “Why EU funds to Palestinian NGOs became a victim of misinformation,” 29 March 2020, available at: <https://www.al-monitor.com/pulse/originals/2020/03/eu-palestine-ngos-try-to-iron-out-discord-over-funding.html> [accessed 15 April 2020].

63 European Union: Council of the European Union, “Restrictive Measures (Sanctions) – Update of the EU Best Practices for the Effective Implementation of Restrictive Measures,” 8519/18, 4 May 2018, para.66, available at: <http://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf>

64 Office of the European Union Representative (West Bank and Gaza Strip, UNWRA), “European Union Clarification Letter,” Response to EU Meeting with the Palestinian Non-Governmental Organizations Network-PNGO, 17 December 2019

requirement of vetting and screening and paves the way for uncertainty and risk of arbitrariness.<sup>65</sup>

The screening and vetting processes are required not only “at the initial distribution of funds” but “down to the level of final beneficiary,”<sup>66</sup> implying that Palestinian grant recipients must carry out a systematic and generalized control of all their stakeholders at each stage of the implementation of their projects.

In combination, and given the wider ramifications implied by the EU sanctions system, Article 1.5 bis would require Palestinian grant recipients to carry out a generalized system of screening and vetting of the overall Palestinian civil society. **As such, it lays the foundation for the exclusion from EU funding of virtually all Palestinian political and civil society activists, and their families and partners, whether on the basis of arbitrary political detention or participation in former, current or future civil and political struggles and activities.** In practice, Article 1.5 bis would also have the effect of drastically limiting the eligibility of persons in need of assistance from Palestinian CSOs, restricting their activities and scope of interventions.

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65 N.B. : Clarifications provided by EU representatives towards Palestinian CSOs regarding the implications of Article 1.5 bis have been inconsistent over the past few months. In an email dated 17 December 2019 addressed to the Palestinian Non-Governmental Organizations network [PNGO] by the Office of the European Union Representative (West Bank & Gaza Strip, UNWRA), it is explained that “natural persons affiliated/sympathizing/supporting/related to any of the group or entity listed in the EU restrictive lists are not automatically excluded from receiving EU funds [emphasis added].” However, the term “automatically” disappeared in the EU Representative’s official clarification letter addressed to PNGO dated 30 March 2020, that reads “a natural person affiliated to, sympathizing with, or supporting any of the groups or entities mentioned in the EU restrictive lists is not excluded from benefiting from EU-funded activities, [...]” This lack of consistency gives rise to doubts as to the coherence of the EU approach regarding political conditional funding. This also suggests that, in absence of a clear and set EU policy, the scope of Article 1.5 bis could potentially be extended in the future.

66 European Union: European Commission, “Procurement and Grants for European Union External Actions – A Practical Guide,” Version 2019.0, 15 July 2019, para.2.4, available at: <https://ec.europa.eu/europeaid/prag/document.do?nodeNumber=2.4> [accessed 1 May 2020]



### ***3.7. The EU Counter-Terrorism Clause is Similar to the US's Financing Measures***

It has been repeatedly argued in the course of discussions between Palestinian CSOs and EU representatives that the EU Article 1.5 bis is not comparable to US counter-terrorism measures, especially as imposed within the USAID framework.

On the contrary, the general EU measures, laws and regulations aimed at countering terrorism, including funding, are similarly patterned on the US counter-terrorism framework. Both the US and EU frameworks were gradually reinforced in the wake of 9/11, although the US charge against Palestinian resistance has proved more targeted and straightforward than the EU's – for the time being.

By and large, the US and the EU, in the expansion and evolution of their respective counter-terrorism policies, have been intrinsically cooperative and interdependent since 9/11, and the EU affirmed acting in close cooperation with the US.<sup>67</sup> Counter-terrorism cooperation has taken the form of information-sharing, notably through the Terrorist Finance Tracking Program aimed at transferring and processing data to discover and investigate attacks, and to identify, track and pursue terrorist individuals and entities.<sup>68</sup>

Furthermore, the EU's counter-terrorism approach has largely been following the US model. This is particularly evident in the endorsement of a common European definition of terrorist offenses – including the offense of participation in the activities of a terrorist group, including funding,<sup>69</sup> combined with a common European list of individuals and

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67 “On 8 October 2001, the Council reiterated the Union’s determination to attack the sources which fund terrorism, in close cooperation with the United States.” Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP, 28 December 2001, (3), available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001E0931> [accessed 31 March 2020]

68 US Department of the Treasury, “Terrorist Finance Tracking Program,” available at: <https://home.treasury.gov/system/files/246/Terrorist-Finance-Tracking-Program-Questions-and-Answers.pdf>

69 European Union: Council of the European Union, Council Framework Decision 2002/475 on Combating Terrorism, 13 June 2002, 2002/475/JHA, Articles 1 and 2, available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32002F0475> [accessed 24 March 2020]



entities considered as terrorists.<sup>70</sup> The EU Council Common Position of 27 December 2001 requires the freezing of assets and the prevention of resources available to “persons, groups and entities involved in terrorist acts.”<sup>71</sup> Combatting terrorism financing pertains to the third pillar of the EU Counter-Terrorism Strategy since 2005, which contains a particular reference to the prevention of “abuse of the non-profit sector.”<sup>72</sup> **The EU measures largely echo similar measures taken by the US to counter terrorism financing.** This encompasses the blocking of assets of, as well as the prohibition of humanitarian assistance to groups considered as terrorist organizations, to disrupt financial support networks,<sup>73</sup> and the reinforced prohibition of terrorism financing in the 2001 US Patriot Act,<sup>74</sup> as reaffirmed in the 2005 US Patriot Improvement and Reauthorization Act.<sup>75</sup>

In imposing a counter-terrorism framework on Palestinian CSOs, the EU follows in the footsteps of the US, through its 2006 Palestinian Anti-Terrorist Act. This act has been enforcing the labelling of Palestinian political factions as “terror organizations,” preventing any substantial – including financial – interactions between US agencies and these

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70 Council Regulation (EC), No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, Article 2(3) , available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R2580:20130707:EN:PDF>

71 European Union: Council of the European Union, Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, 27 December 2001, 2001/931/CFSP, Article 1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001E0931> [accessed 24 March 2020]

72 “Tackle terrorist financing, including by implementing agreed legislation working to prevent the abuse of the non-profit sector, and reviewing the EU’s overall performance in this area.” The European Union Counter-Terrorism Strategy, Doc. 14469/4/05 REV 4, 30 November 2005, 16, available at: <https://www.asser.nl/media/2403/cleer-wp-2014-2.pdf>

73 Executive Order 13224, 66 FR 49079, 27 September 2001, available at: <https://www.federalregister.gov/documents/2001/09/25/01-24205/blocking-property-and-prohibiting-transactions-with-persons-who-commit-threaten-to-commit-or-support> [accessed 23 March 2020]

74 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, available at: <https://www.govinfo.gov/content/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf> [accessed 23 March 2020]

75 USA Patriot Improvement and Reauthorization Act of 2005, available at: <https://www.congress.gov/109/plaws/publ177/PLAW-109publ177.pdf> ; see also US Department of Justice, “Fact Sheet: USA Patriot Act Improvement and Reauthorization Act of 2005,” 2 March 2006, available at: [https://www.justice.gov/archive/opa/pr/2006/March/06\\_oppa\\_113.html](https://www.justice.gov/archive/opa/pr/2006/March/06_oppa_113.html) [accessed 23 March 2020]

Palestinian organizations, and pressing the international community to do the same.<sup>76</sup>

USAID is the main US federal body in charge of administering foreign aid and development assistance. **Article 1.5 bis of Annex II of the general conditions applicable to EU-financed grant contracts for external actions shares striking similarities to the Anti-Terrorism Certification (ATC) that USAID grant recipients are required to comply with, pursuant to Executive Order 13224 (2001).**<sup>77</sup> Beneficiaries of USAID funds must confirm that they “did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated, or participated in terrorist acts.”<sup>78</sup> The language of the USAID ATC directly and specifically refers to the concept of terrorism. Although the counter-terrorism framing of Article 1.5 bis of the EU grant contracts is more contained, the intent remains identical. USAID grant recipients are required to ensure that they do not provide any material support or resources to individuals or entities listed as “Specially Designated Nationals and Blocked Persons” held by the Office of Foreign Assets Control (OFAC) or identified by the UN Security sanctions committee.<sup>79</sup> This clause relative to USAID certification regarding terrorist financing has proved to have far-reaching consequences on USAID fund recipients, including on projects not funded by USAID. Between the lines, it entails that any USAID grant recipient must not have been involved in projects – regardless whether the funds were provided by a US funding agency or not - involving entities enlisted as terrorist by the US. This clause is retroactive for a period of ten years, which means that all projects carried out and completed within that timeframe are also under scrutiny. These

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76 Palestinian Anti-Terrorism Act of 2006, Sec.10, available at: <https://www.congress.gov/109/crpt/hrpt462/CRPT-109hrpt462-pt2.pdf>

77 Executive Order 13224, 66 FR 49079, 27 September 2001, available at: <https://www.federalregister.gov/documents/2001/09/25/01-24205/blocking-property-and-prohibiting-transactions-with-persons-who-commit-threaten-to-commit-or-support> [accessed 23 March 2020]

78 USAID, Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303, 7 June 2018, Article 4(1), available at: <https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf>

79 USAID, Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303, 7 June 2018, Article 4(2), available at: <https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf>

underlying implications were made clear in the context of a settlement between the US and the Norwegian People's Aid in 2018.<sup>80</sup> USAID's overly broad counter-terrorism requirements instill and reinforce a system of control on the whole donor community and non-governmental organizations (NGOs), whether they are funded by USAID or not, including in Europe.

Admittedly, the EU's counter-terrorism policies regarding external grants are currently not as robust as USAID's, which even requires the implementation of "reasonable monitoring and oversight procedures."<sup>81</sup> However, there is no guarantee that the EU will not be reinforcing and restricting funding following the model of the US, similar to the current Partner Vetting System (PVS) Pilot Program carried out by USAID and the US Department of State. The PVS entails the vetting of US and non-US persons benefiting from USAID's foreign financial assistance according to a risk-based approach.<sup>82</sup>

In the long run, the EU is clearly following the increasingly tightening counter-terrorism trajectory taken by the US. Under the current EU framework, only administrative sanctions are attached to non-compliance

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80 A settlement was reached in April 2018 between the US Attorney for the Southern District of New York and the Norwegian People's Aid against the background of a civil law complaint involving the above mentioned anti-terrorist certification clause. The Norwegian People's Aid was charged for having provided training and expert advice or assistance to Iran, Hamas, Democratic Front for the Liberation of Palestine and Popular Front for the Liberation of Palestine, although these projects did not involve USAID funds. See "Manhattan US Attorney Announces Settlement With Norwegian Not-For-Profit, Resolving Claims That It Provided Material Support To Iran, Hamas, And Other Prohibited Parties Under US Law," US Attorney South District of New York, press release, 3 April 2018, available at: <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-settlement-norwegian-not-profit-resolving-claims-it> [accessed 24 April 2020]; see also United States of America v. Norwegian People's Aid, 15 Civ. 4892 (GHW), S.D.N.Y. 30 March 2018, available at: <https://www.justice.gov/usao-sdny/press-release/file/1048451/download> [accessed 24 April 2020]; see also Norwegian People's Aid, "Norwegian People's Aid Reaches a Settlement with the US government," press release, available at: <https://npaid.org/news/norwegian-peoples-aid-reaches-a-settlement-with-the-u-s-government> [accessed 24 April 2020]

81 USAID, Certifications, Assurances, Representations, and Other Statements of the Recipient: A Mandatory Reference for ADS Chapter 303, 7 June 2018, Article 4(2), available at: <https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf>

82 USAID, "USAID/State Partner Vetting System Pilot Program: Frequently Asked Questions," last updated 17 March 2016, available at: <https://www.usaid.gov/work-usaid/partner-vetting-system> [accessed 23 March 2020]

with Article 1.5 bis.<sup>83</sup> However, it cannot be asserted that the EU will not proceed to the next stage: following the US model of criminal liability under US jurisdiction imposed on any recipient of US foreign assistance, as provided by the 2018 Anti-Terrorism Clarification Act.<sup>84</sup> **In the meantime, the termination of a contract on the grounds of not complying with Article 1.5 does not challenge the merits of such clause per se, and will provide another argument used by Israel or the US to reinforce and reaffirm the terrorist label on Palestinian civil society.**

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83 Grounds for termination of a grant contract include “[failing], without justification, to fulfill any substantial obligation incumbent on them individually or collectively by this contract [...]” and having been found “guilty of [...] involvement in a criminal organization, money laundering or terrorist financing, terrorist related offenses [...].” *See* Annex II General Conditions Applicable to European Union-Financed Grant Contracts for External Actions, July 2019, Article 12.2(a) and Article 12.2(d), available at: [https://eeas.europa.eu/sites/eeas/files/e3h2\\_gencond\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/e3h2_gencond_en_0.pdf) . Furthermore, “a sanction of exclusion from all contracts and grants financed by the EU, may be imposed [...] upon the beneficiary(ies) who in particular [...] is guilty of [...] participation in a criminal organization, money laundering, terrorist-related offences.” *See* Annex II General Conditions Applicable to European Union-Financed Grant Contracts for External Actions, July 2019, Article 12.8, available at: [https://eeas.europa.eu/sites/eeas/files/e3h2\\_gencond\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/e3h2_gencond_en_0.pdf)

84 Anti-Terrorism Clarification Act of 2018, 18 USC 1, 3 October 2008, Section 4(a), available at: <https://www.congress.gov/115/plaws/publ253/PLAW-115publ253.pdf>

## 4. CONCLUSION

The above demonstrates that imposing political conditional funding on CSOs pursuing the right to self-determination of an oppressed and colonized people is not only morally and politically unacceptable, but also illegal in consideration of international law. In particular:

- Although consistent with the continuous reinforcement of the counter-terrorism regime within the EU, Article 1.5 bis was only included in grant contracts with Palestinian CSOs in 2019 and constitutes an alarming precedent that undermines the trust upon which the EU-Palestine relations are based.
- Article 1.5 bis imposes a new obligation on Palestinian grant recipients, as it entails the endorsement of EU restrictive measures, screening and vetting processes of the Palestinian CSOs' own people, the Palestinians. By forcing such conditions upon Palestinian grant beneficiaries, the EU is unacceptably asking Palestinian CSOs to monitor and police their own counterparts and to endorse the European counter-terrorism framework to do so.
- Article 1.5 bis is not only inconsistent with the principles of humanitarian action, but also with the Palestinian people's legitimate human rights as recognized under international law, including the right to self-determination, and the right to resist by any legitimate means against foreign oppression, occupation, colonization and apartheid. The current counter-terrorism framework imposed on Palestinian civil society by means of Article 1.5 bis criminalizes the Palestinian people's struggle for their right to self-determination, contributes to the de-politicization and alienation of Palestinian civil society, and neglects the Palestinian people's right to legitimate resistance
- Article 1.5 bis contradicts Palestinian law that prohibits political conditional funding, therefore imposing an unacceptable legal and moral dilemma on Palestinian CSOs vis-a-vis their own domestic law.
- Given that Article 1.5 bis reflects the current EU counter-terrorism policies, largely influenced by the US and Israel, there

is solid evidence that support the possible escalation of measures targeting Palestinian civil society and labelling their work under the framework of terrorism in order to discredit them.

- Although framed in an innocuous way, and while no Palestinian person currently appears on EU sanctions lists, Article 1.5 bis would have dramatic consequences as it lays the foundations for a system of generalized screening and vetting of the whole of Palestinian civil society.
- If compared with the USAID's conditions imposed in the early 21<sup>st</sup> century, the EU's imposition of a terrorist framework on Palestinian civil society occurred later but follows the increasingly tight counter-terrorism framework imposed by the US.

In sum, Article 1.5 bis does not only discredit the Palestinian people's legitimate struggle to fulfill their right to self-determination vis-à-vis the international community, but foremost, dishonors Palestinian CSOs at a national level, undermining the integrity and credibility of the Palestinian CSOs amongst the Palestinian community, breaking up solid and essential relationships between partners, which then fosters fragmentation of Palestinian civil society and entrenches isolation of Palestinian CSOs.

Consistently with the above, Article 1.5 bis can hardly be supported on the basis of conjectural reasoning on the interpretation that will be given to its terms.<sup>85</sup> Such hypothetical legal analyses do not offer any convincing insight into the concrete implementation of Article 1.5 bis, but rather reinforces the concern that its implications remain uncertain, and that the clause in itself does not offer any guarantee.

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85 A legal analysis published by the European Legal Support Center on Article 1.5 bis and its implications, interpretation of Article 1.5 bis is based on hypotheses and conjectures: "the information provided here is hypothetical," (para.20), "it is unclear whether," "it can be assumed that," "adopting a literal interpretation, it would appear that" (para.22-23). This manifest lack of interpretative certainty tends to confirm our assumption that there is no clear vision of the potential repercussions of such a clause, that could pave the way for extensive interpretations and unpredictable consequences. Moreover, the same paper includes a disclaimer that stipulates that "it cannot be excluded that the EU could adopt a broader interpretation of the clause" (para.28). See Andreina De Leo & Giovanni Fassina, "General Conditions Application to EU-Financed Grant Contracts for External Actions: Explanation of the Background Legislation, Meaning of the Clause and Likely Impact on Civil Society Organizations Operating in Palestine," *European Legal Support Center*, 7 March 2020

By entrenching the terrorism paradigm that resonates within the EU context, Israel enlists the support of the EU community, and contributes to deconstructing the human rights-based approach promoted by Palestinian CSOs – and supposedly, the EU. This is the result of an Israeli campaign of de-legitimization of Palestinian civil society and human rights organizations that includes: arbitrary detention of Palestinian human rights activists; the thwarting of local projects under the pretense of security concerns; vilification campaigns against Palestinian CSOs; false allegations of misuse of funds and aid diversion; and the imposition of propagandist terminology based on the notion of terrorism and anti-Semitism to discredit Palestinian CSOs' work. Combined, this has placed pressure on international donors to defund Palestinian CSOs. Defaming and delegitimizing Palestinian civil society serves no purpose other than to whitewash the multiple human rights violations and international crimes committed by Israel. Not only does Israel refuse to accept responsibility for these violations and crimes, but the international community has failed to hold Israel accountable.

Political conditional funding is not only problematic in and of itself, but also raises the question of the underlying context in which it operates: the imposition of Trump's so-called "Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People" upon Palestine and the Palestinian people, the shrinking space that Palestinian civil society faces, together with the intensification of a coercive environment and the acceleration of annexation. The imposition of political conditional funding contributes to the creation of a coercive and shrinking environment for Palestinian civil society, whose scope of action is gradually restricted, to the point of not being able to freely and adequately pursue their activities. This shrinking space is not only characterized by politically-oriented restrictions on funding, but also the gradual corrosion of democratic processes, the repression of Palestinian human rights defenders, and aggravating Israeli human rights violations and crimes.

“Political conditional funding remains acceptable as long as it does not, in principle or in fact, impose a political or moral dilemma to the recipient organizations, or minimize their agency over their own purpose and projects as protected under international humanitarian and human rights law.”