

Paris, London, Brussels, 10 February 2009

Dear Head of Delegation to the Council Africa Working Group,

We are writing in advance of the upcoming meeting of the Council Africa Working Group (COAFR) in Brussels, to highlight the key role of universal jurisdiction in the fight against impunity for serious international crimes- genocide, crimes against humanity, war crimes and torture.

As two human rights organisations working towards accountability for perpetrators of serious international crimes and assisting victims in their access to justice, we have been following the developments related to universal jurisdiction over the past months with serious concern. Misconceptions about universal jurisdiction, its role in the fight against impunity and its legal basis in international law led to an unfortunate decision by the AU at its summit in Sharm el Sheik in July 2008 and ensuing efforts to limit universal jurisdiction. We therefore welcome the decision taken at the last AU/EU Troika Meeting, on the initiative of COAFR, to establish a technical ad hoc expert group to clarify the respective understanding on the African and EU side on the principle of universal jurisdiction. This provides an opportunity for both sides to clarify misconceptions and to explore ways of how best to support the exercise of universal jurisdiction, thereby contributing to global accountability for the most serious crimes.

1. Definition and legal basis of universal jurisdiction

Usually, crimes are prosecuted in the country where they were committed or by the courts of the nationality of the perpetrator or the victim. Universal jurisdiction, however, allows third countries anywhere in the world to try perpetrators of serious international crimes regardless of the location of the crimes and irrespective of the nationality of the perpetrator or the victim. It is based on the recognition that certain crimes are so horrific- genocide, crimes against humanity, war crimes, torture and enforced disappearances- that they affect the international community as a whole. Consequently, all states have a duty and at times an obligation to hold perpetrators of such crimes accountable.

International treaties, such as the Convention on the Protection of all Persons from Enforced Disappearances of 2006, the Convention against Torture of 1984 and the Geneva Conventions of 1949 all oblige States Parties to ensure that suspects who come within their borders are brought to justice, either by prosecuting them before their own courts, including on the basis of universal jurisdiction, or by extraditing them to stand trial elsewhere. It is further widely recognised that international customary law at least permits the exercise of universal jurisdiction for genocide and crimes against humanity. The exercise of universal jurisdiction is therefore not an infringement of another state's sovereignty, as consistently alleged by some

opponents to universal jurisdiction over the past months. To the contrary, the wide ratification of the treaties providing for universal jurisdiction as well as its basis in international customary law underline that an exercise of universal jurisdiction is an expression of respect for and compliance with international law. The exercise is itself subject to certain legal restrictions as has been interpreted by the International Court of Justice, such as immunities for Foreign Ministers. In addition, the principle of subsidiarity which has been referred to in several national judgments, considers universal jurisdiction to be a 'reserve jurisdiction' for cases where the judicial system of the country where the crimes were committed is either unwilling or unable to ensure accountability.

The universal jurisdiction principle is not to be confused with other bases of jurisdiction, such as passive personality jurisdiction, which allows States to exercise jurisdiction over crimes committed against their own nationals. This was the basis for the international arrest warrants issued by a French judge against those allegedly responsible for shooting down the plane carrying the presidents of Rwanda and Burundi in 1994. The plane's crew were French citizens and the French judge did not invoke universal jurisdiction when issuing an arrest warrant against Rwandan officials. The more recent Spanish arrest warrants for Rwandans alleged to have committed genocide and other serious international crimes is based on a mixture of passive personality and universal jurisdiction as some of the victims were Spanish priests.

2. The 'raison d'être' of universal jurisdiction

Over the past months it was often argued that universal jurisdiction is an 'imperialistic and neo-colonial' tool used by the West to prosecute Africans. However, past practice has illustrated that it was used to charge, indict and prosecute suspects and perpetrators from all over the world, including the United States, Argentina, Chile, Senegal, Rwanda, Congo, Uganda, Tunisia, Afghanistan, Israel and Sri Lanka. While trials should preferably take place in the country where the crimes were committed, there are many reasons that warrant an exercise of universal jurisdiction as a 'jurisdiction of last resort'.

- National courts may often not be in a position to investigate and prosecute serious international crimes, in particular in the aftermath of an armed conflict that may have left the justice system in tatters. Where the crimes have been committed by government officials in power, the national authorities may not have an interest in or even be opposed to ensuring accountability of those responsible for human rights violations. In both circumstances, universal jurisdiction can be a key instrument for victims of the most horrific crimes, providing them with an access to justice where they have nowhere else to turn. Indeed, in the immediate aftermath of the war in the former Yugoslavia and due to the absence of a functioning judicial system in the former Yugoslavia in the 1990s, a number of European countries, including Germany and Denmark, prosecuted and convicted a number of perpetrators for committing genocide and war crimes in the region. Similarly, several perpetrators and suspects involved in the genocide in Rwanda in 1994 have been and still are being investigated and prosecuted by European and Canadian authorities on the basis

of universal jurisdiction. Rwandan authorities support these proceedings and cooperate closely with their European counterparts to ensure that those suspected of the 1994 genocide do not benefit from impunity by simply fleeing abroad. The African Union itself relied on universal jurisdiction when it called on Senegal to prosecute Hissène Habré, former Chadian dictator, '*in the name of Africa*'.

- Where the traditional forum (territorial state or state of the accused) is unable or unwilling to act, victims may gain an access to justice through international tribunals and courts or the International Criminal Court (ICC). Yet international tribunals and courts are constrained by a mandate that is limited to a specific territory and conflict such as the two ad-hoc tribunals for Yugoslavia and Rwanda or the Special Court for Sierra Leone. The jurisdiction of the ICC is limited to crimes committed after 1 July 2002. Neither the ICC nor other internationalized courts and tribunals that have been established from time to time have sufficient resources to investigate or prosecute all alleged perpetrators. Indeed, the Office of the Prosecutor of the ICC indicated a 'risk of an impunity gap unless national authorities, the international community and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used'. In fact, because of the Court's limited jurisdiction and capacity, it could not have prosecuted any of the cases that have been successfully brought to justice in Europe so far and an exercise of universal jurisdiction is therefore crucial to close the impunity gap.
- Universal jurisdiction can further be an important catalyst for trials in the country where the crimes were committed ('territorial state') and where national authorities have previously been unwilling to investigate and prosecute those involved in serious international crimes. The landmark case of Augusto Pinochet in Spain and the United Kingdom triggered effective proceedings in Chile, and enable victims who had previously kept silent and were not considered by the Chilean Truth and Reconciliation Commission until the filing of complaints in Europe to trigger new proceedings and to obtain the creation of a Truth Commission on Torture. In Argentina, special legislation such as the 'full stop' and 'due obedience' laws that were introduced to protect military officials from an investigation and prosecution for atrocities committed during the military dictatorship of 1976-1983 was repealed in June 2005, after several proceedings against Argentinean officials were initiated before Spanish courts on the basis of universal jurisdiction.

3. The European Union and universal jurisdiction

All EU Member States have ratified the Convention against Torture, the Geneva Conventions and, with the exception of the Czech Republic, the Rome Statute of the ICC. All Member States have implemented universal jurisdiction legislation into their domestic penal codes at least to some extent and it is primarily European countries which, over the past years, have set the agenda when it comes to the fight against impunity through an exercise of universal jurisdiction. Universal jurisdiction legislation in countries including Belgium, France, Spain, the Netherlands, the United

Kingdom, Denmark, Sweden, Finland, Germany and Norway has been used to lodge criminal complaints and in some instances, to lodge criminal investigations and prosecutions against suspects and perpetrators from Afghanistan, Argentina, Chile, Iraq, Rwanda, Congo, Uganda, China, Israel and the United States.

The EU as an institution has done much to encourage these developments and on various occasions, expressed its determination *'to work towards the prevention of crimes of international concern and the ending of impunity for the perpetrators of such crimes'*. The Joint Africa EU Strategy as adopted in December 2007 underlines that *'both sides commit themselves to the fight against impunity in all its forms'* and that the most serious crimes of concern to the international community *'should not go unpunished and their prosecution should be ensured by measures at both domestic and international level'*.

In the context of its Justice and Home Affairs policy, the Council of the EU further adopted two Framework decisions expressly designed to support Member States in their efforts to bring perpetrators of serious international crimes to justice. The Framework decision to establish the EU Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes of May 2002, was followed by a decision on the investigation and prosecution of these crimes. Both decisions have proved invaluable and past cases underscored the added value of a European Justice and Home Affairs approach to investigations and prosecutions of serious international crimes on a Member State level.

4. Conclusion and Recommendations

A national and a European framework for the investigation and prosecution of serious international crimes, including an exercise of universal jurisdiction, has thus been established over at least the past decade and it continues to be developed. The EU's commitment to international justice in the margins of its External but also its Justice and Home Affairs policy, combined with the Member States' pledge to actively contribute to an end of impunity puts the EU in a position to contribute to global accountability and justice for the worst international crimes.

Past cases in Europe, and increasingly elsewhere, including the USA, Canada, Senegal, Peru and New Zealand, illustrate the important and indeed effective role of universal jurisdiction in this endeavour. However, despite the advancements made and the growing desire worldwide for accountability and justice, universal jurisdiction is still misunderstood and rejected, in particular by those subject to an international arrest warrant issued on the basis of universal jurisdiction.

We therefore recommend that the COAFR:

- Continues supporting the fight against impunity and to work with the Expert Group on universal jurisdiction, the COJUR and the Article 36 Committee to ensure that the European Union speaks out unanimously in support of universal jurisdiction;
- Emphasizes in meetings with the AU the absolute independence of the judiciary and the principle of non- interference with decisions made by the judiciary. Judges must not be required to take into account political

considerations when considering a case of genocide, crimes against humanity, war crimes or torture;

- Underscores the importance for all States to cooperate in the investigation and prosecution of these crimes, whatever the legal basis for such investigation and prosecutions may be. Such cooperation must include the compliance with arrest warrants and prompt implementation of requests for mutual legal assistance;
- Takes all necessary steps to ensure that the EU provides assistance and support to African countries where capacity to adequately investigate and prosecute these crimes may be lacking and to place pressure where the willingness to ensure accountability is lacking;
- Relies on the key role of existing cooperation mechanisms in advancing the fight against impunity and in providing a platform for exchange, in particular the EU Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes;
- In close collaboration and coordination with other Council working groups, in particular COHOM, COJUR and the Article 36 Committee, fosters a European wide approach to the fight against impunity ensuring that there are no legal, practical or other loopholes which would allow perpetrators to find a safe haven in Europe and deny victims justice.

Thank you for your attention with regards to this important matter.

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