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Seeking Reparation for Torture Survivors

fidh
International Federation for Human Rights

To: Representatives to the Council Africa Working Group

Re: The AU- EU Expert Report on the Principle of Universal Jurisdiction.

Paris, London, Brussels, 22 April 2009

Dear Representative to the Council Africa Working Group,

We are writing in advance of the meeting of the Council Africa Working Group (COAFR) in Brussels and in respect of the AU- EU Expert Report on the Principle of Universal Jurisdiction ('the Report'), which was released on 16 April 2009.

As underlined in a letter sent to you by our organisations on 10 February 2009[1] on the important role of universal jurisdiction in the fight against impunity for genocide, crimes against humanity, war crimes and torture, we have been following the developments related to universal jurisdiction over the past months with serious concern. A common understanding between the AU and the EU about universal jurisdiction and its legal basis in international law is vital to the global fight against impunity.

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 and to issue recommendations for *'fostering a better mutual understanding between the AU and the EU of the purpose and the practice of universal jurisdiction'*.

While we are aware that it is an Expert, rather than an AU/ EU Report, we would like to use this opportunity to outline our assessment and concerns, and urge you to take these into account in any follow up discussion and further action taken in respect of the Report.

1. Preliminary Remarks

It appears from **Part I** of the Report that there is a common understanding as to the **definition** and **content** of universal jurisdiction. We welcome that the Report recognises that universal jurisdiction is a *'vital element in the fight against impunity'*, while clearly distinguishing it from other bases of jurisdiction. We support the experts' findings that both, customary international law and international treaty law permits, and at times obliges states to exercise universal jurisdiction.

[1] Letter available online at http://www.redress.org/documents/Letter%20to%20COAFR_10%20February%202009.pdf

The **approaches** to universal jurisdiction taken in national law and practice of Member States of the AU and the EU, referred to in **Part II** of the report, illustrate, that there are serious shortcomings and discrepancies in national practice when it comes to the proper implementation of treaty obligations in domestic law and in particular, the exercise of universal jurisdiction. Unfortunately, the Report encourages only African States to adopt national legislative and other measures aimed at preventing and punishing war crimes, genocide and crimes against humanity (Recommendation 2). While we certainly agree that there is great need for such measures in many African States, the same can be said about EU Member States' national legislation, which in the majority of cases does not fully reflect their obligations under international law.

We therefore regret that no similar recommendation is made with regard to EU Member States.

Certain political statements made about universal jurisdiction to an extent have confused the jurisdiction of the **International Criminal Court (ICC)** with the principle of universal jurisdiction. The Report in **Part III** clearly sets out the differences between the two and underlines that universal jurisdiction serves as a complement to the jurisdiction of the ICC, relating *'to the competence of a state to prosecute persons before its own courts, rather than to the prosecution of those same persons before an international judicial body'*. A state's exercise of universal jurisdiction is therefore independent from the ICC and not subject to prior consent of the ICC.

The real difference in approaching universal jurisdiction in AU and EU Member States, however, seems to relate to its **exercise in practice**, demonstrated in **Part IV** of the Report, entitled 'The Key Points of AU-EU Concern over Universal Jurisdiction'.

We welcome the illustration in paragraph 26 which notes that- contrary to the contention of certain states- judicial authorities in EU Member States initiated universal jurisdiction proceedings against suspects from 27 states worldwide. Only 10 of these proceedings relate to individuals from AU Member States. This underscores that the principle of universal jurisdiction is a universal tool, and is not specifically "targeting African states".

However, we are concerned about some major shortcomings of the Report and in particular its recommendations, relating to 1) the independence of the judiciary, 2) the role of universal jurisdiction for victims, 3) the failure to provide a better understanding of the purpose and practice of universal jurisdiction in respect of some key points and 4) the failure to call for EU support of the principle.

2. <u>The Independence of the Judiciary</u>

Paragraph 41 of the Report recognises that the independence of the judiciary is a '*cardinal constitutional principle'* of the '*various national legal traditions within the EU'*. While the need for judicial independence should be self-evident, the principle has come under attack in recent months in the context of universal jurisdiction and as

such it is commendable and absolutely necessary for the Report to express support of this principle. However, we regret that the spirit of the Report's recommendations and in particular recommendations 6, 7 and 10 are in direct opposition to this strong insistence on the '*non- negotiable character'* of the principle. These recommendations request States to '*bear in mind the need to avoid impairing friendly international relations*' when exercising universal jurisdiction. The Report's recommendations further request national criminal justice authorities to refrain from taking certain judicial measures- such as issuing arrest warrants- against suspects against whom such authorities have '*collected compelling evidence of serious crimes of international concern*' where these suspects are foreign state officials. This will require judicial authorities to take into account political rather than legal reasons in the judicial decision making process and provides considerable room for political interference with the judiciary.

Judicial independence is a pre-requisite to the rule of law and as such, a fundamental guarantee of a fair trial.[2] It would have therefore been of utmost importance for the fundamental nature of this principle, as stated in paragraph 41 of the Report, to form part of the recommendations so as to indeed '*take at a starting point the non-negotiable character of this principle*' when addressing concerns about EU Member States' exercise of universal jurisdiction. This would have assisted to prevent future calls for a moratorium of arrest warrants issued by judicial authorities in Europe (or elsewhere) and to ensure that judicial authorities can exercise their duties freely and without any pressure from the executive.

3. Victims' access to justice and universal jurisdiction

The Report seeks to foster 'a better mutual understanding between the AU and the EU of the **purpose** and the **practice** of universal jurisdiction', yet fails to refer, at any point, to the crucial role of universal jurisdiction for victims of the most horrific crimes. This is difficult to understand, as one of the main purposes of universal jurisdiction as a 'jurisdiction of last resort' is precisely to provide justice for victims who have nowhere else to turn. Territorial 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 may even be opposed to, ensuring accountability of those responsible for human rights violations.

We agree that where feasible preference should be given to trials in the territorial state or the state of the accused's or the victims' nationality and we welcome the important efforts undertaken by Member States of the AU to bring to justice those responsible for serious human rights violations on the basis of territorial jurisdiction as highlighted in paragraph 20. However, at the same time, we would like to point to proceedings where universal jurisdiction presented the only alternative for victims to obtain justice, even with regard to AU Member States. For instance, several individuals suspected of being involved in the genocide in Rwanda in 1994 have been

[2] See for instance the Bangalore Principles of Judicial Contact of November 2002, Value 1, Independence, at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

and still are being investigated and prosecuted by European and Canadian authorities on the basis of universal jurisdiction. Rwandan authorities- tasked with a high number of cases before their domestic courts and overcrowded prisons- support these complementary 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'*, as victims did not find access to justice in Chad. Other, similar examples include the case of Ely Ould Dah, prosecuted and convicted in France for torture committed in Mauritania, where an amnesty law prevented victims from seeking justice in Mauritania.

Victims' access to justice should therefore play a major role when discussing universal jurisdiction and when considering whether the territorial state is able and willing to try suspects of serious crimes of international concern. The Report rightly highlights in Part I that there is no '*mandatory hierarchy of internationally permissible jurisdictions'*.[3] Unfortunately, the Report's recommendations fail to take this into account. Recommendation 9 asks States, as a *matter of policy, to accord priority to territoriality as a basis for jurisdiction*, mainly for practical reasons. However, the recommendation does not render the territorial priority subject to the willingness and ability of the territorial state to bring perpetrators to trial in accordance with international human rights standards.

The emphasis in recommendation 9 should have been placed on a State's ability to deliver justice and ensure accountability when considering in which State a case is to be investigated with a view to prosecution, rather than on the basis of jurisdiction.

4. Fostering a better understanding of universal jurisdiction

We appreciate that the Report sets out the definition and content of the principle of universal jurisdiction in international law and in particular distinguishes universal from other forms of jurisdiction. This will help to prevent misunderstandings in the future, in particular as far as passive personality jurisdiction and universal jurisdiction are concerned.

The Report further puts universal jurisdiction in the context of the *aut dedere aut judicare* obligation of several human rights treaties and expressly underlines that a state party to one of the treaties in question is '*bound to empower its criminal justice system to exercise universal jurisdiction'* and further bound *'to actually exercise that jurisdiction by means to either considering prosecuting or extraditing*'.

We particularly welcome that the Report in recommendation 4 urges Member States of the AU and EU to '*promptly institute criminal proceedings'* against suspects of serious international crimes on their territory, unless they decide to extradite them. This is particularly important with respect to the many genocide suspects from Rwanda who are allegedly located in EU and AU Member States, and in respect of the case of former Chadian dictator, Hissène Habré, who is currently in Senegal.

[3] See part I, I.3 of the Report.

However, we regret that the Report does not assist to foster a better understanding of universal jurisdiction in key areas, including the requirement of the suspects' presence on the territory of the forum country (the country exercising jurisdiction), the extent of immunities of state officials under international customary and conventional law and the progress made in the exercise of universal jurisdiction over the past decade.

a. <u>presence requirement</u>

The essence of the principle of universal jurisdiction defies territorial borders. The presence of the accused person on the territory of the investigating State is therefore not per se a precondition for the exercise of such jurisdiction under international law. Indeed, the Report underlines that several states' legislation or practice permits the exercise of universal jurisdiction in absentia. As far as the obligation to exercise universal jurisdiction is concerned, the Report provides in paragraph 9 that States only have an obligation to exercise universal jurisdiction where they ratified the relevant treaty and where the suspect is '*subsequently present in the territory of the forum state'*. It then goes on to mention 'treaty crimes of particular significance', which include grave breaches of the 1949 Geneva Conventions.

This at least appears contrary to the text of the relevant articles of the Geneva Conventions, which oblige States "**to seek out and prosecute**" those said to be responsible for grave breaches. The articles do not refer to the presence of the accused as a pre-condition for the obligation to enter into force and it remains at least questionable whether States only have an obligation to exercise universal jurisdiction over grave breaches of the Geneva Conventions when the suspect is present on the territory of the forum state.

b. <u>immunities of state officials for crimes of international concern</u>

The Report in recommendation 8 reminds national criminal justice authorities considering to exercise universal jurisdiction that they are '*legally bound to take into account all the immunities to which foreign state officials may be entitled under international law'*. It does not clarify the extent of such immunities under international law. Recommendations 7 and 10 further seek to shield 'foreign state officials exercising a representative function on behalf of his or her state' from certain judicial measures, such as an arrest warrant. While States' practice as far as immunities are concerned differs (as demonstrated for instance in paragraph 24 (vii)), the International Court of Justice (ICJ) in the "**Arrest Warrant**" case was very limited in its findings. The ICJ did not decide on anything other than current foreign ministers. Furthermore, the basis for determining that there was immunity for a limited range ofsitting state officials related to the nature of their functions. Consequently, immunity should not be extended beyond the limited range of state officials referred to in the ICJ's judgement, nor to persons who are no longer in post.

The Report's recommendations 7, 8 and 10 therefore provide considerable room to go beyond the limited findings of the ICJ, bearing a risk of impunity in cases where immunities are granted contrary to international law.

c. progressive development of universal jurisdiction in recent years

The Report acknowledges that a wide range of countries, in the AU and in particular in the EU, to some extent provide for universal jurisdiction in their domestic legislation. While a more frequent exercise of universal jurisdiction in AU Member States may currently be prevented by a lack of capacity, an increasing number of judicial authorities in European countries have exercised universal jurisdiction in recent years.[4] The Report places an emphasis on the legal as well as practical limitations of universal jurisdiction yet unfortunately fails to address the positive practice in the recommendations.

The Report ignores advancements made over the past 10 years, such as the establishment of specialised war crimes units within immigration, police and prosecution authorities in an increasing number of countries, an increase in training and specialisation of personnel in the investigation and prosecution of serious international crimes, and an increasing number of prosecutions on the basis of universal jurisdiction. These developments further reduce the practical limitations of universal jurisdiction that are referred to in the Report, and are crucial to foster a better understanding of universal jurisdiction and to ensure its proper application.

5. The EU and universal jurisdiction

The Report provides a good overview of countries' legislative approaches to universal jurisdiction and includes numerous examples. Prosecutors in EU countries initiated universal jurisdiction proceedings against suspects from 27 States worldwide and all EU Member States have legislation providing for universal jurisdiction at least to some extent, as set out in paragraphs 22 ff.

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'*[5]. 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 June

[4] The report refers to Austria, Belgium, Denmark, France, Germany, the Netherlands, Spain and the UK, at paragraph 26; in addition, Sweden and Finland have also exercised universal jurisdiction in the past and are currently considering universal jurisdiction proceedings against Rwandan genocide suspects on their territory.

[5] The European Commission: "The EU's Human Rights and Democratisation Policy" at http://ec.europa.eu/external_relations/human_rights/icc/index.htm

2002[6], was followed by a decision on the investigation and prosecution of these crimes of May 2003, which urged Member States to consider to set up specialized 'war crimes units'[7]. 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.

The Report rightly underlines that the competence of the EU is limited when it comes to matters of criminal jurisdiction. We welcome the recommendation to Eurojust and the EU Network of contact points in respect of genocide, crimes against humanity and war crimes to discuss and develop ways forward in relation to the concerns expressed by the AU Member states.

However, given the issues involved, a recommendation should have been directed in addition to the relevant working group actually dealing with third pillar matters, such as the Article 36 Committee, to discuss and coordinate ways forward in relation to universal jurisdiction.

6. Conclusion and follow up

The Report may help to clarify some of the misconceptions over the exercise of universal jurisdiction in respect African nationals by prosecutors in some EU Member States. However, not all concerns previously voiced by the AU are addressed, and these remaining issues are unlikely to simply go away through the release of this Report.

It remains to be seen whether the Report will have an impact on reactions to future arrest warrants, if any, issued by European judges against African nationals on the basis of universal jurisdiction.

The recommendations fail to shed light on the purpose of universal jurisdiction. It is crucial as a jurisdiction of last resort for victims. The principle thereby ensures that justice is done and that perpetrators know that they have nowhere to hide, thereby contributing to an end of the culture of impunity. The need for universal jurisdiction will continue to exist in the decades to come. 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.

FIDH and REDRESS urge Member States and EU institutions to take into account the concerns as outlined above at the upcoming meeting of COAFR, but also in view of the meeting of the AU/ EU Troika on 28th April and any other follow up to the release of the Report. This will help to facilitate a meaningful debate on the issue of universal jurisdiction that takes into account international law and reflects the advances made

[6] 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 (2002/494/JHA)

[7] Council Decision of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (2003/335/JHA).

and EU positions taken in respect of international criminal justice. This is particularly important as an increasing number of states are exercising universal jurisdiction and as the need for universal jurisdiction proceedings will continue.

We therefore request EU Member States and the EU institutions to:

- Continue to support the fight against impunity for serious crimes of international concern at both national and international levels. To this end, and in line with recommendation 2 of the Report, the Presidency of the EU should request the European Commission to consider to prepare model legislation or guidelines for states on the prevention and punishment of serious crimes of international concern;

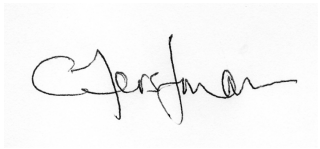
- Insist on the absolute independence of the judiciary and the principle of non interference with decisions made by the judiciary. Contrary to recommendations 6, 7, 9 and 10, judges cannot be required to take into account political considerations when considering a case of genocide, crimes against humanity, war crimes or torture;

- Follow up on recommendations 15, 16 and 17 directed at EU bodies;

- Cooperate closely on a national and European level, including in the relevant working groups to ensure that EU Member States have a common and unified position in support of universal jurisdiction and compliance with international law obligations.

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

Souhayr Belhassen
President, FIDH



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