

HUMAN RIGHTS WATCH

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Mr. Andris Piebalgs
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European Commission
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September 23, 2013

Re: Recommendations concerning the EU Complementarity Toolkit

Dear Baroness Ashton and Commissioner Piebalgs:

We are writing to urge you to take additional steps to implement the European Union complementarity toolkit (the “Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap between International and National Justice”).

Adopted as a joint working document between the European Commission and the European External Action Service (EEAS) on January 31, 2013, the complementarity toolkit is an important development in the European Union’s fight against impunity. It reaffirms the European Union’s commitment to encouraging national prosecutions for grave international crimes and provides a roadmap for how the European Union can strengthen its use of rule of law assistance to that end. Its adoption is all the more significant given that the European Union is the world’s largest provider of official development assistance and that a considerable amount of its development funding is allocated to strengthening rule of law in third countries.¹

¹Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap between International and National Justice (“EU Complementarity Toolkit”), p. 4.

However, additional steps are needed to increase awareness of the toolkit and to ensure its effective implementation. Through this public letter, Human Rights Watch seeks to make five recommendations that we see as essential to ensuring the toolkit's effective implementation into EU practice.

As explained in the toolkit, states bear primary responsibility “to investigate, prosecute and bring to judgment perpetrators of genocide, crimes against humanity and war crimes.” The International Criminal Court (ICC) serves as a “safety net” or a “court of last resort,” intervening only where national courts are unwilling or unable to prosecute these crimes. However, experience has shown that many states do not have the necessary legal framework, technical capacity, or infrastructure to carry out trials for grave international crimes. Political will is also often lacking. The international community has come to realize that more efforts are needed to support domestic prosecution of these crimes.

At the same time, there is growing consensus that general rule of law and justice sector assistance is insufficient to bolster national judicial systems' capacity to handle these complex, and often politically sensitive, crimes. Stronger, more focused action by donors is needed. The toolkit confirms this realization and has the potential to be an important reference point for EU practitioners as they develop more effective programming for complementarity projects.

The toolkit provides a useful introduction to the principle of complementarity and an overview of existing EU policies in the justice field. It then offers a comprehensive summary of the areas where donor assistance may strengthen domestic judicial systems' ability to adjudicate grave international crimes. The toolkit also identifies two key elements to ensure donor support is effective: the need for a “detailed needs assessment” at the outset to identify the most significant gaps within a particular judicial system and the need for sustained donor coordination.

While the toolkit thus provides a strong framework to guide EU practitioners in the formulation of complementarity projects in third countries, it has one significant weakness: its discussion of the role of domestic political will. The toolkit seems to suggest that the European Union should only consider supporting complementarity projects (and broader justice sector reform) where national political will already exists in a country. While political will at the national level can undoubtedly facilitate donor plans to strengthen domestic judicial capacity and may help ensure that assistance programs are successful, the European Union should not wait until domestic political will exists. The European Union and other international donors have an important role to play in catalyzing political will in post-conflict countries, even where political will is entirely lacking.

Recommended Next Steps to Promote and Operationalize the Toolkit

1. Promotion and dissemination among EU staff

Given the importance of the toolkit, we would suggest that an official event be organized in Brussels to raise awareness of the toolkit and to facilitate discussion among stakeholders. We would also recommend issuing a press release to coincide with the event and placing the toolkit more prominently on the EEAS website.²

EEAS Brussels diplomats informed us that the toolkit was distributed to EU field delegations in March 2013, however we are concerned that many delegation staff who work on justice and rule of law in third countries remain unaware of its existence and that few have taken steps to consider how the toolkit can provide additional guidance to develop and adapt programming for complementarity projects. It is crucial that the toolkit reach and be understood by relevant delegation staff, so we would encourage the EEAS and DevCo to resend the toolkit to all delegations with a short accompanying note that summarizes the toolkit and its key recommendations.

2. Training of relevant personnel

We also recommend that the toolkit be included in training workshops for all Brussels-based and field delegation staff working on justice and rule of law for the European Union. Offering training on the toolkit at regular, at least annual, intervals will help ensure that the toolkit is understood by relevant practitioners and will encourage them to implement it in their justice and rule of law programming.

It is our understanding that this year's annual training of EU field delegation staff on justice, rule of law, good governance, and human rights that took place in Brussels included a presentation on the toolkit. This briefing is a positive first step, but more in-depth training may be required to ensure that the toolkit is understood and effectively implemented. Training should include not only an overview of the toolkit but also a discussion of specific programming that can be used to support complementarity (based on an operational annex, discussed below). We would also encourage trainings to dedicate time for participants to exchange their own experiences on how such programming has played out in different countries and to share any lessons learned. The next opportunity for training on the toolkit could be the human rights focal point meeting scheduled in Brussels for early 2014.

3. Development of an operational annex to the toolkit

The toolkit aims to provide “practical guidance to European officials, Delegations and Member States on steps that can be taken [to] support and reinforce justice systems in third countries so they have capacity to fully exercise criminal jurisdiction over those responsible for the crime of genocide, crimes against humanity and war crimes.”³ Nearly

² In addition to its current placement on the “Fight Against Impunity” page, we would suggest that it also be placed on the “Key EU documents” page: http://www.eeas.europa.eu/human_rights/icc/docs/index_en.htm.

³ EU Complementarity Toolkit, p. 2.

10 pages of the toolkit are devoted to analyzing key areas where assistance may strengthen domestic judicial systems' ability to adjudicate grave international crimes. The toolkit also has an "operational steer" with a list of questions that practitioners should take into consideration when assessing the feasibility of complementarity programming.

Despite the overview of options and list of relevant considerations, the toolkit falls short insofar as it does not provide an operational annex with a list of specific EU programs and budget lines that could be used to fund complementarity projects in third countries. We would strongly encourage the European Union to develop such an annex and to circulate it to all relevant staff in Brussels and field delegations in order to make the toolkit a more concrete tool for practitioners.

4. Periodic evaluation of implementation of the complementarity toolkit

In order to ensure that the toolkit remains a living document and evolves as complementarity practice develops, we believe it would be useful for the European Union to evaluate at appropriate junctures the toolkit's utility in aiding the development of effective complementarity programming. The Governance, Democracy, Gender and Human Rights Unit of the Commission, which drafted the toolkit, could carry out the evaluations, looking at how different complementarity projects have played out in third countries and attempting to draw lessons learned. The evaluation could then be shared on a periodic basis with relevant stakeholders within the European Union.

It could also be useful for the European Union to share the periodic evaluations of the toolkit at the Assembly of State Parties (ASP) meetings in the context of plenary discussions on complementarity. Given the significant amount of development assistance given to third countries, the European Union is likely to be a leader in the field of supporting complementarity projects and may have guidance to offer other States Parties that are involved in complementarity work.

5. Encouraging member states to adopt their own guidance notes on complementarity

Finally, we would urge the European Union to encourage member states to develop their own national guidelines on how complementarity projects could be better mainstreamed in their development assistance. This would be particularly valuable for those countries that provide a significant amount of development aid, particularly in the fields of justice and rule of law.

The EU complementarity toolkit and the operational annex, as well as any subsequent evaluations, could provide a firm basis upon which member states could develop their own policy on complementarity. Together, the European Union and its 28 member states have the potential to significantly bolster national judicial systems' capacity to adjudicate grave international crimes.

We thank you in advance for your attention to this important matter. We would welcome the opportunity to meet with you to discuss these recommendations in more detail.

Yours sincerely,



Lotte Leicht
EU Director



Richard Dicker
International Justice Director

Cc:

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Chair of the EU's Working Party on Human Rights (COHOM), Mr. Engelbert Theuermann
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