



Translating EU Commitment to Deter and Repress the Most Serious Crimes of International Concern into Effective Action: A Special Representative for International Humanitarian Law and International Justice

Concept Note

The European Union (EU) and its member states have a longstanding commitment to promote respect for human rights and international humanitarian law (IHL) and to fight impunity for international crimes through criminal prosecutions.¹ Translating these commitments into effective action now needs to be a matter of urgent priority for the European Union, in the face of an alarming commission of international crimes across the globe.

When it comes to armed conflict, as in Yemen, Syria, and South Sudan, the protection of civilians from targeting and indiscriminate attacks remains a paramount challenge. More specific

¹ This includes support for the International Criminal Court and other international mechanisms, assistance to national courts in third countries, and the use of universal jurisdiction and other forms of extraterritorial jurisdiction in the domestic courts of EU member states. Deterring and repressing international crimes also forms part of the European Union's commitment to integrated approaches to external conflicts and crises, and is essential to peacebuilding and other efforts to achieve sustainable development. The EU has dedicated guidelines relevant to the deterrence and repression of international crimes committed against particularly vulnerable populations, guidelines on children and armed conflict, and guidelines on violence against women and girls and combating all forms of discrimination against them. Above all, these commitments reflect the European Union's core commitment to the rule of law as an alternative to the use of violence. See, for example, "Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes," Council of the European Union, 2002/494/JHA, June 13, 2002; "EU Guidelines on Children and Armed Conflict," December 9, 2003; "EU guidelines on violence against women and girls and combating all forms of discrimination against them," December 8, 2008; "Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL)," 2009/C 303/06, December 15, 2009; "Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP," March 22, 2011; "Action Plan to follow-up on the Decision on the International Criminal Court," Council of the European Union, July 12, 2011; "Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the gap between international & national justice," Council of the European Union, February 22, 2013; "The EU's Policy Framework on support to transitional justice," Council of the European Union, November 15, 2015; "Council Conclusions on the Integrated Approach to External Conflicts and Crises," January 22, 2018.

challenges include attacks on humanitarian workers, as well as attacks on education and on medical and healthcare facilities. Ensuring civilian populations in need have access to humanitarian assistance, and that parties respect their obligations under IHL to facilitate humanitarian assistance is also a central concern. International crimes are also taking place outside of the context of an armed conflict, as in Burma/Myanmar's Rakhine State.

And yet, global political consensus in support of the International Criminal Court (ICC) and other justice mechanisms—which should be able to act regarding crimes committed in conflict and non-conflict settings—has weakened and fragmented. Without stepped-up efforts there is a risk that impunity will become the new norm, fueling further attacks against civilians, healthcare facilities, schools, and aid workers, the use of illegal and indiscriminate weapons, and other serious crimes by governmental and non-state actors who have no reason to fear accountability.

International leadership is urgently needed. This is the time for the European Union and its member states to step up and renew their commitments to defend the rule of law, advance the protection of civilians, and relentlessly pursue justice for victims of the most serious crimes of international concern. The European Union and its member states should appoint a high-level expert as the European Union Special Representative (EUSR) for International Humanitarian Law and International Justice to ensure the best possible guidance and leadership in implementing EU pledges in these areas.

This high-level capacity is urgently needed for the EU to effectively confront what is an exceptionally complex policy landscape. Increasing support for the ICC remains essential. Although many crises are beyond the reach of its jurisdiction, its ability to act where it can sends a message about international commitment to accountability. This is of the greatest importance in the face of horrific contemporary crimes which include airstrikes on civilians, aid workers, and civilian infrastructure—such as schools and health facilities in Yemen and Syria—among other conflicts and situations. The ICC is needed to monitor situations within its jurisdiction, including crimes against humanity outside conflict situations, and hopefully to deter future crimes. But further investment is also needed in complementary mechanisms for providing justice at the national and international level, and in fact-finding and other means of evidence preservation to build long-term strategies for justice.

In addition, there is a need for the EU to engage and move forward at a higher level on a range of important debates at the UN and other multilateral settings relevant to the protection of civilians, consistent with its existing policies, including the EU Guidelines on Children in Armed Conflict and the EU Guidelines on violence against women and girls and combating all forms of discrimination against them. Over three-quarters of EU member states have joined the Safe Schools Declaration, a political commitment to protect education in war that the International Committee of the Red

Cross (ICRC) has recognized as a tool to improve compliance with IHL. Debates related to attacks on healthcare facilities and personnel would benefit from additional expertise, research, and coordination. Critical international campaigns are also underway to prevent harm from the use of explosive weapons with wide-area effects in civilian areas and to prevent the development, production and use of fully autonomous weapons, also known as lethal autonomous weapons systems.

Against this landscape, the EU and its member states should continue to increase much-needed principled leadership. Creative diplomatic action is needed to identify and support the right approaches to build successful coalitions for the respect of IHL and the deterrence of international crimes (including those committed outside armed conflict), secure the protection of civilians, and develop pathways to justice for victims. A dedicated EUSR for International Humanitarian Law and International Justice will help ensure that EU policies, decisions, and efforts work as effectively as possible toward these ends and will greatly enhance the EU's ability to team up with likeminded states, organizations, and actors around the world.

Proposed Mandate

An EUSR for International Humanitarian Law and International Justice should be mandated to:

- Propose specific EU and member state actions to advance protection of civilians through respect for IHL and justice for international crimes, particularly in response to urgent crisis situations. This should include developing expertise on the range of justice options, for example, the ICC, other international tribunals and internationalized courts, fact-finding missions, commissions of inquiry, and dedicated investigative mechanisms. This should also include national-level atrocity crime trials, and ensuring that appropriate mechanisms are supported politically, financially, and at an operational level by the EU and other international partners;
- Advance respect for IHL worldwide and implementation of the EU guidelines and action plan on IHL. This should include recommending measures to raise the cost for those committing atrocity crimes and addressing the lack of accountability for IHL violations, such as attacks on healthcare facilities and personnel. The EUSR should also promote the protection of schools including by restricting their use for military purposes;
- Promote implementation and compliance of key humanitarian disarmament instruments such as the 2008 Convention on Cluster Munitions, 1997 Mine Ban Treaty, 1993 Chemical Weapons Convention, and 1980 Convention on Conventional Weapons. The EUSR should support the creation of new international law to prevent the development and use of fully autonomous weapons;

- Advance and contribute to the implementation of the EU’s decision and action plan on the ICC. This should include maintaining contacts with the ICC, promoting cooperation with the court, notably with regards to pending arrest warrants; steering an EU early warning mechanism to avoid non-cooperation with the court and ensure the EU’s reaction when it occurs; strengthening the EU’s diplomatic support to the ICC with regards to ongoing investigations; and promoting universal ratification and implementation of the Rome Statute;
- Mainstream EU support to national-level efforts through application of the complementarity principle, both as a matter of policy and in specific country situations;
- Help to ensure internal and external coherence and coordination in EU policies addressed to advance respect for international law and fighting impunity for atrocity crimes; and
- Forge coalitions with a range of other like-minded actors working collaboratively and innovatively, including other regional and international organizations, states, justice mechanisms, experts, victims, and civil society organizations.

Reporting to both the EU High Representative and EU member states will help maximize coordination of policies and actions, including with other special representatives; increase the representational value and legitimacy of the EUSR; and invest ownership in the development of policy steps equally with the EU institutions and member states.

What value would this position add to the EU’s existing support for international humanitarian law and international justice?

- **Expert leadership.** The EUSR would provide expert leadership concerning implementation of existing EU decisions and policies concerning IHL and international justice, as well as urgently-needed expert guidance for recommended EU actions and policies when dealing with situations of persistent IHL violations and persistent impunity for the most serious crimes of international concern.
- **Visibility.** The EUSR would be an important “face and voice” of EU support and the promotion of justice for international crimes across situations. The EUSR could catalyze diplomacy by various EU institutions and EU member states for maximum effect. Mandated by the European External Action Service (EEAS) and EU member states, the EUSR could demonstrate EU unity in matters related to the ICC and other international justice mechanisms, and add additional weight to the EU’s voice and actions.
- **Coordination.** The EUSR would also be a high-level voice internally at the EEAS, who could ensure that support for IHL, the ICC, and other accountability mechanisms is appropriately mainstreamed in all relevant areas of EU foreign policy. This would also serve to ensure smooth coordination between the EEAS, the European Commission, other EU institutions, ESDP missions, and EU member states in the areas of IHL and international justice.

- **Innovation and consistency.** The EUSR should bring and concentrate expertise on matters related to IHL, the ICC, and accountability for grave crimes with a view to influencing EU policy in a positive, proactive manner. This expertise should be across the board of various international justice initiatives and would enable the EUSR to draw lessons learned and inform EU policy. The EUSR would be the “keeper” of the EU’s agreed policies on IHL and the ICC and accountability for grave international crimes, to ensure consistent implementation. Working with a small expert team, the EUSR would also ensure that the EEAS has the necessary staff resources allocated to this important work. This is particularly important given the scale of IHL challenges around the world and the range of international justice mechanisms relevant to an increased commission of international crimes.
- **Knowledge resource.** The EUSR would collect information relevant to IHL developments and the operation of the ICC and other justice or related mechanisms (e.g., commissions of inquiry and fact-finding missions) for the promotion of accountability globally. This information would then be shared with the relevant EU working groups in Brussels and could inform EU policy to advance the work of the ICC and justice.
- **External coordination and partnership.** The EUSR would work within a network of partnerships across governments, regional organizations, the UN, the ICRC, and civil society. In this regard, the EUSR would be the counterpart of other existing IHL and international justice envoys including relevant regional and UN mechanisms.