

Jan Kouhout,
Deputy Minister for Foreign Affairs
Czech Republic

Ref: B863
27 April 2009

Dear Mr Kouhout ,

EU-AU Troika, 28 April 2009

We are writing to you ahead of the European Union (EU) - African Union (AU) Ministerial Troika, to urge you to use the discussion to make progress on ending impunity for crimes under international law. Amnesty International calls on both sides of the meeting to renew prior AU and EU declarations by making a firm commitment to strengthening efforts at the national level to investigate and prosecute such crimes wherever and whenever they occur, regardless of the rank of the perpetrator, including through the use of universal jurisdiction.

The importance of universal jurisdiction in closing the impunity gap

Impunity gap in Africa. In the past few decades, millions of Africans have been the victims of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances committed both by government officials and persons acting at their instigation or with their consent or acquiescence and by members of armed opposition groups. However, there is a huge impunity gap. Only a few states where the crimes occurred or whose nationals have committed crimes abroad have brought any of those responsible to justice, most notably the Central African Republic, Democratic Republic of the Congo, Ethiopia, Mali and Rwanda. In addition, the three international criminal courts, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court, all established as the result of initiatives and strong support from Africa, have tried only a handful of the tens of thousands of persons responsible for these crimes.

Impunity gap in Europe. There is a similar impunity gap in Europe, as a result of failures by police and prosecutors in European states where such crimes have been committed or whose nationals are responsible for crimes abroad to bring to justice those responsible for such crimes committed in European countries, such as Bosnia and Herzegovina, Montenegro, Russia (Chechnya) and Serbia, although there have been a number of important steps in recent years to do so in some of these countries. The International Criminal Tribunal for the former Yugoslavia has convicted more than 58 persons for such crimes, but tens of thousands of other persons responsible for such crimes remain at large in their own states with complete impunity.

Universal jurisdiction as a tool to help end the impunity gap. One important tool to help close this impunity gap for these horrific crimes against African and European victims, as well as victims anywhere in the world, is universal jurisdiction, as recognized six decades ago when the drafters of the 1949 Geneva Conventions required each state party to those treaties to search for and bring to justice those responsible for grave breaches. As documented in an Amnesty International study of state practice at the international and national level in 125 countries, published in September 2001, international law permits and, in some instances, requires states to exercise universal jurisdiction over ordinary crimes under national law (such as murder, assault, rape and abduction), crimes under national law of international concern (such as hijacking, hostage taking and terrorist bombing) and crimes under international law (such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearance).¹

National courts acting as agents of the international community. When national police investigate and national prosecutors prosecute foreign nationals suspected of committing crimes under international law against other foreigners abroad, they are not seeking to enforce national law to vindicate a particular

¹ Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018/2001, September 2001. This study was the first global study of universal jurisdiction since the Harvard Research in International Law in 1935.

national conception of law, but, instead, are acting as agents of the international community to enforce international law by bringing to justice persons who have committed crimes against the entire international community. As the Supreme Court of Israel explained half a century ago in the *Eichmann* case:

"Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed."²

The evidence demonstrates unequivocally that when national courts have sought to exercise universal jurisdiction as agents of the international community – as opposed to other forms of geographic jurisdiction, such as territorial, active or passive personality or protective jurisdiction – they have almost invariably done so in an even-handed way, investigating crimes under international law committed in all regions of the world, both by government officials and former officials and by members of non-governmental armed groups. In almost all cases, the investigations and prosecutions have been instituted based on complaints by the victims themselves or by their families after they have sought and failed to obtain justice in the countries where the crimes occurred. Indeed, there are almost no examples of a national court that has sought to exercise universal jurisdiction over a suspect where the court in the state where the crime occurred or the suspect's own state had opened a thorough, prompt, independent and impartial criminal investigation or commenced a prosecution in a competent, independent and impartial court.

The catalytic impact of universal jurisdiction. Although national police and prosecutors have been able to investigate and prosecute only a relatively small number of the tens of thousands of persons suspected of such crimes using universal jurisdiction, these criminal investigations and prosecutions have had a catalytic effect on national investigations and prosecutions in the states where the crimes were committed or the suspects' own states far beyond the individual cases. For example, after the House of Lords determined that the United Kingdom could extradite former President Augusto Pinochet Ugarte of Chile to Spain, investigations and prosecutions became possible or dramatically increased in Argentina, Chile and elsewhere in the Southern Cone of South America of persons suspected of torture, extrajudicial executions and enforced disappearances. Similar results have been seen in other countries where the crimes occurred or the suspects' own countries after national police opened criminal investigations, judges issued arrest warrants or prosecutors commenced prosecutions based on universal jurisdiction, such as Chad, Guatemala and, most recently, the United States of America, after a Spanish investigating judge indicated that he was planning to open a criminal investigation of Presidential legal advisers who wrote a memorandum stating the certain torture techniques were lawful.

Misconceptions about universal jurisdiction and the EU-AU dialogue. Regrettably, a number of misconceptions about universal jurisdiction have arisen recently, such as the claim that national courts have "abused" such jurisdiction. In many instances, the courts were actually exercising passive personality jurisdiction, based on the nationality of the victim, not universal jurisdiction. In other instances, critics have suggested that there was insufficient evidence to secure a conviction, but that evidence had yet to be tested in court, the appropriate means to address such claims. In other instances, national police and prosecutors were accused – without citing any evidence of bias – of focussing on crimes committed against African victims.

AU steps to address the perceived "abuse and misuse" of universal jurisdiction. Some of these misconceptions appear to have led to the AU Ministers of Justice/Attorneys General in Addis Abba on 18 April 2008 asking an expert commission to prepare a report on the so-called "abuse and misuse of indictments against African leaders" in universal jurisdiction cases. Despite the failure of the report to document any pattern of abuse and misuse of universal jurisdiction against African leaders, these misconceptions have persisted and the AU Assembly, at its 11th Ordinary Session, 30 June - 1 July 2008, Sharm El-Sheikh, Egypt, took note of the report of this expert commission, concluded that the "the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these

² *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 277, 304 (Israel Sup. Ct. 1962).

States”, resolved that warrants issued in such cases “shall not be executed in African Union Member States” and that “an international regulatory body” be established to deal with this problem, requested the AU Chairperson to table the matter before the UN Security Council and General Assembly and “urgently [to] cause a meeting between the AU and European Union (EU) to discuss the matter with a view to finding a lasting solution to this problem” and, finally, requested all UN member states “to impose a moratorium on the execution of those warrants until all the legal and political issues have been exhaustively discussed between the African Union, the European Union and the United Nations”.³ The meeting between the AU and the EU led to the establishment of an expert group which published its report on 16 April 2009 (see below). The AU Chair requested the UN General Assembly to include an item on this subject on its agenda, but, as of the date of this letter, no decision had been taken on this request.

EU-AU Expert Report on Universal Jurisdiction

The meeting will have before it the AU-EU Expert Report on Universal Jurisdiction, No. 8672/09 <http://register.consilium.europa.eu/pdf/en/09/st08/st08672.en09.pdf>, published on 16 April 2009.

From the perspective of African and European victims of crimes under international law and their families, the EU-AU Expert Report is a considerable advance over the 18 April 2008 AU Report of the Commission on the abuse of the Principle of Universal Jurisdiction, which it supplants.⁴ In particular, the EU-AU Expert Report contains extensive information about state practice in AU and EU member states provided by Amnesty International and other non-governmental organizations.⁵ There are a number of positive aspects about this report, for example, its findings that “[p]ositive international law recognises no hierarchy among the various bases of jurisdiction that it permits”; the majority of AU member states have universal jurisdiction legislation which, with one aborted attempt to prosecute a former African head of state in the courts of an AU state, their police and prosecutors have failed or refused to use; AU and EU states have provided for universal jurisdiction over crimes under customary international law as well as over crimes listed in treaties; at least 13 African states have abolished in national law, or have agreed to do so, provisions recognizing claims of immunity by state officials for crimes under international law; the broad range of nationalities of suspects or accused who have been investigated or prosecuted in EU courts on the basis of universal jurisdiction; and clarification that some of the cases that have been cited as evidence of abuse of universal jurisdiction have actually been based on passive personality jurisdiction.

However, it is disappointing that some of the concerns voiced by certain states or individuals are mentioned in the Expert Report uncritically. For example, these include the suggestion that universal jurisdiction has been abused in cases involving nationals of AU member states; the assertion that the dignity of suspects or accused is undermined if the indictments are issued by low-level judges; and the claim that issuing indictments or arrest warrants for officials is inconsistent with the presumption of innocence. In addition, there are a number of recommendations which should be improved or should not be implemented, including the proposal to give priority to the state where the crimes occurred or the state of the suspect’s nationality – the very states which are often directly involved in crimes; the division of suspects and accused into two classes, where officials would benefit from special procedures and courts; and the continued acceptance that state officials suspected of crimes under international law, such as genocide, are immune from trial in foreign courts.

Amnesty International’s recommendations for strengthening investigations and prosecutions of crimes under international law committed in Africa

Recommendations to the EU-AU Troika

³ AU Assembly, at its 11th Ordinary Session, 30 June - 1 July 2008, Sharm El-Sheikh, Egypt.

⁴ The AU Report of the Commission on the abuse of the Principle of Universal Jurisdiction prepared pursuant to the AU Ministers of Justice/Attorneys General in Addis Ababa, Ethiopia on 18 April 2008, which was submitted to the AU Executive Council, at its 13th Ordinary Session, 24 – 28 June 2008, Sharm El-Sheikh, Egypt.

⁵ Amnesty International provided a member of the AU/EU Expert Group with a copy of its 722-page study of state practice at the national and international level in 125 states, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018/2001, September 2001, and copies of the first of its 192 papers in the *No safe haven* series updating and expanding the information in the 2001 study on each UN member state.

- Develop, in transparent consultation with civil society in Europe and Africa, a joint EU-AU comprehensive long-term action plan to end impunity for crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.
- Such an action plan should include the following elements, among others;
 - Calling upon all members of the AU and of the EU and its associated states to ratify and implement promptly and effectively:
 - The Rome Statute of the International Criminal Court;
 - The Agreement on Privileges and Immunities of the International Criminal Court;
 - The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol;
 - The International Convention for the Protection of All Persons from Enforced Disappearance;
 - Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; and
 - European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (if the state is a member of the Council of Europe).
- Rather than drafting model legislation, calling upon member states to draft, in transparent consultation with civil society, legislation ensuring that they can investigate and, where there is sufficient admissible evidence, prosecute anyone suspected of committing crimes under international law, regardless when or where the crimes were committed and regardless of rank.
- Rather than giving criminal jurisdiction over crimes under international law to an existing regional court, which will never have the resources to try more than a handful of cases, call upon member states, which have the primary duty to investigate and prosecute crimes under international law, to do so.
- Expand the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes to include contact points from AU member states.
- Defend the use of universal jurisdiction in all fora, including the UN General Assembly and Security Council.

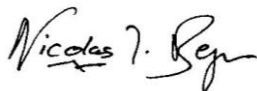
Recommendations to each AU and EU member state

- Develop, in transparent consultation with civil society, a national comprehensive long-term action plan to end impunity for crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.
- Such an action plan should include the following elements, among others;
 - Where this has not yet been done, ratifying and implementing promptly and effectively:
 - The Rome Statute of the International Criminal Court;
 - The Agreement on Privileges and Immunities of the International Criminal Court;
 - The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol;
 - The International Convention for the Protection of All Persons from Enforced Disappearance;
 - Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; and
 - European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (if the state is a member of the Council of Europe).

- Drafting, in transparent consultation with civil society, legislation ensuring that the competent authorities can investigate and, where there is sufficient admissible evidence, prosecute anyone suspected of committing crimes under international law, regardless when or where the crimes were committed and regardless of rank.
- Rather than giving priority to the courts of a state where the crimes were committed or the state where the suspect or victim has nationality, should courts of another state seek to exercise concurrent jurisdiction over a person suspected of committing a crime abroad, giving priority to the court in the state that initiated the criminal investigation or prosecution first, unless the second state can demonstrate that the first state is unable or unwilling to investigate and prosecute in a fair trial, without torture or other ill-treatment or the death penalty, and that it is able and willing to do so.
- Treating every suspect or accused equally and not establishing special procedures for summoning, arresting or trying persons based on their status. In particular, not recognizing assertions that national officials and former national officials are immune from prosecution for crimes in a foreign state for crimes under international law.
- Defending the use of universal jurisdiction in all fora, including the UN General Assembly.

Amnesty International looks forward to learning what decisions the EU-AU Troika takes tomorrow and to working with the AU and EU to strengthen measures, including through the use of universal jurisdiction, to end impunity for genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearance.

Yours sincerely,



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Louis Michel, Commissioner for Development, and African Caribbean and Pacific Countries
H.E. Jean Ping, African Union Commission Chairperson
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