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Outlawing Hamas

- An Illustration of the High Stakes of Legalisation

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Abstract

In this paper, the political implications of the EU's listing of the political branch of Hamas as a terrorist organisation are examined. The terrorist lists are perceived as a case of legalisation of a previously unregulated field in international politics, where power in two steps has been moved from the table of democratically accountable politicians: first from the level of the nation state to the Union, and thereafter from the political to the legal sphere via a process of legalisation.

Through a study inspired by new institutionalism, the diplomatic, economic and institutional isolation of the Palestinian Authority's newly elected government is linked to the fact that Hamas has been outlawed by the Union. This case of legalisation testifies of the existence of rival agendas of EU policy, where the *fight against terrorism* is in conflict with other agendas of the union: its *democratisation* efforts, its endeavours in the *peace process* and its *foreign aid* commitments. The policy, understood as a function of the terrorist listing, is tested against criteria of *democracy*, *rule of law*, *interest maximisation* and *target fulfilment*. The result of this assessment depicts a lack of compliance with these dimensions, suggesting that the costs of legalisation are high in this case.

Keywords: legalisation, terrorist lists, Hamas, EU, new institutionalism

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1 Introduction

Law and politics, *juris* and *demos* – are they loyal comrades from the cradle to the grave or antagonists constantly fighting for the biggest share of power? In this paper, I critically examine an example of where politicians have turned to law to restrict political choices, thereby also in a way restricting democracy.

The internationalisation of counter-terrorist measures has followed as a shadow to the globalisation of terrorism. In this paper, the listing of ‘terrorist’ organisations is placed in the theoretical framework of legalisation, understood as a process where power is shifted from political to juridical spheres. However, it is not primarily the moment when politicians decide to create terrorist lists that interests us. Instead, it is the moment when they let their political choices be guided by the judicial contents that is our focal point. I will argue in favour of an understanding of the listing of terrorist organisations and affiliated individuals as an institutional choice that constrains, if not *per se* so in practice, the options of action at hand for the EU post-election policy towards the Palestinian Authority. In other words, there are clear signs that the impact on the political sphere exceeds what is judicially stipulated, the meaning of which will be discussed in the paper.

The terrorist lists have some, for the current legalisation discourse, atypical traits. I hope that this study can break some new ground and contribute to the understanding of legalisation through a slightly different angle. However, there are no claims that what is established for the terrorist lists can be *generalised* to apply for legalisation at large. Legalisation is used as a *theoretical relief* through which the terrorist lists and their impact on policy autonomy can be understood. At the same time, the terrorist lists are used to demonstrate one set of *effects* that can follow a process of legalisation in world politics. Thus, the analysis presented should be seen as *an example of what political implications legalisation can lead to*.

1.1 Presentation of the Problem

The aim of this paper is to show what impact the listing of Hamas as a terrorist organisation, understood as a case of legalisation, has on EU post-election policy towards the Palestinian Authority (PA), and to evaluate the compliance of the policy with a) democratic principles, b) rule of law criterion, c) interest maximisation and d) target fulfilment.

Questions at issue:

- To what *extent* has the listing of Hamas as a terrorist organisation limited the European Union's options of action towards the Palestinian territories post-elections?
- Is the EU post-election policy towards the Palestinian Authority *compatible* with the central political values and strategies of the EU?

As you can see, the first question captures the extent, or degree to which the listing has an influence on policy autonomy. Here extent or degree does not have a strict quantitative meaning since it cannot be fully operationalised. Instead, it refers to overall impressions as concluded by the analysis.

Discussions over the compliance with democracy, rule of law and efficiency concerns are often present in literature on legalisation/ judicialisation/ juridification, but I argue that this field of research normally deals with other domains than terrorist issues, such as trade-regulation and legal review, issues for which legalisation tend to have other repercussions. By looking at the terrorist lists as an expression of legalisation, aspects of relevance for both legalisation and counterterrorism literature can be discussed.

The paper is organised in three main parts. First, the background of the following assessment is outlined via concise information about the listing of Hamas, the elections to the Palestinian Legislative Council and the following policy shift of the Union. Thereafter, I present why it is reasonable to view the policy as a function of the listing of Hamas as a terrorist organisation. In the third part of the paper, the EU's post-election policy towards the PA is evaluated in terms of its compliance with democratic principles, rule of law, interest maximisation and target fulfilment.

In order to anticipate any confusion that may arise, it should be underlined that it is *not the behaviour of Hamas* but of the European Union that is our object of study.

1.2 Methodological Considerations

The topic of this paper touches upon one of the 'hottest potatoes' in daily world politics: the situation in Israel/ the Palestinian territories. This is a potential asset but also a challenge that needs to be handled. The Israeli-Palestinian conflict and everything that surrounds it constitutes a true nucleus for world politics, having effects on political behaviour, expectations and power balance not only in the region, but in the whole world. The overall setting of the issue is such that it would be naïve to have ambitions of complete neutrality. I have tried to stay aware of my own interpretive glasses, believing that this is a central prerequisite in order for the occurrence of biases in the text to be minimised.

Moreover, due to a very intense and quickly changing course of events in the Palestinian territories, this might seem like a *time-sensitive* research task. Nevertheless, the paper can shed light on principally interesting aspects of policy behaviour that have a reach and possible application beyond the immediate circumstances.

The EU post-election policy towards the Palestinian Authority is a case with many context-specific attributes, and it is important to be aware of the methodological limits attached to this fact. However, I do not regard it as a pure *sui generis* case. The setting of the policy is unique in many ways, but can also be seen as an example of a *policy reaction to the rise of a controversial actor to power* in more general terms – a reaction that I argue is determined by the *institutional choice of legalisation* of counterterrorism measures, as expressed by the terrorist list. However, due to the context-specific setting, it is difficult, in the scope of this paper even impossible, to make a straightforward comparative analysis between this EU policy and other policies. Instead, this is a study of a singular case, the EU post-election policy, but I will turn to comparison as a tool for the construction of principal arguments.

In line with the informal new institutional view on institutions, I regard legalisation as an institution in world politics and the listing of terrorist organisations as an example of an institutional choice within this setting. I see the current research task as “a matter of analysing [EU post-election policy] behaviour within the parameters set by institutional facts and opportunity structures” (Goodin & Klingemann 1996:10-11, in Lowndes 2002:107, my parenthetic supplement). Moreover, I agree with Pierre in his statement that “the inclusion of or exclusion of different actors and the selection of instruments – is not value neutral but embedded in and sustains political values” (1999:390, in Lowndes 2002:100), and it is with that assumption that I take on the task to study the terrorist lists as an institutional choice. Other points of departure for the analysis are that the power relations built-in and expressed by institutions favour particular options of action (Lowndes 2002:100) and that “institutional choices made early in the development of a policy area delimit policy choices thereafter” (Lowndes 2002:101).

1.3 Material

Anyone studying something even remotely connected to the Israeli-Palestinian conflict has to be extremely attentive to material biases. The setting is a virtual minefield in terms of how preconceptions and background circumstances tend to influence writer’s positions. Dr. Anders Strindberg, historian and intelligence expert, claims that much scholarly research on Hamas (as well as on other Islamist organisations) more resembles “political propaganda than social science” (Strindberg 2002:264). This has compelled me to study the material with particular carefulness. Lacking the possibility to penetrate internal sources, I have to abstain from discussing a possible informal EU agenda. Instead, the assessment relies on the

official transcripts from the EU, supplemented with references from acknowledged international media, journals and policy analysts.

1.4 Conceptual Remarks

The terrorist lists represent a case where an issue is being framed in *legal* or *judicial* rather than inherently *political* terms. The appearance of terrorist lists as an institution in EU politics represents a judicial regulation of a previously unregulated field, and a process of legalisation¹ on an international level. Power shifts from politics to law on the national level usually take place in a context where I regard it as legitimate to talk about a zero-sum game, i.e. an increased judicial power *at the expense of political power*. On the other hand, on the international level it is not unusual for legalisation of an issue to enter an earlier institutional vacuum, thus representing a change from a *national political* mandate to an *international judicial* mandate.

In a special edition of *International Organization* (Goldstein et al 2000), a group of political scientists and legal scholars presents a theoretical framework aimed to capture the costs and benefits of the process of *legalisation*. They highlight three dimensions of legalisation: *obligation* – how *bound* states or other actors are by the regulation, *precision* – how *clear* the definition of the regulation’s implication is, and *delegation* – to what extent power over interpretation, implementation, dispute resolution and possibly even rulemaking has been *given to a ‘third party’* (Abbott et al 2000:401). In terms of level of *obligation*, the lists score high since they have to be implemented in national law (see Statewatch 2006). The *precision*-criterion is at least partially fulfilled, since the lists name actual organisations and individuals and the direct legal implications are rather undisputed. However, the fact that Hamas as an organisation – and not actual individuals belonging to Hamas – has been listed suggests that the precision could have been higher. Also, as will be discussed in this paper, even though the direct legal effects of the terrorist lists are simple, the political positions distilled from the terrorist list indicate that they do not, as required by the precision-criterion, “unambiguously define the conduct they require, authorize, or proscribe” (Goldstein et al 2000:387).

Finally, the EU’s terrorist lists bring several aspects of the matter of delegation to the fore. Apart from the obvious fact that political power has been delegated from the national level to the Union, there has also been a delegation to national courts, responsible of interpreting and implementing the legal effects of the listing. Goldstein et al include judicial interpretation of the third party as an important factor

¹ Similar notions occurring in the literature are *juridification* (see for instance Blichner and Molander 2005) and *judicialisation* (see for instance Stone Sweet 1999).

in the notion of delegation (Goldstein et al 2000:387), but this is not of primary interest to us. Instead of discussing the judicial interpretive space, we focus on *the way that political actors interpret the lists*, the way that they derive political policy from it – thereby pinioning their own options for political action. In our understanding, the ‘third party’ refers to a broader notion of giving away power to some kind of judicial setting: a court, a committee, or even the institutional arrangement of the terrorist listing *in itself*.

2 Reconstructing the Course of Events

Following the 2001 WTC attacks and as a response to UN Security Council Resolution 1373², the EU began to reform its counterterrorism agenda, and the initiative to list terrorist organisations and affiliated individuals was put forward, as outlined in the common positions 2001/930/CFSP and 2001/931/CFSP. To legally regulate the terrorist issue in this way at an international level, can be understood as a reaction to the globalisation of terrorism. However, in the empirical setting studied in this paper, terrorism is still mostly of regional character.³ It should be remembered, as stated by Henry Siegman (2006), “ Hamas itself is as much a Palestinian national movement as it is a religious one”. On the other hand, the European Union has an expressed *solidarity*-ambition in its terrorism policy. In other words, it does not differentiate between different kinds of terrorism and holds a view that “[a] terrorist attack against one country concerns the international community as a whole” (European Council 2004:1).

2.1 The Listing of Hamas as a Terrorist Organisation

In 2002 the military wing of Hamas, the Ezzeddine al-Qassam brigades, was put on the list of terrorist organisations. In a presidency statement from December 2001, the Union stressed that the Palestinian Authority should take on “the dismantling of Hamas’ and Islamic Jihad’s terrorist networks” (Bulletin EU 12-2001, 1.6.18.). As you can read from the genitive in the above quotation, the Union expresses that the terrorist networks are *a part of*, rather than *equal to* Hamas and Islamic Jihad. In other words, this testifies of the Union being ready to separate military elements from more moderate, ‘political’ ones. In June 2003, the Council put pressure on Hamas to accept a total ceasefire and referred to the Union’s listing of “the *military* wing of Hamas” (my emphasis) as a part of its efforts to stop financing of terrorism (Bulletin EU 6-2003, 1.6.82.). Thus, as late as in June 2003, the Union did not perceive Hamas as *one*, uniform, terrorist organisation. According to Lebanese journalist Haidar

² Resolution 1373 obliges all member states to take measures against the financing of terrorism For details, see United Nations Security Council 2001 Press Release SC/7158, which includes the full text of the resolution.

³ International Crisis Group expert Nicolas Pelham (in Lebouachera 2006) argues that Hamas “have distanced themselves from the global Jihad struggle” and that “they will not carry out attacks in other countries”.

Khatoun, the EU for long refrained from outlawing Hamas because it saw a potential for the organisation to play a constructive role in the peace process (Khatoun 2003).

On September 11 2003, exactly two years after the WTC-terrorist attacks, the European Council decided to “begin procedures leading to the insertion of the *political* branch of Hamas in the European list of terrorist organisations” (Bulletin EU 9-2003, 1.6.24., my emphasis). Already five days earlier, during an informal foreign minister’s meeting, an agreement had been reached to move forward with this initiative. The EU motivated the listing with two arguments, the first one being “the global fight against terrorism” and the second being the “context”: recent terrorist attacks and the view of the Union that the “authors of these acts” are “enemies of peace” (Bulletin EU 9-2003, 1.6.24.). The reference to “the *authors* of these acts” (my emphasis) can be seen as a broadening of the definitional criteria for terrorist labelling, thereby permitting the inclusion of the political wing of Hamas. It is interesting to note the continued use of the term “political wing” in the Bulletin – a term that could be interpreted as being incompatible *per se* with the terrorism-concept.

Already at the time, there was awareness that the outlawing of Hamas represented an important shift in EU policy. However, we must not forget that the policy shift was made against a movement *without formal political power* and constituting *no international threat*, and not against a democratically elected government. Nevertheless, the decision was preceded by internal disagreement. Great Britain and France represented opposed positions – the former in favour of outlawing Hamas and the latter for long very skeptical (see Keinon 2003a and Keinon 2003b). As late as in August 2003, French diplomatic advisor to President Chirac, Maurice Gourdault-Montagne is reported to have denied that Hamas would be a terror group. While claiming ready to re-evaluate the position “if we find that Hamas and Islamic Jihad are indeed terror groups opposed to peace”, he also declared that “we mustn’t limit ourselves to one, clear cut, position” (Jerusalem Post August 25, 2003). Thus, at least at that specific point in time, Gourdault-Montagne seems to have perceived the terrorist listing as an institutional arrangement that would *restrict the freedom of action* in an undesirable way for the Union (or for France). Still, less than two weeks later, then French Foreign Minister Dominique de Villepin, declared that “a consensus emerged” to outlaw Hamas, at the informal foreign minister’s meeting in Italy (Reuters September 6, 2003). The fact that Hamas as a whole, as opposed to individual leaders, was named, has been interpreted as a negotiation gain for the French (see Haidar 2003). The reactions to the listing were of course polarised: Israel and the U.S praised it, Israel quickly responded with attacks against the Hamas leadership (see Keinon 2003b), the Arab world deplored that the EU had given Israel what they saw as a “license to kill” Hamas members (see Haidar 2003).

2.2 Post-Election Policy

January 25, 2006 – the international community holds its breath as the Palestinian people exercise their democratic right in the elections to the Palestinian Legislative Council. Soon it stands clear that the elections both are a triumph for democracy in the Middle East and a defeat for Western anti-terrorist policy. The elections had been postponed several times (Quartet S422/05), in what has been interpreted as an attempt from President Abbas to “buy time” to regain popular support. However, the President’s probable underlying assumption that time would weaken Hamas proved wrong, as it instead progressively increased its support in polls and finally turned out as the winner of the elections.

The judgement of the international election observers was uniform: this was a free and fair election where the Palestinian people had finally had their say (see European Union Election Observation Mission West Bank & Gaza 2006 and Carter Center 2006). It is hard to establish clear criteria for the judgement of what a “free and fair” election is (see Elklit & Svensson 1997) and sometimes election monitoring is accused of being unprofessional or expressing a bias for the political alternative favoured by Western powers or donors (see for instance Anglin 1998, Carothers 1997, Laakso 2002, Munsun 1998 and Pastor 1998) In this case the response did not signal any Western bias, since one would expect that such a bias would have been to the disadvantage of Hamas. In conclusion, there is little doubt that the victory of Hamas was legitimate.

The policy discussion after the elections has circulated around three main issues: how to formulate an appropriate demand profile towards the new government, how to handle political contacts and what to do with the aid commitments. In a first reaction on January 26, the Quartet (the EU, the U.S., Russia and the U.N.) put forward congratulations for a successful electoral process and noted that the Palestinian people “had voted for change” (S029/06). On January 30, the Quartet confronted the incoming, not yet established, government with three conditions: *non-violence*, *recognition* of Israel and acceptance of previous *agreements* and obligations (S031/06). These demands were repeated on March 30, after Hamas had presented its government, and once more in a Quartet statement on May 9 (S099/06 and S128/06). I will argue that, had Hamas not been listed as a terrorist organisation, these conditions for political acceptance would probably not have been articulated. Also, there is reason to question if the Quartet actually *expects* the Hamas-led government to accept to these conditions. As argued by International Crisis group analyst Robert Malley and public policy scholar Aaron David Miller, Hamas will most likely not accept the demands set up by the Quartet. Malley and Miller (2006) believe that a redefined, less categorical, set of demands would create a pressure from the Palestinian people for Hamas to comply.

It should be noted that the Quartet’s writing: “recognition of Israel”, in the EU’s interpretation often turns into recognition of Israel’s *right to exist* (see 5565/06 Presse

22 and Ferrero-Waldner 2006d). While visibly a small detail, it cannot be excluded that this represents a significant difference. “Recognition of Israel” can be read as a demand to recognise the actual present territorial setting, a demand that the Hamas-led government would never accept, and that would prejudice any negotiated settlement between Israelis and Palestinians. To recognise the right of Israel to *exist*, however, might be a more realistic option, since it targets the *principal* right of Israel to exist without entering the immensely contentious territorial issues.

The election of Hamas illustrates how an exaggerated reliance on elections in democratisation efforts, the so-called *electoral fallacy*, may hit back on the objectives of the Union. It has been eager to get the elections running (see Solana 2006a and Ferrero-Waldner 2006a) and as expressed by the following statement by Javier Solana (2005), the Union did not oppose the participation of Hamas in the elections:

The decision as to who is entitled to participate in Palestinian elections is entirely a Palestinian one, according to the laws of the Palestinian Authority. I do not want to interfere. The EU does not oppose the participation of Hamas or any other organization in the elections.

The Union was probably aware of the necessity to include Hamas in order for the elections to be perceived as legitimate. There is some evidence that the process of democratisation in the Arab world goes hand in hand with the inclusion of Islamist movements in regular politics (see Brown, Hamzawy & Ottaway 2006:19). Also, as shown by Bassma Kodmani in her report on the exclusion of Islamists from politics in Egypt, while the political participation of Islamists implies certain risks, the dangers of political exclusion outweigh the former. She concludes that “conservative Islamic authorities that claim to be non-political are more problematic and dangerous for social progress than legally recognized Islamic parties participating in the democratic process would be” (Kodmani 2005:3). However, it is the EU policy rather than the question of whether radical groups should or should not be welcomed to electoral processes that is of interest for us. As highlighted by the International Crisis Group, “boycotting Hamas while facilitating its electoral participation [...] makes no sense at all” (International Crisis Group 2006:ii).

Since Hamas formed government in March, the policy of the EU is to keep supporting the Palestinian people, while ‘temporarily’ strangling all resources to the government (see IP/06/235 and Ferrero-Waldner 2006d). On the 9th of May 2006, the Quartet presented the so-called international mechanism, through which assistance will be delivered to the Palestinian people (Quartet 2006-05-09). The EU will set out this mechanism, and the objective is to have it in place by June (AFP May 15, 2006).

It can hardly be argued that the Union has a strict obligation beyond the humanitarian imperative⁴ to give economic aid to a third party, but the very particular circumstances in the region and the Palestinian Authority's complete dependence on external support⁵, makes the economic situation on the Palestinian territories an international concern. In fact, High Representative Solana himself has declared continued aid a "moral imperative" (Solana 2006b). On the other hand, Ferrero-Waldner has argued that "the key to preventing a humanitarian disaster in the Palestinian territories lies with Israel and the Palestinian community, not the international community" (Ferrero-Waldner 2006d), thus criticising Israel's withholding of Palestinian customs and tax revenues.

2.3 Alternative Options for Action

As presented above, so far the EU has chosen a policy consisting of the following principal elements: a) withdrawal of economic aid to the Palestinian Authority, while trying to find ways of transmitting economic aid without involving Hamas, and b) diplomatic and political isolation of the newly elected government. Javier Solana has named two principles on which the post-election policy is based: *rigour* and *flexibility* (Solana 2006b). The declared flexibility-ambition seemingly does not refer to flexibility vis-à-vis the Hamas government, but rather to openness towards alternative ways to keep influence in the territories while still isolating Hamas.

With the empirical situation established, we can move on to the principally interesting question of *why* this particular policy has been chosen, and *what aspects* have influenced its formation. The policy of the Union is an interesting example of how the *interaction between legal and political* spheres or agendas can influence the policy-outcome. To begin with, we have the judicial document represented by the terrorist lists. The legal contents are "to freeze the funds and other financial assets of the individuals and groups on the list and ensure that they do not gain access to them" (2001/931/CFSP). On the other hand, we have the *political demands* put forward by the Quartet: commitment to *non-violence*, *recognition* of Israel and acceptance of previous *agreements* and *obligations* (see S031/06, S029/06, S099/06 and S128/06). Since the legal contents are limited to the interdiction of economic contacts, the political agenda is not explicitly connected to the terrorist list. In other words, even if

⁴ The Humanitarian Imperative refers to the right and obligation of all countries to receive and provide humanitarian assistance, irrespective of political regime or other contextual factors. For more information, see Slim 2002.

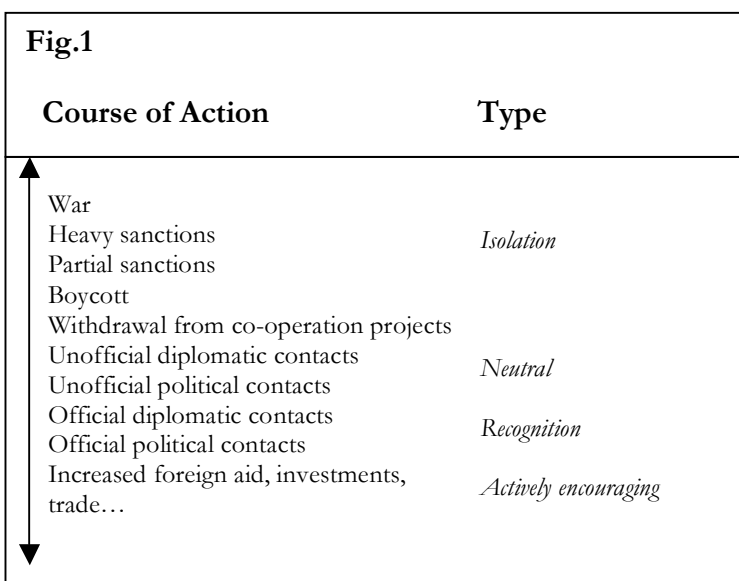
⁵ Prior to the freezing, the international community stood for around two thirds of the PA's budget (Nasir 2006).

Hamas would fulfil the demands stated by the Quartet, though plausible it is not in any way guaranteed that the organisation would be removed from the list.

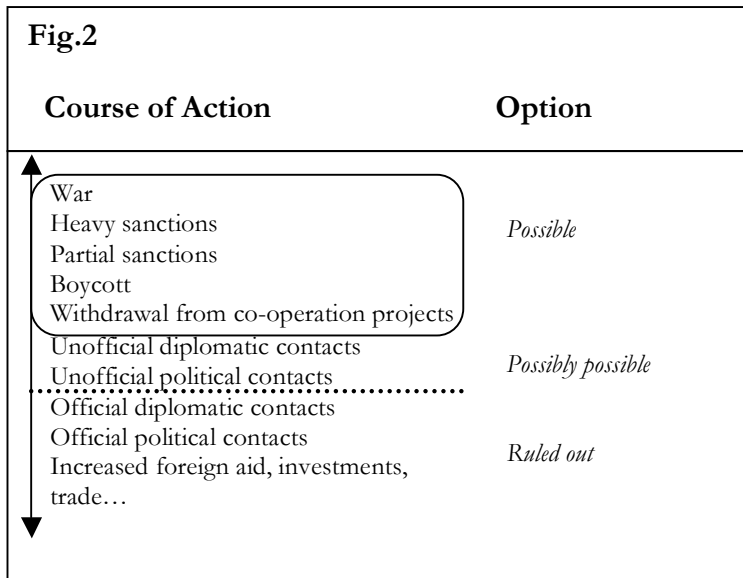
In the Quartet’s agenda lies the latent promise of *restored economic aid* and *political recognition* if the three conditions are respected. However, due to the terrorist listing economic aid is a matter for EU law, and even if the political conditions were followed, it would be illegitimate to reinstate economic aid. In other words, since the terrorist lists only rule out financial transactions, from a legal point of view all other kinds of policy options *would logically still be open*. The political demands of the Quartet however show that *in their interpretation* this is not the case. The reasoning seems to be that any political contact is ruled out, *in analogy* with the labelling of an organisation as terrorist. The political agenda cannot be directly derived from the judicial contents of the terrorist listings and in consequence the political demands should not be perceived as *an operationalisation* of the terrorist lists. In this context it should be mentioned that the special envoy of the Quartet, James Wolfensohn, has left his position, according to the New York Times “because of the restrictions on his role” following Hamas election victory (New York Times May 2, 2006). Wolfensohn evidently does not believe in the Quartet’s new hard line, declaring that “[i]t would surprise me if one could win by getting all the kids out of school or starving the Palestinians” (New York Times May 2, 2006).

If we place the terrorist listings in the post 9/11-setting, where it definitely belongs, I argue that the *political use* of the lists most probably is the result of the U.S. framing of the terrorist issue, as exemplified by the ‘either you’re with us or against us – doctrine’ (see Bush 2001). In other words, the U.S. agenda-setting power in this issue has emphasised the value of *loyalty* in international relations.

As an illustration to the above reasoning, in the figure below different hypothetical options of political action are mapped according to degree of political complicity:



The figure proposes that, theoretically speaking, there is a whole spectrum of options at hand. However, these options have been drastically restricted by the choice to regulate the terrorism issue through lists. In the figure below, the range of options that seems to be left when entering the listing into the equation are encircled. The spotted line represents the fact that while not formally sanctioned by the EU Common policy, we cannot rule out the occurrence of unofficial diplomatic and/or political contacts. Hamas Refugees minister Atef Adwan even had some open contacts with parliamentarians during his visits to Sweden and Norway.



3 Terrorist Lists and EU Policy

In this chapter, four arguments are put forward, supporting the thesis that the terrorist listing has had a determining impact on EU post-election policy towards the Palestinian Authority.

1. The *deviance* argument, according to which the EU policy swerves from the dominant external policy approach of the Union.
2. The *similar case* argument, which shows that EU policy towards ‘similar’ actors that have not been listed has not been constructed in the same way.
3. The *variation* argument, representing the various degrees of freedom of action demonstrated by the different members of the Quartet.
4. The *explicit reference* argument, investigating the way the terrorist lists are used to legitimise the EU policy.

3.1 The *Deviance* Argument

According to the web site for EU external relations, “[t]he idea that the European Union should speak with one voice in world affairs is as old as the European integration process itself” (European Union 2005). Certain attributes can be identified when studying the way in which the Union tries to create a role for itself internationally, even though the common foreign policy sometimes has to compete with national policy initiatives. Some researchers have conceptualised these patterns into notions describing the Union as a ‘civilian’ (for instance Bull 1982), ‘normative’ (for instance Manners 2002), or ‘narrative’ (Nicoladidis & Howse 2002) power. These conceptions can be criticised for being premature and overestimating certain aspects of EU policy, but it is possible to talk about a pattern of EU foreign policy in less paradigmatic terms. I argue that one central characteristic of the Union in international relations is its *dialogue-preference*, i.e. that it is an advocate for keeping the diplomatic channels open even with tricky political partners. Examples of this are EU approaches towards China, Russia and Iran. Also, it has been indicated that prior to the listing, most European countries had diplomatic contacts with Hamas (see Gunning 2004:234).

Javier Solana has declared that “until Hamas shows unequivocal willingness to respect the international community’s principles, we cannot do business as usual with the Palestinian Authority” (Solana 2006b). There might be reason to question to what degree China, Russia, Iran or even Israel follow these principles. The self-imposed dialogue-preference can be illustrated by the Union’s explanation of why it does not impose sanctions on Israel:

The EU's policy is based on partnership and cooperation, not exclusion. It is the EU's view that maintaining relations with Israel is an important contribution to the Middle East peace process and that suspending the Association Agreement, which is the contractual basis for EU-Israeli relations, including political dialogue, trade relations and cooperation activities, would not make the Israeli authorities more responsive to EU concerns. Keeping the lines of communication and trying to convince our interlocutors is a better way forward.

European Commission External Relations – The EU & the Middle East Peace Process FAQ

A statement from Commissioner Ferrero-Waldner also testifies of how the Union uses another tone when targeting the PA than when addressing Israel: “Just as we must be *clear* with the new Israeli government we must be *firm* with the new PA government” (Ferrero-Waldner 2006c, my emphasis).

Prior to the freezing of aid, the EU was the biggest donor to the Palestinian Authority, providing approximately € 500 million each year (COM(2005) 458 final:2). The Union invested not only economic resources but also human capital and political credibility in the state building efforts. On a press conference a week before the elections, Ferrero-Waldner made clear that “these elections could not have taken place without us”, referring to the prominent role played by the Union in the preparations for the elections (Ferrero-Waldner 2006a). Therefore, in the light of the Union's democratisation endeavours and considerable investments, especially when there has been a breakthrough in the form of a successful democratic election, in normal cases involvement would continue or even increase. As we have seen, post-election policy towards the Palestinian Authority has taken on a completely opposite route, characterised by political isolation and withdrawal from common projects.

3.2 The *Similar Case* Argument

This second argument will demonstrate that the dialogue preference outlined in the first argument is sustained even when dealing with actors that bear big resemblances with Hamas. The cases that are compared with Hamas are Hezbollah in Lebanon and the Islamic Republic of Iran. Of course, the cases are too diverse in terms of specific circumstances, to prove on their own the impact of the listing of Hamas as a terrorist organisation on EU policy. Nevertheless, this argument points in the direction of the *listing* having a crucial impact on policy formation.

The Islamist movement Hezbollah joined the Lebanese government after the May 2005 elections (Herzog 2006). Ferrero-Waldner (2005) called the elections “an important turning point”, promised enhanced cooperation and economic support and plans are set out for Lebanon's inclusion in the ENP (European Neighbourhood Policy). In short, the EU post-election policy in this case truly merits to be labelled ‘actively encouraging’. While on the U.S. terrorist list, in spite of heavy pressure the ‘political branch’ of Hezbollah has not yet been included in the EU list.

Because of its apparent lack of compliance with the kind of demands posited by the Quartet, Iran merits to be entered in the analysis even though it is not a candidate to be included on the EU terrorist list.

The following table covers three dimensions: whether the party is listed as a terrorist organisation by the EU or not, whether it can be said to fulfil the Quartet demands or not⁶ and what characterises the EU policy. The results plotted in the table should only be viewed as approximations, which merit to be more thoroughly examined on another occasion. Nevertheless, even though the picture might have been different with other indicators, the pattern is clear enough to support the thesis of the determining effect of the listing.

Fig.3 THE SIMILAR-CASE ARGUMENT ILLUSTRATED

	Hamas*	Hezbollah**	Iran***
LISTED	YES	NO	NO
Behaviour (Quartet demands)			
<i>Violence</i>	NO	NO	NO
<i>Israel</i>	NO	NO	NO
<i>Pacta Sunt Servanda</i>	NO	NO	NO
POLICY			
<i>Official political contacts</i>	NO	YES	YES
<i>Official diplomatic contacts</i>	NO	YES	YES
<i>Unofficial political contacts</i>	YES	YES	YES
<i>Unofficial diplomatic contacts</i>	?	YES	YES
<i>Cooperation / Economic involvement</i>	NO	YES	Yes, but weak

* However, concerning violence - temporary cease-fire since March 2005 (see International Crisis Group 2006:6pp).

** Behaviour: see for instance Devenny 2006, Atkins 2004 and BBC News 2005.
Policy: see Allyn 2004 and documents at the web site for EU relations with Lebanon

*** Behaviour: see for instance Akbar Dareini 2006 and Crail & Lorenzo Sobrado 2006
Policy: see documents at the web site for EU relations with Iran

As you can see, even though all three actors fail to fulfil the conditions now posited to Hamas by the Quartet, only in the case of Hamas has this led to such a strict policy outcome. I argue that the terrorist listing is the factor that determines this inconsistency. While not included in the above table, the international community's policy towards PLO, which suffered from similar disobedience until the 1980's, seemingly and preliminarily, confirms the pattern.

⁶ To avoid any misunderstanding, it should be stressed that in practice these demands only target Hamas. In this table, the Quartet demands serve as valuable points of comparison.

3.3 The *Variation* Argument

While officially wanting to keep a unitary façade, in practice we have observed the Quartet members (US, EU, UN, Russia) interpreting the Quartet's common agenda in slightly different terms. It should be noted that Hamas is not included on the UN terrorist list. However, since the UN has such a special identity and function as a political actor, it is difficult to analyse it in the same way and it will therefore be left aside. While the EU and the U.S. might be said to use different tones, Russia is the Quartet member whose approach stands out the most. I argue that this is the result of Russia not having restricted its options of action through a listing of Hamas as a terrorist organisation. Russian representatives have on repeated occasions opposed the isolation-policy of the Quartet, claiming that "the attempts to isolate Hamas are counterproductive" (foreign minister Sergey Lavrov in BBC Monitoring Former Soviet Union March 15, 2006), "non-recognition of Hamas will only make the situation in the region more complicated" (special envoy Anatoliy Safonov in BBC M.F.S.U. April 20, 2006), "[i]t is impossible not to see that the isolation of the legitimate Palestinian authorities and the introduction of a blockade against them will primarily impact on the Palestinian people" (Foreign Ministry official spokesman Mikhail Kamynin in BBC M.F.S.U. April 10, 2006) and acknowledging "of course we feel it essential to continue to work with the Hamas government" (Lavrov in Quartet press conference May 9, 2006).

Also, the Russian policy is an example of how the post-election situation in the Palestinian territories is used as a playing field on which Russia can profile itself as an independent and powerful international actor. Foreign minister Lavrov declared Russia to fulfil a role as "a bridge between cultures and civilizations", a role which he regarded as being both in the national Russian interest and in the interest of the international community (BBC M.F.S.U. May 6, 2006). Discussing the new role, Russian newspaper Rossiyskaya Gazeta concludes "Russia is starting to behave like a great power with its own agenda, demonstrating its independence and autonomy, its sovereignty in the geopolitical sense, in respect of quite acute conflicts" (in BBC M.F.S.U. March 10, 2006). From this perspective, Russia's choice to not restrict its policy autonomy through the institutional setting of terrorist listing is understandable.

Another striking example of the limiting effects on policy autonomy is Norway's decision to leave the EU terrorist list just days before the elections to the Palestinian Legislative Council. The Norwegian ministry of foreign affairs (2006, my emphasis) stated the following motives for the withdrawal:

"The reason for this decision is that a continued alignment with the EU list could cause difficulties for Norway in its role as neutral facilitator in *certain peace processes*. Norway's role could become difficult if one of the parties involved was included on the EU list, and the opportunities for contact were thus restricted."

Quite evidently, at this point Norway felt uncomfortable with the constraints imposed by the terrorist list, and I would say perceived it as necessary to step out of this institutional choice in order to regain policy autonomy and protect a future role as peace mediator. Again, this testifies of how wider political contents are derived from the legal contents of the terrorist list. However, neither Hamas nor the election to the Palestinian Legislative Council are explicitly mentioned. In other words, without access to the internal discussion of the Norwegian Ministry of Foreign Affairs, it cannot be established that the polls pointing towards a Hamas victory had anything to do with the Norwegian withdrawal from the EU terrorist list. However, due to the timing, to the Norwegian previous involvement in the Middle Eastern Peace Process and its willingness to continue to play a prominent role, it is plausible to assume that Hamas was somewhere in the picture. In addition, Norway has advocated a more pragmatic stance vis-à-vis the Hamas-led government, as illustrated by the following quote from Minister of Foreign Affairs Jonas Gahr Støre (2006, my emphasis):

[...]a Hamas-led government should be judged on its political platform and its actions, rather than on its words. The international community should *not exaggerate its requests* for the immediate redefinition of ideological rhetoric in a way that could provoke a refusal to make any compromise in action.

3.4 The *Explicit Reference* Argument

The *explicit reference* argument provides internal evidence of the meaning of the listing. Here a concentrate of quotations will be presented that show the way in which the EU and its representatives use the terrorist lists in the policy formation.

In December 2005, when polls were starting to predict a possible success for Hamas, High Representative Solana signalled that the Union might not be willing to give economic support to the Palestinian Authority, in case of a Hamas victory. He claimed that it “would be very difficult to finance a group which is on the EU terrorist list” (Solana in Cymerman 2005, my translation from Spanish). This way of referring to the list almost *as if it were beyond the political control* of the EU is quite typical and illustrates the constraining effect of the listing on policy-making autonomy, or in other words the *autonomy* or *sovereignty costs*⁷.

As a response to criticism after the EU decision to freeze aid to the Palestinian Authority, British foreign minister Jack Straw claimed “European taxpayers would find it intolerable if they found their money used for terrorists or terrorist operations” (*Spiegel* April 11, 2006). Put aside the question of how *probable* it is that the Hamas-led government would use EU aid to finance terrorist activities, maybe

⁷ See Abbott and Snidal 2000:436pp for a discussion on sovereignty costs and legalisation.

Straw misjudges the European public's attitudes. According to the result of a poll from the European Commission in 2004, 59% of the 7500 Europeans asked thought that Israel was a threat to peace in the world (Beaumont 2003), which might suggest a divergence of opinion between Mr. Straw and the European public. Furthermore, Straw argued that Hamas could escape this fox trap by respecting the Quartet principles. Yet, the Quartet does not link the fulfilment of the demands to any promise of Hamas being removed from the terrorist lists. The demands are directed to the Hamas-led government, while the listing is attached to Hamas as a movement. Still, Straw argues that compliance with the Quartet demands would make economic aid possible.

Since the actual legal implication of the terrorist listing is the interdiction of financial support in any form, it is rather evident that the freezing of aid is a direct result of Hamas being listed as a terrorist organisation. However, there are signs of the listing having effects beyond the economic dimension:

High Representative Javier Solana, April 2006

Ultimately, the unwillingness of Hamas to come into line with our principles, in spite of some very light steps, along with the fact that Hamas appears on the European list of terrorist organisations, must inevitably have consequences for the EU: the impossibility of regarding Hamas as a valid partner until it changes its stance.

(Solana 2006b)

The above quote illustrates the practice of mixing legal and political contents. Solana first lifts the lack of compliance with EU principles, i.e. the Hamas-led government's disrespect of the Quartet's demands, then talks about the listing in *passive* terms: Hamas *appears* on the list. That the EU in this way *distances itself* from the terrorist lists shows how the legalisation of an issue has an impact that goes beyond what is formally regulated. In other words, even though the possibility to remove Hamas from the list is essentially a matter of political will, the terrorist list as an institution and a product of a legalisation-process eliminates this possibility, at least in the political rhetoric.

4 High Stakes and Low Returns

As has been outlined by the four arguments above, EU post-election policy towards Hamas can be seen as a *function of the terrorist listing*.⁸ Having established this reliance on legalisation, we can move on to evaluate what this implies for fundamental political values and strategies of the EU. Four theoretical categories are used for this assessment. The two first categories – compliance with *democratic principles* and *rule of law* – are content-based whereas the two latter – *interest maximisation* and *target fulfilment* – have a functional character and highlight the Union’s actorness.

4.1 Rule of Law

Legalisation of a matter such as the terrorist issue is an especially worthy study-object since terrorism has been called “a term without any legal significance” (Higgins 1997:28, quoted in Bowring and Korff 2004:1). There have been repeated failures to agree on a common definition of terrorism, and those skeptical of the possibility to reach consensus popularly summarise their position in the slogan “one’s terrorist is another one’s freedom fighter”. During the 70’s, the definitional debate was further complicated by the fear of ex-colonies that national liberation movements would be confounded with terrorism (see Bowring and Korff 2004:2).

I want to point out that I resist entering the contagious debate of whether Hamas in fact *is* a terrorist movement. The question of when, if ever, violence is legitimate, is too complex to be covered by this paper (for an interesting discussion on ethics and terrorism, see Goertzel 1988). Nonetheless, when judging the violence conducted by elements in the Palestinian territories, I argue that the contextual circumstances of the occupation should also be entered into the equation. According to Brown, Hamzawy and Ottaway, while mainstream Islamist organisations normally commit to non-violence, “virtually all Islamist organizations – and some non-Islamist as well –believe that violence against Israel constitutes legitimate resistance, rather than terrorism” (2006:11). Combining non-violence with an acknowledgement of the right of the Palestinians to resist is apparently a difficult balance walk (see Brown, Hamzawy & Ottaway 2006:11). The highly charged link between resistance and violence also makes it hard and unlikely for organisations wanting popular support to

⁸ The understanding of EU post-election policy towards the PA as a function of the terrorist listing implies that the following discussion of the policy is also an evaluation of the consequences of the reliance on legalisation, in this case the terrorist listing, as an institutional choice.

“renounce violence in all circumstances, implicitly asserting that Palestinians do not have the right to resist occupation” (Brown, Hamzawy and Ottaway 2006:12).

Making a disputed concept such as terrorism the basis of legal regulation can be regarded as problematic, since a certain amount of arbitrariness is likely to remain. Had the issue rested within a purely political framework, this would have been less doubtful since *flexibility* can be regarded as an asset rather than an impediment to a political context. But, in a legal framework, such arbitrariness should normally be avoided, through the use of clear requisites. Thus, I argue that the definitional problems attached to terrorism are emphasised when power over counterterrorism measures is framed in legal rather than political terms.

In conclusion, while the terrorist lists have a *de-facto legal character*, they are only *quasi-legal* if evaluated from established judicial criteria. The meaning of this will be developed in the following chapter.

4.2 Democracy

Both the terrorist list as such and the policy that results from it, merit to be analysed through the filter of democratic principles.⁹ While the terrorist list is a political intervention and a political initiative is necessary to outlaw Hamas, an important role is played by the ‘experts’ in the so-called *Clearing House*, a rather secretive organ on which it is difficult to access information. After the foreign ministers meeting in Italy in September 2003, Danish Foreign Minister Per Stig Moeller underlined that the decision was in the hands of the Clearing House, and not in those of the politicians (Keinon 2003b). Yet, even though the details of the procedural arrangements are unclear, formally the European Council should make the final decision.

Thus, in the creation of terrorist lists, politicians a) take an initiative to b) restrict their own political power by c) turning to law to ‘cement’ the terrorist issue, thus d) withdrawing the issue from the political spotlight and e) instead placing it in a setting where values as transparency and accountability are practically absent. At first view, this looks like a shift of power from the political to a legal sphere, as illustrated by the following simple figure:

⁹ Fully aware that this could be theoretically problematised, in the following analysis I depart from the fundamental conception of *democracy as rule by the people* and focus on the values of *accountability*, assured primarily through *free and fair elections*, and *transparency*, necessary for having knowledgeable citizens who keep control of the agenda.

Fig.4 Ideal Types of Political and Legal Spheres

Political sphere	Legal sphere
<p><u>Institutions:</u> Parliament/government Diplomacy Non-binding norms Political sanctions (exclusion from political communities, economic sanctions directed at states, war)</p> <p><u>Values:</u> Representativity Debate Transparency Ideology Interests Flexibility Accountability</p>	<p><u>Institutions</u> Courts/legal experts Rights/duties Binding norms Judicial sanctions (prison, fines: personal responsibility)</p> <p><u>Values</u> Judicial knowledge Fair trial Integrity Neutrality Impartiality Coercion Predictability</p>

The particular empirical setting of the Union complicates the picture further. The character of the “political sphere” on the Union level can be accused of not fulfilling the criteria set up in the left-column. The ‘democratic deficit’ of the Union has become an almost undisputed truth, of which judicialisation and expert-reliance can be considered a significant part. Nonetheless, the political sphere of the Union can neither be said to have incorporated the attributes of the legal sphere as described above. Instead, I argue that from a democratic perspective, there has 1) been a power-transaction from the national level to the Union level (*internationalisation*) where crucial democratic values such as transparency, accountability and representativity have partially been lost and 2) been an, at least partial or possibly even illusionary¹⁰, power transaction from the political Union level to the Clearing House, which has implied a deviation from the already mentioned values. Also, due to the objections that can be made against the terrorist lists from an internal, judicial, point of view, I argue that this *does not necessarily imply* that the ‘original’ political values have been replaced by neutrality, impartiality and judicial knowledge-criteria. In other words, this is what I would call a transmission of power from a semi-democratic to a quasi-legal sphere, as illustrated by the figure below:

¹⁰ Since the precise role and mandate of the Clearing House is kept in the dark, it cannot be excluded that this organ is nothing but a figure-head, which politicians can charge with responsibility for possibly provocative decisions while actually never abandoning control. Thus, this can be perceived as a situation where politicians, for one reason or another, want to give *an illusion* of power being transmitted to a non-political third party, while in practice keeping the real political power.

Fig.5 Sketch of the Semi-democratic and Quasi-legal spheres

Semi-democratic sphere	Quasi-legal sphere
<p style="text-align: center;"><u>Institutions:</u></p> <p>Representatives two or more steps from voters Negotiation Non-binding norms Political sanctions (exclusion from political communities, economic sanctions directed at states, war)</p> <p style="text-align: center;"><u>Values:</u></p> <p>Realpolitik Consensus Interests Efficiency</p>	<p style="text-align: center;"><u>Institutions</u> “experts”</p> <p>Unclear definitional basis for requisites Binding norms Judicial sanctions (prison, fines: personal responsibility)</p> <p style="text-align: center;"><u>Values</u></p> <p>Expertise Fulfilment of political targets Law as a political instrument Coercion</p>

As you can see, shifts of power between these spheres represent a smaller step in terms of changes in values and institutions than shifts of power between the ideal types as depicted in figure 4. Since both the semi-democratic and the quasi-legal spheres represent deviations from values that most agree are vital, the task to examine these power shifts is particularly pressing.

4.3 Interest Maximisation

From a realist conception, interest maximisation determines the behaviour of political actors. Even if we question some of the realist assumptions, I judge the existence of interest-motivated agendas to remain a political reality. Article six in the EC Council Regulation 2580/2001, states an exception to the interdiction of funding “with a view to the protection of the interests of the Community, which include the interests of its citizens and residents”. Thus, anti-terrorist policy is not as unconditional as it first appears. Through this writing, the Union acknowledges that there may be a clash between interest maximisation and the legal framing of the terrorist issue. However, how the Union more concretely defines its interests in this context remains unclear. How strong an interest should be in order for the regulation to be repealed is not specified either.

As discussed in section 3.1, the Union has invested considerable amounts of money, human capital and political credibility in the Palestinian territories. I therefore argue that it is *in the interest of the Union* to assure that these investments have not been in vain but that they will give returns to the Union in the form of all the advantages that a political partnership can provide. I also argue that the post-election policy has undermined these prospects, since the political cooperation has been interrupted as well as development cooperation projects.

Intuitively, both democratisation and peace in the Middle East seem in line with the interests of the Union. However, the interests of the Union do not necessarily equate the goals of the Union's policy. This is because a policy can be said to be constructed by a combination of a) choices motivated by pure self-interest and b) altruistic motives. Moreover, since the EU policy is not created in a power vacuum but under constant influence from other actors, there are situations, 'hard cases', where the Union must prioritise one interest over another.

On several occasions, representatives of the Union and members of the Quartet have declared ambitions to support the Palestinian presidency in different ways, including lifting the prospect of using it to channel aid (see for instance Solana 2006b, Ferrero-Waldner 2006b & 2006d and 7939/06:13). When it comes to strengthening Abbas, the EU likes to link this to the fact that he "was elected by an overwhelming majority of Palestinian voters" (Solana 2006b). However, the Union obviously does not use the same reasoning when it comes to Hamas' electoral success.

The active interference of external actors with an intention to strengthen a particular branch of the political system can and should be regarded as controversial – especially in such a fragile setting as that in the Palestinian territories. While there certainly are some good reasons to support Abbas at this time (being a pragmatic force in Palestinian politics, open for returning to the negotiation table and with the potential of providing some kind of stability), we must also be aware that a strong presidency might be less welcome in other, future political contexts. For instance Ottaway regards the strong executives in the Middle East as a major threat against pluralism and "the fundamental problem of democracy in the entire region" (2005:10).

Whereas the strengthening of the presidency has been a policy priority lately, it should be noted that earlier, the international community promoted a strong prime minister, as exemplified in a 2003 statement from the Quartet Task Force¹¹. At this time, Mr. Abbas, now President, was prime minister and Yasser Arafat was president, which might suggest that the motives to support the prime minister's office then, and to support the presidency now, are actor-related rather than based on institutional preferences.

The emphasis on the presidency can also be seen as a way to promote top-down democratisation, and with Marina Ottaway's words "promote democracy without risking destabilization" (2005:7). Ottaway argues that "[c]hange from the top would also safeguard the interests of foreign countries that are interested in stability and *advocate democracy not as a means to bring about sweeping change, which can be dangerous, but as a means to create mildly reformist regimes deemed to be more flexible and thus more stable*

¹¹ The so-called task force was composed by representatives of the Quartet, Norway, Japan, Canada, the World Bank, and the International Monetary Fund

than authoritarian ones” (2005:7, my emphasis). Margot Light (2001:85) provides another perspective, arguing that democracy could be positive from a security perspective only once it has been consolidated, implying that transition regimes can be quite hostile.

As shown by the earlier analysis of Russian policy, the post-electoral setting in the Palestinian territories offers an opportunity for international actors to enhance their agency profile. I argue that the Union has two incompatible alternatives to consider. The first is the interest of the EU to create and sustain its position as ‘the third power’ in world politics and the second is an interest to remain loyal to the U.S.–determined war on terrorism. It seems like the loyalty-interest has been dominating in practice. A partial explanation to this can be found in an article from Natalia Chaban, Ole Elgström and Martin Holland, whose study shows that whereas non-EU actors perceive the EU as a great power in economic, environmental and aid-related circumstances, when it comes to international security the Union is viewed as “a comparatively unimportant actor” (2005:262). In other words, to the extent that the post-electoral setting can be framed as an issue for international security, this could mean that the Union has difficulty in promoting its “third power” alternative identity.

4.4 Target Fulfilment

Let us say the EU policy will “succeed”: in other words that Hamas will adapt to the international pressure and admit Israel’s right to exist, distance itself from terrorism and declare its agreement with established accords. Even though this would be an important change of the official standpoint, one might wonder if dialogue rather than isolation would not improve the chances of arriving at a profound, honest and long-term policy-change.

If we accept the idea that the Union’s overall goals are democratisation and peace in the Middle East, we can move further to evaluate whether the post-election policy towards the Palestinian Authority has brought us closer or further away from that goal. I claim that two factors are important when evaluating the target fulfilment, namely the *symbolism of non-acceptance of a democratic choice* and the *transformative power of political participation*.

The Symbolism of Non-Acceptance of a Democratic Choice

The impact of the way that the world has reacted to the democratic choice of the Palestinian people, on their constitution as democratic citizens, is doubtlessly considerable. In other words, I argue that there is a strong symbolic power attached to the EU’s new policy towards the Palestinian territories. Such symbolic power is probably especially strong in transitory circumstances where democracy has yet to be rooted, such in the Palestinian Authority. Lebanese journalist Khatoun Haidar argues

that the listing of the political wing of Hamas as a terrorist organisation “made more difficult the task of those in the Arab world who argue against the popular belief that what is happening today is a new Western Crusade against the Arabs” (Haidar 2003). The atmosphere of pride and enthusiasm that the election observers from the Carter Center election monitors noted (Carter Center 2006), is reported to have been replaced with a “sense of insult” and “anger” (Rubenstein 2006). As concluded by the Economist: “nobody believes that foreigners are trying to punish Hamas and not the people” (the Economist April 22, 2006).

Polls have shown that the vote on Hamas to a large extent was a vote against corruption and for economic and social stability (see for instance Herzog 2006), but it is interesting to note that the Union chooses to judge Hamas not on its electoral platform of reform and good governance (see International Crisis Group 2006:i and Herzog 2006) but on its ideological extremism and violent history.

It should also be stated that the political environment in the territories is such that the alternatives at hand for the people have been very limited. This fact has been interpreted as the Palestinians only having the choice between different variants of terrorism organisations (see Mc Guire 2006 and Sharansky in Porter 2006). Israeli Likud politician, former Soviet-dissident and writer Natan Sharansky concludes from the result of the Palestinian elections that it was “a mistake to put elections before the democratic process”. Without adhering to this pessimistic view on Palestinian democracy, we should note the reasoning of Brown, Hamzawy and Ottaway, that mainstream Islamist organisations are successful “because they have little competition” and thereby “an ideological advantage” (2006:17).

In her assessment of democratic reform in the Middle East, Marina Ottaway underlines that “while there can be and have been paradigm shifts without democracy, there can be no democracy that is not preceded by a paradigm shift” (2005:6). Reliant on the importance of *change* and *pluralism* for democratisation, Ottaway stresses that “even the growth of a political organization with an agenda that falls short of democracy can be important in breaking down the power of the old regime”. I argue that *if* the January 2006 election had the potential of constituting an important step towards a paradigm change¹² in the democratisation of the Palestinian territories, this chance was largely lost – not primarily because of the outcome of the election, but as a result of the symbolic power attached to the international reaction. Prior to the elections, Javier Solana called them “an essential step in the building of a democratic Palestinian state” and he “expressed strong support for and confidence in Palestinian democracy” (Solana 2006a). Similarly, Benita Ferrero-Waldner called the elections “an important milestone on the road to democracy” (Ferrero-Waldner 2006). I would like to turn upside down Ottaway’s question of “whether the change

¹² For Ottaway, a paradigm shift represents the “abandoning of old assumptions once taken for granted” (2005:7). See Ottaway 2005:5-8 for a more extensive discussion on the meaning of paradigm shifts.

of political paradigm in a country can be the result of external pressure” (2005:8), instead asking whether a paradigmatic change can be halted by external reactions.

Political Participation – a Catalyst for Pragmatism?

The question of the extent to which political participation in a democratic context can lead to a softening of radical political elements, even potentially of terrorist-associated groups, is central for the evaluation of EU post-election policy’s target fulfilment. As stated by Brown, Hamzawy and Ottaway in a 2006 report from Carnegie Endowment, “organizations that are not allowed to participate in the normal politics of their countries have no incentive to continue to adapt to changing circumstances” (2006:8). In line with the classical *median-voter hypothesis*, the success in a democratic process would lead to the moderation of political positions in order to continue to attract popular support. Brown, Hamzawy and Ottaway refer to empirical support that “movements that take on government responsibility [...] are under pressure to deliver concrete changes to their constituencies and thus move beyond rigid ideological stances” (2006:19).

The opposite view fears that the rise to power of Islamist or in other ways controversial groups would lead to a radical religious policy that would threaten human rights and risk overthrowing democracy, and argue that Islamist movements only give up violence or soften their approach when they do not have an alternative (see for instance Herzog 2006). It is hard to say to what extent it is possible to compare Islamist groups with the Christian Democratic parties who have reached a successful and non-threatening co-habitation of religious and secular politics. However, as pointed out by Brown, Hamzaway and Ottaway, the Christian Democratic examples have at least demonstrated that it is possible to combine a religious framing with democratic credibility (2006:14).

Because of the influence of the international community’s policy, we cannot determine what impact democratic participation *could have had* on Hamas as an organisation. However, since Hamas on a local level has showed pragmatic potential, capability to provide social services and even readiness to co-operate about daily matters with Israel (see International Crisis Group 2006:i), and it was largely on such a mandate that the government was elected, it cannot be excluded that it would be capable of pragmatic ruling also on a central level. Also, there are quite ambitious paragraphs for political reform and democratic consolidation in the Hamas government’s programme (Palestinian Media Center March 23, 2006). These writings at least tell us that the Hamas-led government has understood the importance *in theory* to make continued democratisation a central policy goal.

An evaluation of the consequences of Hamas’ election victory on the chances for revitalising the peace process is closely linked to the belief in the movement’s overall capacity for pragmatism and ideological reform. However, it should be noted that while Hamas has commonly been viewed as an external spoiler to the peace process, Jeroen Gunning claimed that the movement was a “limited spoiler with a diminishing commitment to its core goal” (2004:252). Other analysts have also noted a growing

pragmatism within the movement (see for instance International Crisis Group 2006), which might suggest a potential to play a positive role in a future peace process.

The Union itself has called “economic recovery” a “way of encouraging peace” (Bulletin EU 12-2001, 1.6.18.) and pressed for “impediments and barriers to the development of the Palestinian economy [...] to be eliminated” (Bulletin EU 7/8-2003, 1.6.106). As late as a week before the elections, Commissioner Ferrero-Waldner stated that “revitalising the economy in Gaza is essential” and “a key to further progress” (Ferrero-Waldner 2006a.). In consequence, according to the Union’s own logic, economic chaos in the Palestinian territories as a result of aid withdrawal would have a negative effect on prospects for peace.

Being a rookie in democratic politics with a violent past and a still aggressive ideology, many fear that Hamas would resort to armed ‘resistance’/ terrorism, if the Palestinian Authority collapses (see Malley 2006, Malley & Miller 2006 and *The Economist* February 25, 2006). From that perspective, even if we doubt Hamas’ inclination to change, much indicates that political participation is the only realistic and available alternative that can have a moderating influence on the movement. *E contrario*, the policy of isolation is a policy that risks leading the movement directly back into violence.

5 Conclusions

In this paper, legalisation as an institutional choice in international politics has been analysed, with the *political interpretation of legal contents* as focal point. First, a chain of signs indicating that the listing of Hamas as a terrorist organisation has drastically restricted the policy-making autonomy of the Union towards the Palestinian territories post-elections was advanced. Breaking with the overall EU inclination towards dialogue, ignoring incentives to get returns on invested capital and deserting previous commitments – the EU policy is irregular, also in comparison with similar cases, which can seemingly only be explained by the institutional setting of the terrorist lists. Thus, the first result of the paper is that the post-election policy of the Union towards the Palestinian territories can be seen as *a function of* the terrorist listing.

The establishment of the impact of the terrorist listing on EU post-election policy allowed us to move forward to evaluate the policy, and thereby also the effects of legalisation. I argue that legalisation in this case has led a policy outcome that is not optimal. An alternative approach where the Hamas-led government, at least initially, would have been given ‘the benefit of the doubt’, could possibly have presented Hamas with incentives to take the final step away from violence. Instead, legalisation seems to have been an insurmountable obstacle for EU policy-making, resulting in high costs both for the Union and for the recipient of the policy, the Palestinian territories. The fact that Israel/Palestine is something of a tinderbox in international politics makes the stakes involved in policy making very high. More concretely, the existence of the PA and the prospects of a peace process are on the scale for the recipients of policy. For the policy originator, together with other interests, the identity as a world player is at stake. For an actor as the EU, which has put democratisation at the forefront of its external policy, the *symbolic power* attached to the isolation of the Hamas-led government is particularly unflattering. The second result of the study is that there are high costs attached to the policy in terms of a defective compliance with central political values and strategies of the Union. As for possible *returns* of legalisation in this case, a strengthening of alliances among those who choose to restrict their policy-making autonomy through the terrorist lists is possible. In that way, the commitment to terrorist lists represents a way of expressing loyalty to the ‘war against terrorism’, an important aspect in the light of the ‘either you’re with us or against us’-rhetoric.

The study has also resulted in some insights on the nature of legalisation. I have proposed that legalisation as expressed by the EU’s terrorist lists should be understood as a shift of power from a *semi-democratic* to a *quasi-legal* sphere, which makes concerns over lack of transparency, accountability and internal legal criteria even more urgent than in cases of legalisation between the ideal types of political and legal spheres. A practice to derive political implications that exceed what is judicially

stipulated has been identified. Thus, for the case of the impact of the listing on EU post-election policy there are costs attached to *both* the actual legal contents – economic aid to the PA being ruled out – and to the interpreted political contents – the political isolation of the PA.

Material

Documents from the European Union

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2001/931/CFSP *Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism* http://www.eu.int/eur-lex/pri/en/oj/dat/2001/l_344/l_34420011228en00930096.pdf (May 22, 2006)

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