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CHECK AGAINST DELIVERY

SESSION II

Breaking the cycle of impunity

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European Union mechanisms to establish accountability and end impunity

I. Culture of impunity

Israel's impunity has been widely documented by NGOs and international organisations. Examples include Israel's failure to comply with its obligations under international humanitarian law (IHL) and international human rights law (IHRL) and to conduct investigations in accordance with international standards into violations of IHL and IHRL as well as the absence of investigations into complaints of torture and ill-treatment.

In the absence of accountability within the territorial jurisdiction in which crimes are committed, it becomes all the more necessary for international actors such as the European Union (EU) to ensure respect for international law and promote external accountability mechanisms. This presentation will focus on the instruments that the EU can deploy to promote Israel's accountability for its repeated violations of international law.

II. Obstacles to accountability

Before presenting mechanisms to promote accountability, it is important to identify the obstacles which can impede bold and consistent EU action to establish accountability.

- The **lack of non-politicized enforcement mechanisms**.
- The **internalisation of the occupation**: because of the recurrence of international law violations and the prolonged character of the occupation, the EU has internalized the occupation as a framework in which it deploys creative measures to address the needs of the population and the state-building process instead of exerting efforts to address the roots of the problem.
- The conduct of the **EU common foreign policy by consensus**, which has constrained the EU ability to take meaningful positions and decisions, and has undermined the possibility of pursuing effective initiatives.
- Member states' "**domestic drivers**" (historical, economic, political).
- The EU **complex institutional set-up** illustrated by the proliferation of instruments and actors.
- The fact that the **Middle East Peace Process (MEPP)** has historically been **led by the US** and that Europeans have largely accepted a subsidiary role.
- The fact that **peace and justice are presented as conflicting objectives**.
- **Lack of knowledge of international law**.

III. EU instruments to promote accountability

A. General Human Rights instruments

The **EU Strategic Framework on Human Rights and Democracy** and the associated Action Plan (2012) form the most comprehensive approach to human rights that the EU has developed so far. In the Action Plan, the EU has committed to make a more systematic use of political dialogue to encourage third countries to implement IHL obligations; to promote the ratification and implementation of the Rome Statute; and, given States' primary duty to investigate grave international crimes, to contribute to the strengthening of the capacity of national judicial systems to investigate and prosecute those crimes. The Action Plan also foresees the adoption of three-year country strategies for human rights.

- Israel's Human Rights Strategy (HRS) has not been officially adopted yet. However, in the non-official draft, the EU fails to address the structural deficiencies of Israel's domestic judicial system to carry out investigations into international law violations in conformity with international standards. Torture has not been set as a priority despite reports of widespread and systematic use of torture and ill-treatment by Israeli security and law enforcement authorities.

In 2005 (rev.2009), the EU adopted **Guidelines on the promotion of compliance with international humanitarian law** in which it outlines operational tools to promote compliance with IHL by third states and non-state actors operating in those countries.

- However, the Guidelines fall under the responsibility of the EU Council Working Party on International Public Law (COJUR). COJUR is not an operational working group and it is chaired by the rotating presidency, which hinders the continuity of its work. EU Member States oppose the transfer of the implementation of the Guidelines to a more operational committee, arguing that the implementation of IHL is a national competence. This circular approach has resulted in a void of which Member States are well aware, but are reluctant to fill. As one official put it, the EU "*wants to avoid a Goldstone-type case of its own*".

An additional tool to promote accountability lies in the EU **policy in support of the International Criminal Court (ICC)**. The EU has supported its establishment and has continuously expressed its support for the Court. It has signed an agreement on cooperation and assistance with the ICC and adopted a Council Decision and an Action Plan in which it pledged to advance universal support for the Rome Statute.

- Whereas there is clear support from the EU for the ICC, in the Foreign Affairs Council Conclusions which followed the granting to Palestine of a 'Non-Member Observer State' Status in the United Nations, the EU called on the Palestinian leadership "to use constructively this new status and not to undertake steps which would deepen the lack of trust and lead further away from a negotiated solution." Several EU officials confirmed that this was a direct reference to the adherence of Palestine to the Rome Statute.

The EU can also promote accountability by adopting **restrictive measures**. According to the EU, "sanctions are an instrument of a diplomatic or economic nature which seek to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles"

- However, when it comes to Israel, the EU has always maintained that engagement was preferred to sanctions. The new EU High Representative for Foreign Affairs and Security Policy, has very recently declared that there is currently “no question of sanctioning anybody”.

The EU can also raise human rights concerns with third states through **démarches** (formal diplomatic approaches) and issue statements as part of its **declaratory policy**, the most authoritative being the European Council Conclusions.

The July 2014 Council Conclusions on the Middle East Peace Process provide a good example of the EU unbalanced approach to Israel and Palestine.

The EU strongly condemns the indiscriminate firing of rockets into Israel by Hamas and militant groups in the Gaza Strip, directly harming civilians. These are criminal and unjustifiable acts. The EU calls on Hamas to immediately put an end to these acts and to renounce violence. All terrorist groups in Gaza must disarm. The EU condemns the loss of hundreds of civilian lives, among them many women and children. While recognizing Israel's legitimate right to defend itself against any attacks, the EU underlines that the Israeli military operation must be proportionate and in line with international humanitarian law. The EU is particularly appalled by the human cost of the Israeli military operation in Shuja'iyya, and is deeply concerned at the rapidly deteriorating humanitarian situation.

- When it comes to Palestinian groups, the EU “condemns” acts that it calls “criminal” and “unjustifiable”, and to which Hamas should “put an end”. The EU avoids calling Hamas a “terrorist” group even though the group is on the EU official list of terrorist organisation, adding just after that all “terrorist” groups must “disarm”. The EU thus leaves the door open for interpretation as whether this also refers to Hamas or not. In addition, the EU takes an unprecedented position on disarmament, generally considered as a parameter to be negotiated in the context of a final status agreement.
- When it comes to Israel, the EU condemns the loss of lives, without explicitly naming or condemning Israel. The EU recognizes Israel a “legitimate” right to “defend itself”, despite the fact that this is not legally valid. Israel’s actions are not assimilated to “violent” actions, but neutrally called “military operations”, which should not be “ceased” but carried out in line with international law.

B. Instruments deriving from bilateral relations

The European Neighbourhood Policy (ENP) provides the framework for EU-Israel bilateral relations, the Association Agreement their legal basis, and the Action Plan the working plan for future cooperation. In addition to the Association Agreement and the Action Plan, structural bilateral dialogue and the “more for more” approach are the most important instruments to promote accountability.

All **Association Agreements** that the EU concludes with ENP countries contain both a Human Rights and a non-execution clause, which provide the basis for negative conditionality, a tool that can be used to exert pressure on ENP countries.

- However, the legal conditions to justify negative conditionality are hard to meet and, on the political front, EU officials have clearly stated that the suspension of the Association Agreement with Israel on the basis of those clauses is not conceivable.

The **EU-Israel Action Plan** entered into force in 2005 and was set to expire in 2008. It established a work plan for future cooperation and created technical subcommittees to discuss sectorial cooperation. It has been due for an ‘upgrade’ since 2009, but it appears that no new Action Plan will be negotiated until the Council reverses the decision it took in 2009 to freeze the upgrade of bilateral relations until progress is made in the peace process.

- The “freezing” of the upgrade and the refusal to adopt a new Action Plan are the most significant political decisions that the EU took vis-à-vis Israel. However, in July 2012, the EU finished “exploring the opportunities of the current Action Plan”, and adopted a list of 60 activities in 15 specific fields where cooperation could be deepened. This is what is sometimes referred to as a “silent upgrade”.

Structural bilateral dialogue where accountability-related issues can be raised takes place in the framework of the EU-Israel Association Council and the meetings of Subcommittee on Political Dialogue and Cooperation and the Informal Working Group on Human Rights.

- Israel is the only ENP country with which human rights dialogue takes place in an informal working group and not a fully-fledged subcommittee.

The last accountability mechanism presented in this section is the “**more for more**” approach or “positive conditionality”. It is one of the pillars of the renewed ENP, launched in 2011. It is an incentive-based approach which aims at giving advantages to ENP countries in accordance with the progress they make towards democratic reforms. Those efforts should be assessed against several benchmarks, one of which relates to “the rule of law administered by an independent judiciary and right to a fair trial”.

- However, the “more for more” approach has not been implemented yet. Moreover, it is intended for “dysfunctional democracies” – which, for EU officials, do not include Israel – and aims to support democratization processes in post-revolution Arab countries. The benchmarks that were outlined by the EU do not take into account the existence of protracted conflicts and the obligations of the parties to the conflicts under international law. It is thus not adapted to Israel.

IV. Is the EU capable of promoting accountability?

Yes, in other conflict situations.

In the case of **Syria**, the EU stated that it was concerned about “the widespread and systematic violations of human rights and international humanitarian law”, which may amount to crimes against humanity and war crimes under the Rome Statute. The EU also stated that “all those responsible for such crimes must be held accountable and that there should be no impunity for such violations and abuses”. The EU added that “if concerns about war crimes and crimes against humanity are not adequately addressed on a national level, the International Criminal Court should deal with the situation” (Council Conclusion, 10 December 2012). All member states, with the exception of Sweden, signed a letter to the UNSC calling for a referral of the situation in Syria to the ICC.

The case of **Sudan** and the support the EU has shown for the referral of Sudanese president Omer Hassan al-Bashir to the ICC is another instance where the EU has defended justice in the peace-justice debate but also an additional example of the EU's inconsistency with regard to the ICC, and, more broadly, international justice.

In the case of **Iran** and **Belarus**, the EU adopted restrictions on admission and a freeze of funds of persons responsible for serious human violations. This type of measures have never been considered in the case of Israeli officials directly responsible for serious human rights violations.

Most recently, the EU has adopted trade and investment restrictions in response to the illegal annexation of **Crimea/Sevastopol** to the Russian Federation. In addition, it has developed a consistent policy of non-recognition of Russia's sovereignty over annexed territories, which is something it has never done in relation to Israel and Palestine. While this policy must be seen as a fulfilment of EU obligations rather than sanctions per se, it nevertheless serves to highlight the EU inconsistencies when it comes to fulfilling its own obligations under international law.

V. In conclusion

- Israel's Human Rights strategy has not been finalized yet and fails to address the lack of avenues for domestic accountability and systematic use of torture;
- The EU IHL Guidelines are not properly implemented;
- The EU not only manifests double standards with regard to the ICC, it also disregards its own policy;
- The EU has been refusing to adopt restrictive measures against Israel while the country clearly falls under the scope of the policy. On the contrary, it has pursued a "silent" upgrade of relations in the framework of the current Action Plan;
- The language it uses when it comes to Palestinian groups is more straightforward and much stronger than when it addresses Israel's violations. In addition, the EU gives the impression to ground its statement in international law, while actually distorting it and misusing international law for political purposes;
- The EU fails to enforce the human rights clause of the Association Agreement and has not set up a fully-fledged human rights subcommittee with Israel;
- The EU ENP incentive-based policy is not adapted to Israel;
- And, mechanisms and language supported by the EU in the context of other conflicts provide examples of the EU good practice in promoting accountability and highlight its double standards and inconsistencies.

This presentation started with the assumption that in the absence of accountability within the territorial jurisdiction in which crimes are committed, international actors must intervene to ensure respect for international law. However, in the Israeli-Palestinian conflict, the EU has largely disregarded justice and accountability for past and ongoing violations of IHL and IHRL.

Throughout the years, the EU has developed good policies when it comes to the promotion of human rights and accountability externally. The EU must be reminded that this framework is not merely smoke and mirrors which enables it to boast about being at the forefront of the defense of human rights in the international community. It is our right, as EU citizens, to hold the EU accountable for its own policies and standards. Citizen pressure is therefore the last accountability instrument I wanted to present, and probably the most promising.
