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UNION AFRICAINE

UNIÃO AFRICANA

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Addis Ababa, Ethiopia

P. O. Box 3243

Telephone: 5517 700

Fax: 5517844

Website: [www.Africa-union.org](http://www.Africa-union.org)

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## **ASSEMBLY OF THE AFRICAN UNION**

**Thirteenth Ordinary Session**

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**Sirte, Libya**

**Assembly/AU/11 (XIII)**

# **PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF THE ASSEMBLY DECISION ON THE ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION**

**PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF  
THE ASSEMBLY DECISION ON THE ABUSE OF THE PRINCIPLE OF  
UNIVERSAL JURISDICTION**

**I. INTRODUCTION**

1. The 11<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the African Union, held in Sharm El Sheik, Egypt in July 2008, in its decision Assembly/AU/Dec.199 (XI), expressed concern on the abusive application of the principle of universal jurisdiction by some non-African States and resolved, *inter alia*, as follows:

“ **6. REQUESTS** the Chairperson of the African Union to table the matter before the United Nations (UN) Security Council and the UN General Assembly for consideration;

**7. FURTHER REQUESTS** the Chairperson of the AU Commission to urgently 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matter with a view to finding a lasting solution to this problem and in particular to ensure that those warrants are withdrawn and are not executable in any country. ”

2. A Progress Report on the implementation of the above Decision was submitted to the Assembly in February 2009, in Addis Ababa, Ethiopia.

3. Following due consideration of the Progress Report of the Commission, the Assembly adopted Decision Assembly/AU/Dec.213 (XII) and requested, *inter alia*, the Commission to follow up on this matter with a view to ensuring that a definitive solution to this problem is reached and to report to the next ordinary session of the Assembly through the Executive Council in July 2009. Paragraph 10 of the said decision states as follows:

“ **ALSO REQUESTS** the Commission to follow up on this matter with a view to ensuring that a definitive solution to this problem is reached and to report to the next ordinary session of the Assembly through the Executive Council in July 2009.”

4. This report presents a summary of the actions taken to implement the above mentioned Assembly decisions vis-a-vis the European Union and the United Nations during the reporting period.

**III. ACTIONS TAKEN TO IMPLEMENT DECISION ASSEMBLY /AU/Dec.199 (VIII)**

**a) Actions undertaken in respect of the European Union**

5. It is to be recalled that during the 11th AU/EU Ministerial Troika meeting held in Addis Ababa, Ethiopia, from 20 to 21 November 2008, the two parties recognized that the issue had negative consequences for the relationship between the AU and the EU. With a view to addressing the matter, the Troika agreed to set up a Joint

Technical Ad-Hoc Expert Group to clarify their respective understanding on the African and EU side on the principle of universal jurisdiction and that a report thereto be submitted to the next Troika meeting in April 2009, with a preliminary report being submitted before the end of January 2009.

6. Pursuant to this decision of the 11<sup>th</sup> AU-EU Ministerial Troika, an advisory Technical Ad hoc Expert Group was constituted by both the African Union and the European Union to inform discussions between the EU and the AU on the principle of universal jurisdiction, in particular to clarify the respective understandings by the AU and the EU of the principle of universal jurisdiction, and to report to the 12<sup>th</sup> Ministerial EU-AU Troika.

7. The final report adopted by the Joint Experts Group covers the following points: (i) Definition and scope of the Principle of Universal jurisdiction; (ii) Approaches to Universal Jurisdiction in the National Law and practice of Member States of the AU and EU; (iii) the jurisdiction of the International Criminal Court; (iv) the key points AU-EU concern over Universal Jurisdiction; and (v) Recommendations.

8. According to their terms of reference, the experts were to make recommendations with a view to fostering better mutual understanding between the AU and EU regarding the principle of universal jurisdiction. The recommendations are addressed to AU and EU Member States, and to the AU and EU institutions, organs and bodies, as appropriate.

9. The Report of the experts was submitted to the 12<sup>th</sup> Meeting of the Ministerial Africa-EU Troika which was held in Luxemburg on 28 April 2009. Following due consideration of the Report of the Experts, the Troika Meeting, *inter alia*, took note of the report and agreed that the report should be shared with the organs of the AU and EU as well as Member States.

10. Accordingly, the report and an executive summary were circulated by the Commission to all Member States and the members of the African Group in New York, Brussels and Geneva.

#### **b) Actions taken in respect of the United Nations**

11. Pursuant to the July 2008 Decision Assembly/AU/Dec.199 (XI), the United Republic of Tanzania, during its tenure as the Chairperson of the African Union, requested for the inclusion of an item in the agenda of the Sixty-third Session of the General Assembly beginning in September 2008 entitled "abuse of the principle of universal jurisdiction".

12. Before the matter could be formally placed on the agenda of the UN General Assembly, bilateral consultations took place between the African Group and the EU Group and other interested parties in New York. Other groups, notably the European Union, expressed willingness to discuss the African Union's request further so as to come up with an agreement on the title of the request. The EU expressed the view

that the title of the agenda item should be changed to “prevention, application scope, impact, and effects of the principle of universal jurisdiction”, as possible alternatives to the word “abuse” after which they would support it. The African Group, drawing inspiration from Assembly decision in Sharm el Sheikh, insisted on “abuse of the principle of universal jurisdiction” as the title. .

13. Additionally, the African Group in New York met the Representatives of the Permanent Missions of Peru and Mexico (Rio Group) at their request. They were also concerned with the choice of the title and further suggested that the African Group should consider a more neutral title which would not pre-judge the outcome of the deliberations. The African Group is therefore expected to consider the proposal by the European Union and the Rio Group on the formulation of the agenda item while maintaining the essence of the AU Assembly decision.

14. At the time this report was being prepared, this issue had not been resolved.

## **V. CONCLUSIONS AND RECOMMENDATIONS**

15. This Report is submitted for information of progress made within the framework of the actions taken to implement Decision Assembly/AU/Dec.199 on the Abuse of the principle of Universal jurisdiction.

16. The Commission believes that the Recommendations of the Independent Experts group have gone a long way in putting forward all the concerns expressed by the African Union and in identifying areas where the application of the principle has not conformed to international law. The report should serve as a working document for negotiations at the level of the United Nations. However, the Commission wishes to note that, during the ministerial Troika held in Luxembourg on 28 April 2009, the European Union expressed the view that it had not been mandated by states to deal with this matter

17. The Commission would like to propose for consideration by the Assembly through the Executive Council the following:

- i. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Assembly Decision Assembly/AU/Dec.199(XI) adopted by the Assembly in Sharm El-Sheikh, Egypt, in July 2008 as well as decision Assembly/AU/Dec.213 (XII) on the Abuse of the Principle of Universal Jurisdiction adopted in February 2009;
- ii. **ALSO TAKES NOTE** of the Report of the AU-EU Technical Ad-hoc Expert Group set up by the 11<sup>th</sup> AU-EU Ministerial Troika with the mandate to clarify the respective understanding on the African and EU side on the principle of universal jurisdiction;
- iii. **REITERATES** its previous positions articulated in decisions Assembly/Dec.199(XI) and Assembly/Dec.213(XII) adopted in Sharm el Sheikh and Addis Ababa in July 2008 and February 2009 respectively to the effect that there has been blatant abuse of the principle of universal

jurisdiction particularly in some non African States and **EXPRESSES** its deep concern that indictments have continued to be issued in some European States against African leaders and personalities. To this end, it calls for immediate termination of all pending indictments;

- iv. **FURTHER REITERATES** its conviction on the need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the principle of universal jurisdiction by individual States;
- v. **CALLS UPON** all concerned States to respect the international law and particularly the immunity of state officials when applying the principle of universal jurisdiction;
- vi. **EXPRESSES APPRECIATION** to the Chairperson of the African Union and the Chairperson of the AU Commission for efforts made so far towards ensuring that this matter is exhaustively discussed at the level of the United Nations General Assembly and with the European Union, respectively;
- vii. **INVITES** the Member States affected by the abuse of the principle of universal jurisdiction by non-African States to respond to the request made by the Chairperson of the Union and to communicate to the Commission the list and details of pending cases in non African States against African personalities;
- viii. **REQUESTS** the Commission to follow-up on this matter with a view to ensuring that a definitive solution to this problem is reached and to report to the next ordinary session of the Assembly through the Executive Council in January/February 2010.

**Annex I: Executive Summary (AU-EU Technical Ad-hoc Expert Group on the Principle of Universal Jurisdiction)**

**Annex II: Report of the AU-EU Technical Ad-hoc Expert Group on the Principle of Universal Jurisdiction**

**Assembly/AU/11 (XIII)**  
**Annex I**

**AU-EU Technical Ad hoc Expert Group on the Principle  
of Universal Jurisdiction**

**EXECUTIVE SUMMARY**

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Addis Ababa, ETHIOPIA P. O. Box 3243 Telephone +251115- 517700 Fax : +251115- 517844  
Website : [www.africa-union.org](http://www.africa-union.org)

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**AU-EU Technical Ad hoc Expert Group on the Principle  
of Universal Jurisdiction**

**EXECUTIVE SUMMARY**

**AU-EU Technical Ad hoc Expert Group on the Principle  
of Universal Jurisdiction**

**EXECUTIVE SUMMARY**

**I. INTRODUCTION**

1. The Assembly of the African Union (AU) in their 11<sup>th</sup> Summit meeting held in Sharm el Sheik, Egypt in July, 2008 received the Report of the Commission on the Abuse of Universal Jurisdiction. Thereupon, it requested the Chairperson of the AU Commission urgently to arrange a meeting between the African Union and the European Union (EU) to discuss the issue of the exercise of universal jurisdiction by European states, with a view to finding a lasting solution to concerns expressed by the African side.
2. Thus during the 10th and 11th meetings of the AU-EU Ministerial Troika held on 16 September 2008 (Brussels) and 20-21 November 2008 (Addis Ababa) the issue of application of the principle of universal jurisdiction by states in the context of the relationship between the AU and EU was thoroughly discussed.
3. In their Joint Communiqué issued at the close of the 11th AU-EU Ministerial Troika meeting it was reported that:

*The two parties recognized that the issue has negative consequences for the relationship between the EU and the African side. Ministers agreed to continue discussions on the issue and to set up 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 report to the next Ministerial Troika meeting, with a preliminary report to be submitted before the end of January 2009.'*

4. An advisory Technical Ad hoc Expert Group was constituted by both the AU and EU in January 2009. The Group comprised of the following members:

**(a) From the African Union**

- (i) Dr Mohammed Bedjaoui (Algeria), former Judge and President of the International Court of Justice, the Hague, the Netherlands.
- (ii) Dr Chaloka Beyani (Zambia), Senior Lecturer, London School of Economics, U.K. and Legal Advisor to the International Conference on the Great Lakes.
- (iii) Professor Chris Maina Peter (Tanzania), Professor of Law, University of Dar es Salaam, Tanzania and Member of the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD).

**(b) From the European Union**

- (i) Professor Antonio Cassese (Italy), Professor of Law and former President of the International Criminal Tribunal for the Former Yugoslavia (ICTY).
- (ii) Professor Pierre Klein (Belgium), Professor, Department of Political Science, Free University of Brussels.



- (iii) Dr Roger O'Keefe (Australia), Deputy Director, Lauterpacht Centre and Senior Lecturer in International Law, Magdalene College, University of Cambridge.

5. The Technical Ad hoc Expert Group was to be supported by a Secretariat made of the following:

**(a) From the African Union**

- (i) Mr Ben Kioko, Legal Counsel, AU Commission
- (ii) Mr Fafré Camara, Legal Officer, AU Commission

**(b) From the European Union**

- (i) Dr Sonja Boelaert, Legal Advisor, European Commission
- (ii) Mr Rafael de Bustamante Tello, UN and ICC Desk, General Secretariat of the Council of the EU

6. The Team was given the following Terms of References:

- Provide a description of the legal notion of the principle of universal jurisdiction, setting out the distinctions between the jurisdiction of international criminal tribunals and the exercise of universal jurisdiction and related concepts by individual states on the basis of their national laws;
- Outline the respective understandings on the African and EU sides regarding the principle of universal jurisdiction and its application; and
- Make, as appropriate, recommendations for fostering a better mutual understanding between the AU and the EU of the purpose and the practice of universal jurisdiction.

7. The Team met twice between January and April, 2009. First in Brussels between 14<sup>th</sup> and 15<sup>th</sup> January, 2009; and secondly in Addis Ababa, Ethiopia between 30<sup>th</sup> and 31<sup>st</sup> March, 2009, in order to clarify some of the incomplete issues, the African Team met once more in Brussels between 9<sup>th</sup> and 10<sup>th</sup> April, 2009.

## II. REPORT OF THE EXPERTS

8. During the last meeting of the Experts in Addis Ababa, the final Report was completed.

9. The Report adopted was divided into the following five broad parts:

- (a) Definition and scope of the Principle of Universal Jurisdiction;

- (b) Approaches to Universal Jurisdiction in the National Law and Practice of Member States of the AU and EU;
- (c) The Jurisdiction of the International Criminal Court;
- (d) The Key Points AU-EU Concern over Universal Jurisdiction; and
- (e) Recommendations.

10. The main points made in each area are as following:

**(a) Definition and scope of the Principle of Universal Jurisdiction**

11. In relation to the definition and scope of the Principle of Universal Jurisdiction the following points were made:

**(i) Definition and Content**

1. Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction.
2. International law, both customary and conventional, regulates states' assertion of universal criminal jurisdiction. States by and large accept that customary international law permits the exercise of universal jurisdiction over the international crimes of genocide, crimes against humanity, war crimes and torture, as well as over piracy. In addition, numerous treaties oblige states parties to empower their criminal justice systems to exercise universal jurisdiction over the crimes defined in those treaties, although this obligation extends only to the exercise of such jurisdiction when a suspect is subsequently present in the territory of the forum state.
3. When not constrained otherwise by treaty, states tend to exercise universal jurisdiction in a variety of ways. Some national legislation, jurisprudence or practice may require that universal jurisdiction is to be exercised only when the suspect is subsequently present on the territory of the forum state; other national law or practice permits the exercise *in absentia* of such jurisdiction. Some national law or practice requires that suspects or, alternatively, victims be habitually resident in the forum state at the time the criminal justice system is engaged.

**(ii) Distinction with other bases of jurisdiction under international law**

1. Customary international law permits states to exercise criminal jurisdiction on a variety of other bases. First and foremost, a state may prosecute persons of any nationality who commit crimes of any nature within its territory. This is known as the territoriality principle. A state may also

prosecute crimes committed outside its territory in a range of circumstances. It may do so under the nationality (or active personality) principle when the perpetrator of the crime is a national of that state.

2. Alternatively, under the passive personality principle, it may exercise criminal jurisdiction over extraterritorial acts by non-nationals when the victim of the crime is a national of that state, at least in respect of serious offences against the person.
3. Additionally, under what is known as the protective principle, a state may exercise criminal jurisdiction over extraterritorial acts by non-nationals which threaten some vital interest of that state, e.g. counterfeiting the national currency. Under customary international law, these bases of jurisdiction are, like universal jurisdiction, merely permissive: a state is not obliged to assert a jurisdiction granted to it by custom. But various treaties oblige states parties to empower their courts to exercise jurisdiction over treaty based crimes.

**(iii) No mandatory hierarchy of internationally permissible jurisdictions**

Positive international law recognises no hierarchy among the various bases of jurisdiction that it permits. In other words, a state which enjoys universal jurisdiction over, for example, crimes against humanity is under no positive legal obligation to accord priority in respect of prosecution to the state within the territory of which the criminal acts occurred or to the state of nationality of the offender or victims.

**(b) Approaches to Universal Jurisdiction in the National Law and Practice of Member States of the AU and EU**

In the course of discussion, it became obvious to the experts that the two areas under discussion i.e. Africa and Europe have very distinct approaches to the application of the Principle of Universal Jurisdiction as exhibited below:

**(i) African Union: Outline of National Law and Practice of Member States regarding Universal Jurisdiction**

1. Among the AU Members there are States that provide for the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes. One State establishes universal jurisdiction over crimes against humanity and genocide only while there are others who grant universal jurisdiction over grave breaches of the Geneva Conventions 1949. As for the UN Convention against Torture 1984 more than half of the Member States of the AU are states parties to this, however a number of them need to domesticate the Convention.
2. In at least two AU Member States, immunities as may otherwise serve to bar the prosecution of foreign state officials have been abrogated in respect of charges of genocide, crimes against humanity and war crimes. In addition, in accordance with Article 12 of the Protocol for the Prevention

and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination to the Pact on Security, Stability and Development in the Great Lakes Region, the provisions of the chapter on genocide, war crimes and crimes against humanity apply irrespective of the official status of the suspect.

3. It should be noted that there are legal limitations to the exercise of universal jurisdiction in the legislative practice of AU Member States, e.g., the requirement that the suspect be in the territory of the prosecuting state at the time of the initiation of criminal proceedings and respect for the immunities from criminal jurisdiction enjoyed by state officials under international law.
4. The practical problems likely to be faced by AU Member States in exercising universal jurisdiction will probably be the same as those encountered by EU Member States, but, given the relative capacity of AU Member States, it stands to reason that the impediment will be greater. No African state is known to have exercised universal jurisdiction effectively. In one state, an indictment was brought against a former African head of state, but proceedings were not pursued. In a decision of July 2006, the AU Assembly mandated the African state in question to prosecute and ensure that the suspect be tried, on behalf of Africa, by a competent court of that state, with guarantees for fair trial.
5. It should also be noted that, in its recent decision on the principle of universal jurisdiction, the AU Assembly requested 'the African Union Commission, in consultation with the African Commission on Human and Peoples' Rights, and African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes and report thereon to the Assembly in 2010.'

**(ii) European Union: Outline of National Law and Practice of Member States regarding Universal Jurisdiction**

1. Certain EU Member States provide for the exercise of universal jurisdiction in criminal matters only where such exercise is envisaged or rendered mandatory by international treaties to which the relevant state is party. An example of such a state is Ireland. Other EU Member States grant universal jurisdiction over international crimes on the basis of customary international law as well.
2. The exercise of universal jurisdiction is often subject to legal limitations, e.g., the presence of the suspect on the territory of the prosecuting State may be required, either before the initiation of a criminal investigation or before the commencement of trial proceedings, nationality requirements, grant of universal jurisdiction over crimes committed during a specified conflict.

3. Beyond these legal limitations, certain practical limitations to the exercise of universal jurisdiction exist. The first is the difficulty of collecting evidence in relation to crimes committed abroad, especially when the state where the crime is alleged to have occurred refuses to co-operate. Prospective evidentiary problems are a major reason why few prosecutors in EU Member States have initiated proceedings on the basis of universal jurisdiction to date. A second practical limitation is the awareness on the part of many prosecuting authorities and courts of the diplomatic sensitivities at stake when the conduct of a serving, and in some cases former, state official is involved.
4. Proceedings on the basis of universal jurisdiction been instituted to date in only eight of the twenty-seven Member States of the EU against African officials, including heads of state, on extraterritorial bases of jurisdiction other than universal jurisdiction and in respect of crimes other than serious crimes of international concern. Since these cases do not implicate universal jurisdiction, they fall outside the scope of the present report.

### **(c) The Jurisdiction of the International Criminal Court**

In relation to the International Criminal Court, the Experts noted that Universal jurisdiction is to be distinguished at all times from the jurisdiction of international criminal courts and tribunals. Universal jurisdiction relates to the competence of a state to prosecute persons before its own courts, rather than to the prosecution of those same persons before international judicial bodies with criminal jurisdiction. These include the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Special Tribunal for Lebanon. The Experts went on to elaborate the following:

1. The most significant international criminal court or tribunal in the present context is the permanent International Criminal Court (ICC). The ICC, established by way of treaty under the Rome Statute 1998, has jurisdiction only with respect to crimes committed after the Statute's entry into force on 1 July 2002. The ICC regime is premised on the principle of 'complementarity,' which means that in practice states (and not just states parties) are entitled to pre-empt the prosecution of crimes within the Court's jurisdiction: if a state investigates and/or prosecutes a given case itself or has done so, and does or has done so genuinely, the case becomes inadmissible before the ICC. At the same time, a state is not obliged to prosecute first but may instead refer the case directly to the Court. The ICC has jurisdiction *ratione materiae* over genocide, crimes against humanity, war crimes and the crime of aggression, although it is unable to exercise its competence over the last until agreement has been reached on the definition of the offence.
2. Article 27 of the Rome Statute renders the official capacity of an accused irrelevant for the purposes of trial before the ICC. Also of significance is article 98(1) of the Statute, which provides that the ICC may not proceed with a

request under article 89(1) for the surrender of a person to the Court if this would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of the immunity.

**(d) The Key Points AU-EU Concern over Universal Jurisdiction**

The points of concern over Universal Jurisdiction were equally different between the two areas i.e. Africa and Europe as shown below:

**(i) African concerns**

1. African states welcome the principle of universal jurisdiction, and are committed to addressing impunity, as shown by Article 4(h) of Constitutive Act of the African Union 2000 and as emphasized in subsequent AU decisions. Article 4(h) of the Constitutive Act, in laying down the right of the AU to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, amounts to a statement that impunity for these crimes is unacceptable to AU Member States. But there are national legal and institutional constraints on the capacity of many African states to address these crimes and to prosecute perpetrators of them. Consideration should be given to building the national legal capacity of African states to combat genocide, crimes against humanity, war crimes and torture.
2. As some members of International Law Commission have observed, assertion by national courts of the principle of universal jurisdiction has led to misunderstandings and to aggravation of inter-state tensions, and has given rise to perceptions of abuse on political or other grounds. African states take the view that they have been singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European states is politically selective against them. This raises a concern over double standards, and the concern is heightened by multiple charges being brought against officials of African states in the jurisdictions of different European states. The African perception is that the majority of indictees are sitting officials of African states, and the indictments against such officials have profound implications for relations between African and European states, including the legal responsibility of the relevant European states. As one leader of a European state has intimated, the powers of investigative judges relating to indictments against officials of foreign states need to be reviewed by amending the relevant legislation.

**(ii) European Concerns**

1. It is apparent to the independent experts appointed by the EU that Member States of the EU, like African states, view the exercise of universal

jurisdiction as an essential weapon in the fight against impunity for serious crimes of international concern. They appear to consider the exercise of universal jurisdiction as an important measure of last resort which is necessary to ensure that perpetrators of serious crimes of international concern do not go unpunished whenever the state where the crime has allegedly been committed and the state(s) of nationality of the suspect and victims are manifestly unwilling or unable to prosecute.

2. The independent experts appointed by the EU understand the concern expressed by AU Member States. In their view, however, these concerns should not be overstated. Criminal proceedings initiated against African state officials on the basis of universal jurisdiction represent only a part of the total number of exercises of universal jurisdiction by EU Member States. Proceedings have been instituted or sought against nationals, whether officials or otherwise, from states of most other regions of the world.

#### **(e) Recommendations**

According to the terms of reference, the experts were to make recommendations with a view to fostering better mutual understanding between the AU and EU regarding universal jurisdiction. The following recommendations are addressed to the governments of AU and EU Member States and to the AU and EU institutions, organs and bodies, as appropriate.

- R1. All states should strive to put an end to impunity for genocide, crimes against humanity, war crimes and torture, and prosecute those responsible for such crimes. States are also legally bound to prosecute treaty crimes, whenever they are parties to such treaties.
- R2. Article 4(h) of the Constitutive Act of the African Union lays down the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. Article 4(h) amounts to a statement that impunity for these crimes is unacceptable to AU Member States. In order to complement Article 4(h), African States should be encouraged to adopt national legislative and other measures aimed at preventing and punishing war crimes, genocide and crimes against humanity. To this end, the AU Commission should consider preparing model legislation for the implementation of measures of prevention and punishment.
- R3. To the same end, in accordance with the AU Assembly's Decision 213(XII) of 4 February 2009, the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, should examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.

- R4. Those Member States of the AU and EU which have persons suspected of serious crimes of international concern within their custody or territory should promptly institute criminal proceedings against these persons, unless they decide to extradite them to the state in the territory of which the relevant conduct is alleged to have occurred (the 'territorial state'), the state of nationality of the suspect (the 'suspect's national state') or the state of nationality of the victims (the 'victims' national state') on the condition that the latter state is willing and able to conduct a fair trial consistent with international human rights standards and to ensure respect for the internationally-guaranteed human rights of detainees.
- R5. In order to help ensure respect for the rights of detainees, those Member States of the AU and EU which are states parties to the Convention against Torture 1984 should fully implement the Convention in their respective national legal orders. Those AU and EU Member States which have not yet become parties to the Convention should be encouraged to do so and to accept the right of individual communication to the UN Committee against Torture.
- R6. When exercising universal jurisdiction over serious crimes of international concern such as genocide, crimes against humanity, war crimes and torture, states should bear in mind the need to avoid impairing friendly international relations.
- R7. Where national criminal justice authorities have initiated investigations and collected compelling evidence of serious crimes of international concern allegedly committed abroad against non-nationals by non-nationals, and where the suspect is a foreign state official exercising a representative function on behalf of his or her state, these authorities should consider refraining from taking steps that might publicly and unduly expose the suspects, thereby discrediting and stigmatizing them, curtailing their right to be presumed innocent until found guilty by a court of law and hampering the discharge of their official functions.
- R8. Those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities.
- R9. In prosecuting serious crimes of international concern, states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction, since such crimes, while offending against the international community as a whole by infringing universal values, primarily injure the community where they have been perpetrated and violate not only the rights of the victims but also the general demand for order and security in that community. In addition, it is within the territory of the state of alleged commission that the bulk of the



evidence will usually be found.

- R10. Where those national criminal justice authorities considering exercising universal jurisdiction believe that the territorial state or the suspect's or victims' national state is willing and able to bring him or her to trial in accordance with international human rights standards, they should confidentially disclose the indictment (or any other instrument containing the charges), along with all the evidentiary material collected, to the criminal justice authorities of the relevant state, together with a request that these authorities investigate the alleged crimes and, where the evidence calls for this, prosecute the suspect. Where, however, those national criminal justice authorities considering exercising universal jurisdiction have serious reasons to believe that the territorial state and the suspect and victims' national states are manifestly unwilling or unable to prosecute the suspect, and the suspect is a foreign state official exercising a representative function on behalf of his or her state, they should seek and issue a summons to appear or equivalent measure, rather than an arrest warrant, to enable the suspect to appear before the court and to produce, with the assistance of counsel, any exculpatory evidence in his or her possession.
- R11. Given the grave nature of serious crimes of international concern such as genocide, crimes against humanity, war crimes and torture, AU and EU Member States may wish to consider legislating to specify an appropriate level of court at which proceedings in respect of such crimes must be instituted. They might also envisage providing specialist training in the prosecution and judging of such crimes.
- R12. Where a state, either on its own initiative or at the request of another state, has arrested a person suspected by a foreign state of a serious crime of international concern, it should take into consideration the appeal made in 2005 by the Institut de droit international, whereby *'Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender'*.
- R13. Where a state has arrested a person suspected by a foreign state of a serious crime of international concern allegedly perpetrated in the latter state, and where the former state considers that the latter state is manifestly unwilling or unable to conduct a fair trial consistent with international human rights standards and to ensure respect for the internationally-guaranteed human rights of detainees, it should, before refusing extradition and exercising universal jurisdiction, notify the requesting state through diplomatic channels of its decision and take into due consideration any

representations made by the latter in relation to the proper conduct of trial proceedings and conditions of detention in that state.

- R14. Where a state which has apprehended a person suspected by a foreign state of a serious crime of international concern extradites that person to the requesting state, the latter state should inform the former state on a regular basis of the progress of the criminal proceedings.
- R15. AU Member States should consider establishing judicial 'contact points' with Eurojust, with a view to exploring and strengthening international co-operation in matters of criminal justice between AU Member States and EU Member States. The AU may wish to consider co-ordinating the appointment of judicial contact points from an appropriate number of states prepared to represent the interests of the main regions of Africa, as well as one contact point from the AU itself.
- R16. The EU network of contact points on genocide, crimes against humanity and war crimes should consider discussing and developing ways forward in relation to the concerns expressed by AU Member States over the exercise of universal jurisdiction over African nationals by some EU Member States. The EU network and the AU Commission should consider establishing co-operation with each other in this regard.
- R17. The relevant EU bodies should assist AU Member States in capacity-building in legal matters relating to serious crimes of international concern, for example within the framework of the Africa-EU Strategic Partnership. Such matters might include training in the investigation and prosecution of mass crimes, the protection of witnesses, the use of appropriate forensic methods, and so on.

**AU-EU Technical Ad hoc Expert Group on the Principle  
of Universal Jurisdiction**

**REPORT**

**AU-EU Technical Ad hoc Expert Group on the Principle  
of Universal Jurisdiction**

**REPORT**

1. The 10th and 11th meetings of the AU-EU Ministerial Troika<sup>1</sup> addressed the issue of universal jurisdiction in the context of the relationship between the AU and the EU.
2. In the Joint Communiqué issued at the close of the 11th AU-EU Ministerial Troika meeting, *"Ministers agreed to continue discussions on the issue and to set up 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 report to the next Ministerial Troika meeting (...)"*.
3. An advisory Technical Ad hoc Expert Group was constituted by the AU and EU, the terms of reference for which were agreed in January 2009, to inform AU-EU discussions on the principle of universal jurisdiction, in particular by assisting in clarifying their respective understandings of the principle, and to prepare a report for the attention of the 12th meeting of the AU-EU Ministerial Troika, which will take place at the end of April 2009.
4. The above report is herewith attached.

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<sup>1</sup> The meetings were held on 16 September 2008 (Brussels) and 20-21 November 2008 (Addis Ababa) respectively.

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## INTRODUCTION

### Background

1. The decision of the Assembly of the African Union (AU) on the Report of the Commission on the Abuse of Universal Jurisdiction<sup>2</sup> on 1 July 2008 in Sharm el Sheik requested, among other things, the Chairperson of the AU Commission urgently to arrange a meeting between the African Union and the European Union (EU) to discuss the issue of the exercise of universal jurisdiction by European states, with a view to finding a lasting solution to concerns expressed by the African side. Consequently, the 10th and 11th meetings of the AU-EU Ministerial Troika<sup>3</sup> addressed the issue of universal jurisdiction in the context of the relationship between the AU and EU.
2. In the words of the Joint Communiqué issued at the close of the 11th AU-EU Ministerial Troika meeting, '*Ministers discussed and underlined the necessity to fight impunity in the framework of international law to ensure that individuals who commit grave offences such as war crimes and crimes against humanity are brought to justice. The African side stated that there are abusive applications of the principle which could endanger international law and expressed concerns over it. The EU took note of the African concern notably as expressed at the AU summit in Sharm el Sheik. The two parties recognized that the issue has negative consequences for the relationship between the EU and the African side. Ministers agreed to continue discussions on the issue and to set up 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 report to the next Ministerial Troika meeting, with a preliminary report to be submitted before the end of January 2009.*'
3. An advisory Technical Ad hoc Expert Group was constituted by both the AU and EU in January 2009 to inform AU-EU discussions on the principle of universal jurisdiction, in particular by assisting in clarifying their respective understandings of the principle, and to prepare a report for the attention of the 12th meeting of the AU-EU Ministerial Troika, to take place at the end of April 2009.

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<sup>2</sup> Decision Assembly/AU/Dec. 199(XI), 1 July 2008.

<sup>3</sup> The meetings were held on 16 September 2008 (Brussels) and 20-21 November 2008 (Addis Ababa) respectively.

## Terms of Reference

4. According to the Terms of Reference of the Technical Ad hoc Expert Group, its report would:

- Provide a description of the legal notion of the principle of universal jurisdiction, setting out the distinctions between the jurisdiction of international criminal tribunals and the exercise of universal jurisdiction and related concepts by individual states on the basis of their national laws;
- Outline the respective understandings on the African and EU sides regarding the principle of universal jurisdiction and its application; and
- Make, as appropriate, recommendations for fostering a better mutual understanding between the AU and the EU of the purpose and the practice of universal jurisdiction.

5. The AU and EU appointed six independent experts, to be assisted by a secretariat of four officials.

The independent experts appointed were:

Professor Antonio Cassese (Italy)  
Professor Pierre Klein (Belgium)  
Dr Roger O’Keefe (Australia)

Dr Mohammed Bedjaoui (Algeria)  
Dr Chaloka Beyani (Zambia)  
Professor Chris Maina Peter (Tanzania)

The secretariat comprised:

Mr Ben Kioko, Legal Counsel, AU  
Commission

Dr Sonja Boelaert, Legal Advisor,  
European Commission  
Mr Rafael de Bustamante Tello, UN and  
ICC Desk, General Secretariat of the  
Council of the EU

Mr Fafré Camara, Legal Officer, AU  
Commission

6. A first meeting was held in Brussels on 14-15 January 2009, at which the Technical Ad hoc Expert Group elected its Co-Chairmen (Dr Mohammed Bedjaoui and Professor Antonio Cassese) and Rapporteurs (Dr Chaloka Beyani and Dr Roger O’Keefe). A second meeting was held in Addis Ababa on 30 and 31 March 2009.

7. All experts served in their personal capacities. They were not bound by AU, EU or national government instructions, official political positions or the like. The views expressed by the independent experts are their own expert opinions. They do not claim, nor are they to be taken, to represent the views of the AU or EU or of any of their organs or institutions, let alone the views of any AU or EU Member State or of any other institution with which they may be associated.

## I. UNIVERSAL JURISDICTION IN INTERNATIONAL LAW

### I.1 Definition and content

8. Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle<sup>4</sup> exists at the time of the commission of the alleged offence.
9. International law, both customary and conventional, regulates states' assertion of universal criminal jurisdiction. States by and large accept that customary international law permits the exercise of universal jurisdiction over the international crimes of genocide, crimes against humanity, war crimes and torture, as well as over piracy. In addition, numerous treaties oblige states parties to empower their criminal justice systems to exercise universal jurisdiction over the crimes defined in those treaties, although this obligation extends only to the exercise of such jurisdiction when a suspect is subsequently<sup>5</sup> present in the territory of the forum state.<sup>6</sup> Treaty crimes of particular significance in the present context include graves breaches of the 1949 Geneva Conventions and of 1977 Additional Protocol I,<sup>7</sup> the crime of torture recognised in the Convention against

<sup>4</sup> For an explanation of each of these internationally-recognised bases of jurisdiction, see below, section I.2.

<sup>5</sup> 'Subsequently' here means subsequent to the alleged commission of the offence.

<sup>6</sup> Provisions to this effect are found in Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, 860 UNTS 105, article 4(2); Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft, Montreal, 23 September 1971, 974 UNTS 177, article 5(2); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, 1035 UNTS 167, article 3(2); Convention against the Taking of Hostages, New York, 17 December 1979, 1316 UNTS 205, article 5(2); Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980, 1456 UNTS 124, article 8(2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1465 UNTS 112, article 5(2); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, 1678 UNTS 221, article 6(4); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988, 1678 UNTS 304, article 3(4); Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, New York, UN Treaty Reg. No. 37789, article 9(2); Convention on the Safety of United Nations and Associated Personnel, New York, 9 December 1994, 2051 UNTS 363, article 10(4); Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UN Treaty Reg. No. 37517, article 6(4); Second Protocol to the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, UN Treaty Reg. No. 3511, article 16(1)(c); Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Treaty Reg. No. 38349, article 7(4); Convention against Transnational Organized Crime, New York, 15 November 2000, UN Treaty Reg. No. 39574, article 15(4); Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, UN Treaty Reg. No. 44004, article 9(4); Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, UN Doc. A/RES/61/177, Annex, article 9(2) (not in force).

<sup>7</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva,



Torture 1984, the crime of attacks on UN personnel under the Convention on Crimes against UN Personnel 1994 and the crime of enforced disappearance within the meaning of the Convention against Enforced Disappearance 2006.<sup>8</sup>

10. When not constrained otherwise by treaty, states tend to exercise universal jurisdiction in a variety of ways. Some national legislation, jurisprudence or practice may require that universal jurisdiction is to be exercised only when the suspect is subsequently present<sup>9</sup> on the territory of the forum state; other national law or practice permits the exercise *in absentia*<sup>10</sup> of such jurisdiction. Some national law or practice requires that suspects or, alternatively, victims be habitually resident in the forum state at the time the criminal justice system is engaged.
11. Treaties which mandate universal jurisdiction tend also to oblige states parties, when a suspect is present in the territory of the state party in question, either to submit the case to their criminal justice authorities for the purpose of prosecution or to extradite the suspect to a state which is willing to do so.<sup>11</sup> This obligation, known as the obligation *aut dedere aut judicare*, is conceptually distinct from universal jurisdiction. The establishment of jurisdiction, universal or otherwise, is a logically prior step: a state must first vest its courts with competence to try given criminal conduct. It is only once such competence has been established that the question whether to prosecute the relevant conduct, or to extradite persons suspected of it, arises. Moreover, the obligation to submit a case to the prosecuting authorities or to extradite applies as much in respect of an underlying jurisdiction based on territoriality, nationality, passive personality, *etc* as it does to universal jurisdiction. The obligation *aut dedere aut judicare* is nonetheless relevant to the question of universal jurisdiction, since such a provision compels a state party to exercise the underlying universal jurisdiction that it is also obliged to provide for by the treaty. In short, a state party to one of the treaties in question is not only bound to empower its criminal justice system to exercise universal jurisdiction but is further bound actually to exercise that jurisdiction by means of either considering prosecution or extraditing.

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12 August 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, 1125 UNTS 3.

<sup>8</sup> For these last three, see above, note 5.

<sup>9</sup> See above, note 4.

<sup>10</sup> 'In absentia' means without the presence of the accused.

<sup>11</sup> See Unlawful Seizure of Aircraft Convention, article 7; Unlawful Acts against Aircraft Convention, article 7; Internationally Protected Persons Convention, article 7; Hostages Convention, article 8(1); Nuclear Material Convention, article 10; Torture Convention, article 7(1) and (2); Unlawful Acts against Maritime Navigation Convention, article 10(1); Mercenaries Convention, article 12; UN and Associated Personnel Convention, article 14; Terrorist Bombings Convention, article 8; Financing of Terrorism Convention, article 10(1); Nuclear Terrorism Convention, article 11(1); Enforced Disappearance Convention, article 11(1) and (2). See also 1999 Second Hague Protocol, article 17(1). See too, in more basic form, 1949 Geneva Convention I, article 49; 1949 Geneva Convention II, article 50; 1949 Geneva Convention III, article 129; 1949 Geneva Convention IV, article 146.

## **I.2 Distinction with other bases of jurisdiction under international law**

12. Customary international law permits states to exercise criminal jurisdiction on a variety of other bases. First and foremost, a state may prosecute persons of any nationality who commit crimes of any nature within its territory. This is known as the territoriality principle. A state may also prosecute crimes committed outside its territory in a range of circumstances. It may do so under the nationality (or active personality) principle when the perpetrator of the crime is a national of that state. Alternatively, under the passive personality principle, it may exercise criminal jurisdiction over extraterritorial acts by non-nationals when the victim of the crime is a national of that state, at least in respect of serious offences against the person. Additionally, under what is known as the protective principle, a state may exercise criminal jurisdiction over extraterritorial acts by non-nationals which threaten some vital interest of that state, e.g. counterfeiting the national currency.
13. Under customary international law, these bases of jurisdiction are, like universal jurisdiction, merely permissive: a state is not obliged to assert a jurisdiction granted to it by custom. But the various treaties mentioned above oblige states parties to empower their courts to exercise jurisdiction over the crimes in question on the above, and sometimes further, bases.

## **I.3 No mandatory hierarchy of internationally permissible jurisdictions**

14. Positive international law recognises no hierarchy among the various bases of jurisdiction that it permits. In other words, a state which enjoys universal jurisdiction over, for example, crimes against humanity is under no positive legal obligation to accord priority in respect of prosecution to the state within the territory of which the criminal acts occurred or to the state of nationality of the offender or victims.

## **II. APPROACHES TO UNIVERSAL JURISDICTION IN THE NATIONAL LAW AND PRACTICE OF MEMBER STATES OF THE AU AND EU<sup>12</sup>**

### **II.1 African Union: Outline of National Law and Practice of Member States regarding Universal Jurisdiction**

15. A survey of legislative approaches to universal jurisdiction in the national legislation of Member States of the African Union shows that jurisdiction over serious crimes of international concern is exercised by virtue of customary international law (e.g. Cameroon, Democratic Republic of the Congo, Ethiopia and South Africa) and under treaties to which such states are parties (e.g. Botswana, Cameroon, Ethiopia, Kenya, Ghana and Malawi).

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<sup>12</sup> The following survey is not intended, and should not be read, as a comprehensive account of the national law and practice of AU and EU Member States in relation to universal jurisdiction. Its purpose is to highlight commonly observed and notable features of this law and practice. It is based on publicly available documentation.

16. Among the AU Member States which provide for the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes are the Democratic Republic of the Congo,<sup>13</sup> the Republic of Congo,<sup>14</sup> Ethiopia,<sup>15</sup> Ghana,<sup>16</sup> Niger,<sup>17</sup> Rwanda,<sup>18</sup> Senegal<sup>19</sup> and South Africa.<sup>20</sup> Mali establishes universal jurisdiction over genocide, crimes against humanity and terrorism.<sup>21</sup> Certain AU Member States grant universal jurisdiction over grave breaches of the Geneva Conventions 1949. These include Botswana,<sup>22</sup> Kenya,<sup>23</sup> Lesotho,<sup>24</sup> Malawi,<sup>25</sup> Mauritius,<sup>26</sup> Namibia,<sup>27</sup> Nigeria,<sup>28</sup> Seychelles,<sup>29</sup> Sierra Leone,<sup>30</sup> Swaziland,<sup>31</sup> Tanzania,<sup>32</sup> Uganda<sup>33</sup> and Zimbabwe.<sup>34</sup> As required in the common-law tradition, these states have legislation incorporating the grave breaches provisions of the Conventions into national law. In some cases, this law remains the relevant colonial-era legislation;<sup>35</sup> in others, the colonial legislation was re-enacted. Certain African states of the civil-law tradition have ratified the Geneva Conventions, and accept universal jurisdiction on this basis. Among these states are Algeria, Angola, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Gabon, Libya, the Republic of Congo and Tunisia. As for the

<sup>13</sup> Penal Code, Book 1, Section VI, article 3-6.

<sup>14</sup> Law N° 8-98 of 31 October 1998.

<sup>15</sup> Penal Code, articles 17 and 18.

<sup>16</sup> Courts Act 1993, article 56(4).

<sup>17</sup> Law N° 2003-025 of 13 June 2003, article 208.8.

<sup>18</sup> Organic Law N° 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990. Note that, in its report of 15 November 2007, Rwanda's Commission nationale indépendante chargée de Rassembler les Preuves montrant l'Implication de l'Etat français dans le Génocide Perpétré au Rwanda en 1994 made the following recommendation, among others: 'La Commission demande au Gouvernement rwandais de soutenir toute action individuelle ou collective de victimes qui souhaiteraient porter plainte devant les tribunaux pour le préjudice causé par les actions de l'Etat français et/ou ses agents au Rwanda.' It is unclear whether the support envisaged included the institution of criminal proceedings on the basis of universal jurisdiction.

<sup>19</sup> Code of Criminal Procedure, article 669.

<sup>20</sup> Implementation of the Rome Statute of the International Criminal Court Act 2002, section 4.

<sup>21</sup> Law N° 01-079 of 20 August 2001, articles 29 to 31 (crimes against humanity and genocide) and Law No 08-025 of 23 July 2008, articles 2 to 8 (terrorism).

<sup>22</sup> Geneva Conventions Act 1970, section 3(1).

<sup>23</sup> Geneva Conventions Act 1968, section 3(1).

<sup>24</sup> See below, note 34.

<sup>25</sup> Geneva Convention Acts 1967, section 4(1).

<sup>26</sup> Geneva Conventions Act 1996, section 3(1).

<sup>27</sup> Geneva Conventions Act 2003, section 2(1) to (3).

<sup>28</sup> Geneva Conventions Act 1960, section 3(1).

<sup>29</sup> Geneva Convention Act 1985, section 3(1).

<sup>30</sup> See below, note 34. A Sierra Leone ordinance of 1 September 1959 modified the Geneva Conventions Act (Colonial Territories Act) Order 1959 (UK).

<sup>31</sup> See below, note 34.

<sup>32</sup> See below, note 34.

<sup>33</sup> Geneva Conventions Act 1964, section 1(1).

<sup>34</sup> Geneva Conventions Act 1981, section 3(1).

<sup>35</sup> See Geneva Conventions Act 1957 (UK) and Geneva Conventions Act (Colonial Territories Act) Order 1959 (UK).

Convention against Torture 1984, while more than half of the Member States of the AU are states parties to this,<sup>36</sup> and are therefore obliged to establish universal jurisdiction over the crime of torture as defined in the Convention, most have not enacted legislation to incorporate into national law the Convention's definition of torture or to vest their courts with universal jurisdiction over the offence.<sup>37</sup> Burundi<sup>38</sup> and the Democratic Republic of the Congo<sup>39</sup> nonetheless provide for the exercise of universal jurisdiction over torture by reference to general provisions relating to the commission of crimes abroad for which their respective national laws impose a penalty of more than two months' imprisonment. Cameroon has specifically added torture to the list of 'international' offences in respect of which universal jurisdiction exists.<sup>40</sup>

17. In at least three AU Member States, namely the Democratic Republic of the Congo,<sup>41</sup> Niger<sup>42</sup> and South Africa,<sup>43</sup> such immunities as may otherwise serve to bar the prosecution of foreign state officials have been abrogated in respect of charges of genocide, crimes against humanity and war crimes. In addition, in accordance with article 12 of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination<sup>44</sup> to the Pact on Security, Stability and Development in the Great Lakes Region,<sup>45</sup> the provisions of the chapter on genocide, war crimes and crimes against humanity apply irrespective of the official status of the suspect. The state parties to the Protocol comprise Angola, Burundi, the Central African Republic, the Democratic Republic of the Congo, Kenya, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia.
  
18. It should be noted that there are legal limitations to the exercise of universal jurisdiction in the legislative practice of AU Member States. These include:

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<sup>36</sup> The AU Member States in question are Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda and Zambia.

<sup>37</sup> See *e.g.* the Committee against Torture's observations on the Democratic Republic of the Congo's implementation of the Convention: UN Doc. CAT/C/DRC/CO/1, 1 April 2006, para. 5.

<sup>38</sup> Penal Code, Decree-Law N° 1/6 of 1981, article 3.

<sup>39</sup> Penal Code, Book 1, Section 1, article 3.

<sup>40</sup> Extradition Act 1964, article 28, read with Act N° 97/010 of 10 January 1997.

<sup>41</sup> Penal Code, Book 1, Section VI, article 21-3.

<sup>42</sup> Law N° 2003-025 of 13 June 2003, article 208.7.

<sup>43</sup> Implementation of the Rome Statute of the International Criminal Court Act 2002, section 4(1).

<sup>44</sup> Nairobi, 29 November 2006.

<sup>45</sup> Nairobi, 14 and 15 December 2006.

(i) The requirement that the suspect be in the territory of the prosecuting state at the time of the initiation of criminal proceedings (e.g. Democratic Republic of the Congo,<sup>46</sup> Senegal,<sup>47</sup> Ethiopia<sup>48</sup> and South Africa<sup>49</sup>).

(ii) The requirement that prosecution be initiated by the Attorney General (Botswana,<sup>50</sup> Kenya,<sup>51</sup> Lesotho,<sup>52</sup> Namibia,<sup>53</sup> Nigeria,<sup>54</sup> Seychelles,<sup>55</sup> Sierra Leone,<sup>56</sup> Swaziland,<sup>57</sup> Tanzania<sup>58</sup> and Zimbabwe<sup>59</sup>), by the Director of Public Prosecutions (Malawi<sup>60</sup> and Uganda<sup>61</sup>) or by the Prosecutor (Burundi<sup>62</sup> and Democratic Republic of the Congo<sup>63</sup>).

(iii) The stipulation that specified low-level courts do not enjoy jurisdiction to try offences to which universal jurisdiction attaches (Botswana<sup>64</sup> and Nigeria<sup>65</sup>).

(iv) Respect for the immunities from criminal jurisdiction enjoyed by state officials under international law.<sup>66</sup>

19. The practical problems likely to be faced by AU Member States in exercising universal jurisdiction will probably be the same as those encountered by EU Member States,<sup>67</sup> but, given the relative capacity of AU Member States, it stands to reason that the impediment will be greater. No African state is known to have exercised universal jurisdiction effectively. In one state, an indictment was brought against a former African head of state, but proceedings were not pursued. In a decision of July 2006, the AU Assembly mandated the African state

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<sup>46</sup> Penal Code, Book I, Section, article 3(7).

<sup>47</sup> Code of Criminal Procedure, article 669.

<sup>48</sup> Penal Code, articles 19 and 20.

<sup>49</sup> Implementation of the Rome Statute of the International Criminal Court Act 2002, section 4(3)(b)(c).

<sup>50</sup> Geneva Conventions Act 1970, section 3(3).

<sup>51</sup> Geneva Conventions Act 1968, section 3(3).

<sup>52</sup> See above, note 34.

<sup>53</sup> Geneva Conventions Act 2003, section 2(6).

<sup>54</sup> Geneva Conventions Act 1960, section 11(1).

<sup>55</sup> Geneva Conventions Act 1985, section 3(3).

<sup>56</sup> See above, note 34.

<sup>57</sup> See above, note 34.

<sup>58</sup> See above, note 34.

<sup>59</sup> Geneva Conventions Act 1981, section 3(6).

<sup>60</sup> Geneva Conventions Act 1967, section 4(3).

<sup>61</sup> Geneva Conventions Act 1964, section 1(3).

<sup>62</sup> Decree-Law N<sup>o</sup> 1/6 of 1981.

<sup>63</sup> Penal Code, Book 1, Section I, article 3.

<sup>64</sup> Section 3(3) of the Geneva Conventions Act 1970 provides that a subordinate court shall have no jurisdiction to try grave breaches of the Geneva Conventions.

<sup>65</sup> Section 11(2) of the Geneva Conventions Act 1960 provides that a magistrate's court shall have no jurisdiction to try grave breaches of the Geneva Conventions.

<sup>66</sup> But see above in relation to the Democratic Republic of the Congo, Niger and South Africa and to article 12 of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination 2006.

<sup>67</sup> See below, paragraph 25.

in question to prosecute and ensure that the suspect be tried, on behalf of Africa, by a competent court of that state, with guarantees for fair trial.<sup>68</sup>

20. It is worth noting that the commitment on the part of AU Member States to fighting impunity for serious crimes of international concern, clearly signalled in the Constitutive Act of the African Union and subsequent AU resolutions,<sup>69</sup> has also been given practical effect by means other than the exercise of universal jurisdiction. When genocide, crimes against humanity and war crimes take place within an African state's own territory, there is no need for that state to rely on universal jurisdiction in order to prosecute the perpetrators: trials can take place on the basis of territorial jurisdiction. It is on the basis of territoriality that thirty-four former officials of the Derg regime, including former head of state Mengistu Haile-Mariam, and twenty-four former members were prosecuted in the Ethiopian courts for, among other things, genocide.<sup>70</sup> Similarly, the national courts of Rwanda have dealt with acts of genocide, crimes against humanity and war crimes committed on Rwandan territory since 1 October 1990. For its part, Uganda is currently in the process of establishing a special division of the High Court to try persons suspected of having committed 'serious crimes' during the conflict between the government and the Lord's Resistance Army/Movement.<sup>71</sup> When it comes to addressing serious crimes of international concern on their territory, some African states have opted for alternative justice mechanisms, the most prominent<sup>72</sup> among these being the Truth and Reconciliation Commission in South Africa, instituted as a response to the crime against humanity of apartheid, and the Truth and Reconciliation Commission in Sierra Leone, which has dealt with those serious crimes of international concern committed during that country's civil war which were not the subject of prosecution before the Special Court for

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<sup>68</sup> Decision Assembly/AU/Dec. 127(VII), 2 July 2006. The Assembly reiterated this decision in Decision Assembly/AU/Dec. 240(XII), 4 February 2009.

<sup>69</sup> See Constitutive Act of the African Union 2000, article 4(h); Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Decision Assembly/AU/Dec. 199(XI), 1 July 2008, paragraph 3; Decision on the Hissène Habré Case, Decision Assembly/AU/Dec. 240(XII), 4 February 2009; and Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Decision Assembly/AU/Dec. 213(XII), 4 February 2009, paragraph 3.

<sup>70</sup> All but one of the defendants was convicted by the Federal High Court on 12 December 2006. Mengistu, among others, was tried *in absentia*. Following an appeal by the prosecution against the life sentence imposed on him, Mengistu was sentenced to death on 26 May 2008. He currently enjoys asylum in another African state. Note that the definition of genocide applied by the Ethiopian courts does not correspond to that found in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 and customary international law, in that it encompasses the destruction of political groups.

<sup>71</sup> See Annexure of 19 February 2008 to the Agreement of 29 June 2007 on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement ('the Juba Agreement'), articles 7 to 9. Articles 10 to 14 envisage the establishment of a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings. In accordance with article 14, prosecutions shall focus on individuals alleged to have planned or carried out widespread, systematic or serious attacks directed against civilians or to have committed grave breaches of the Geneva Conventions.

<sup>72</sup> Other such bodies include the Truth and Reconciliation Commission in the Democratic Republic of the Congo, the National Reconciliation Commission of Ghana, the Truth and Reconciliation Commission of Liberia, and the Equity and Reconciliation Commission of Morocco. A Truth, Justice and Reconciliation Commission is currently being established in Kenya. Articles 4 to 6 of the Annexure to the Juba Agreement envisage the creation of an analogous body in Uganda.

Sierra Leone (an international court<sup>73</sup>). Rwanda, alongside its prosecution of higher-ranking suspects, has pursued a traditional form of alternative justice through its *gacaca* courts,<sup>74</sup> and the Annexure to what is known as the Juba Agreement provides that traditional justice mechanisms shall form a central part of the alternative justice and reconciliation framework in Uganda.<sup>75</sup> Finally, certain African states have complemented their formal or alternative exercises of national criminal jurisdiction by requesting the establishment of *ad hoc* international criminal courts and tribunals for the prosecution of serious crimes of international concern committed on their territory,<sup>76</sup> and/or by becoming parties to the Statute of the International Criminal Court (ICC),<sup>77</sup> and/or by referring to the ICC situations within their respective territories involving the suspected commission of serious crimes of international concern.<sup>78</sup> All these measures, aimed at combating impunity for such crimes, represent alternatives to the exercise of universal jurisdiction.

21. It should also be noted that, in its recent decision on the principle of universal jurisdiction, the AU Assembly requested ‘the African Union Commission, in consultation with the African Commission on Human and Peoples’ Rights, and African Court on Human and Peoples’ Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes and report thereon to the Assembly in 2010.’<sup>79</sup>

## II.2 European Union: Outline of National Law and Practice of Member States regarding Universal Jurisdiction

22. Certain EU Member States provide for the exercise of universal jurisdiction in criminal matters only where such exercise is envisaged or rendered mandatory by international treaties to which the relevant state is party. An example of such a

<sup>73</sup> See below, section III.1.

<sup>74</sup> The *gacaca* courts are a community-based justice mechanism modelled on local dispute-resolution traditions. The system, instituted in 2001, requires the accused to face his or her victims, to confess and to seek forgiveness.

<sup>75</sup> See Annexure to the Juba Agreement, articles 19 to 22.

<sup>76</sup> The International Criminal Tribunal for Rwanda was established after a request by the then-new Rwandan government to this effect, and the creation of the Special Court for Sierra Leone was a direct response to an approach made to the UN by the government of Sierra Leone.

<sup>77</sup> AU Member States comprise the largest regional bloc of states to become parties to the Statute of the ICC. The current African states parties to the Statute comprise Benin, Botswana, Burkina Faso, Burundi, the Central African Republic, Chad, the Republic of Congo, the Democratic Republic of the Congo, the Comoros, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

<sup>78</sup> In December 2003, Uganda referred the situation concerning the Lord’s Resistance Army in Uganda (subsequently renamed the situation concerning northern Uganda); in April 2004, the Democratic Republic of the Congo referred the situation of crimes within the jurisdiction of the Court committed anywhere in the territory of the Democratic Republic of the Congo since 1 July 2002; and in January 2005, the Central African Republic referred the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002. African states remain to date the only states to have referred situations to the Court. Additionally, in February 2005, Côte d’Ivoire became the first non-state party to accept the exercise of jurisdiction by the Court under article 12(3) of the Statute, in its case with respect to crimes committed on its territory since 19 September 2002.

<sup>79</sup> Decision Assembly/AU/Dec. 213(XII), 4 February 2009.

state is Ireland. Many of these states have adapted their national laws to provide for universal jurisdiction over grave breaches of the 1949 Geneva Conventions and of 1977 Additional Protocol I, over the crime of torture recognised in the Convention against Torture 1984 and over the crimes recognised in some or all of the various conventions dealing with terrorist acts.

23. Other EU Member States grant universal jurisdiction over international crimes on the basis of customary international law as well.<sup>80</sup> Such countries include Belgium (universal jurisdiction over genocide, crimes against humanity and war crimes<sup>81</sup>), the Czech Republic (universal jurisdiction over genocide, certain war crimes and crimes against peace<sup>82</sup>), Denmark (universal jurisdiction over genocide, crimes against humanity and war crimes<sup>83</sup>), Finland (universal jurisdiction over genocide, crimes against humanity and war crimes<sup>84</sup>), France (universal jurisdiction over the crimes within the respective jurisdictions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)<sup>85</sup>), Germany (universal jurisdiction over genocide, crimes against humanity and war crimes<sup>86</sup>), Luxembourg (universal jurisdiction over genocide, crimes against humanity and war crimes<sup>87</sup>), the Netherlands (universal jurisdiction over genocide, crimes against humanity and war crimes<sup>88</sup>), Spain (universal jurisdiction over genocide, crimes against humanity and war crimes<sup>89</sup>), Sweden (universal jurisdiction over crimes against international law<sup>90</sup>) and the UK (universal jurisdiction over genocide, crimes against humanity and war crimes<sup>91</sup>).

24. The exercise of universal jurisdiction is often subject to legal limitations, including the following:

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<sup>80</sup> These states also provide for universal jurisdiction where such exercise is envisaged or rendered mandatory by international treaties to which the relevant state is party.

<sup>81</sup> Code of Criminal Procedure, Part 1, article 10(1*bis*) (jurisdiction where suspect has, at the time proceedings are initiated, been effectively, habitually and legally present in Belgium for at least three months).

<sup>82</sup> Criminal Code, section 19.

<sup>83</sup> Penal Code, paragraph 8(a) (jurisdiction where, *inter alia*, the suspect is present in Denmark when proceedings are initiated).

<sup>84</sup> Penal Code, Chapter 1, section 7, cross-referenced with Decree on the application of Chapter 1, section 7 of the Penal Code.

<sup>85</sup> Law N° 95-1 of 2 January 1995, article 2 and Law N° 96-432 of 22 May 1996, article 2 respectively.

<sup>86</sup> Code of Crimes against International Law, section 1.

<sup>87</sup> Law of 11 July 2000 approving the Statute of the International Criminal Court.

<sup>88</sup> International Crimes Act 2003, section 2(1)(a) (jurisdiction over anyone who commits any of the crimes defined in the Act if the suspect is present in the Netherlands when proceedings are initiated).

<sup>89</sup> Law 6/1985 of 1 July 1985 on the Competence of the Courts, article 23(4)(a) and (g). Note that Spanish law does not permit the exercise by the Spanish criminal courts of passive personality jurisdiction, with the result that, even where the victim of the alleged crime is a Spanish national, the courts must exercise what, under Spanish law, is expressly characterized as universal jurisdiction. In some cases of this sort, the Spanish nationality of the victims, or of one or some of the victims, has been used by the courts as a 'legitimizing link' justifying, in policy terms, their assumption of universal jurisdiction. Under international law, however, passive personality jurisdiction would provide a formal alternative legal basis for Spanish jurisdiction in such cases.

<sup>90</sup> Penal Code, Chapter 2, section 3(6).

<sup>91</sup> International Criminal Court Act 2001, section 68 (jurisdiction where the suspect is resident in the UK when the criminal proceedings are brought) and International Criminal Court (Scotland) Act 2001, section 6 (ditto). See also, in relation to certain war crimes, War Crimes Act 1991, section 1(1) and (2) (jurisdiction over persons who, subsequent to the alleged offence, become UK nationals or residents).



(i) The presence of the suspect on the territory of the prosecuting State may be required, either before the initiation of a criminal investigation or before the commencement of trial proceedings (e.g. Denmark,<sup>92</sup> France,<sup>93</sup> Ireland,<sup>94</sup> the Netherlands<sup>95</sup> and the UK<sup>96</sup>).

(ii) It may be that the suspect must, subsequent to the commission of the alleged acts, have become a national of the prosecuting state (e.g. under the UK's War Crimes Act 1991<sup>97</sup>) or a resident of that state (e.g. under the UK's War Crimes Act 1991<sup>98</sup> and the UK's International Criminal Court Act 2001<sup>99</sup> and International Criminal Court (Scotland) Act 2001<sup>100</sup>).

(iii) It may be that universal jurisdiction is granted by national law only over crimes committed during a specified conflict (e.g. France's Law N° 95-1 of January 1995 and Law N° 96-432 of 22 May 1996 apply only to crimes within the respective temporal and territorial jurisdictions of the ICTY and ICTR;<sup>101</sup> and the UK's War Crimes Act 1991 applies only to war crimes committed between 1 September 1939 and 5 June 1945 inclusive, in a place which at the time was part of Germany or under German occupation<sup>102</sup>).

(iv) It may be that executive or special judicial authorization is required before a prosecution may be brought on the basis of universal or other extraterritorial jurisdiction. In Belgium, for example, prosecution (including the preliminary investigation phase) for the crimes set forth in Book II, Part 1*bis* of the Penal Code may be undertaken only at the request of the Federal Prosecutor.<sup>103</sup> In Finland, an offence committed abroad may not be tried without a prosecution order from the Prosecutor-General.<sup>104</sup> In Ireland, the consent of the Attorney General<sup>105</sup> or the Director of Public Prosecutions<sup>106</sup> is required before a prosecution may be brought for at least certain offences subject to universal jurisdiction. Similarly, in the UK (excluding Scotland), the consent of the Attorney

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<sup>92</sup> Penal Code, paragraph 8(a).

<sup>93</sup> Law N° 95-1 of 2 January 1995, article 2 and Law N° 96-432 of 22 May 1996, article 2.

<sup>94</sup> This is a general principle of Irish criminal law and procedure.

<sup>95</sup> International Crimes Act 2003, section 2(1)(a).

<sup>96</sup> This is a general principle of the criminal law and procedure of England and Wales, Scotland and Northern Ireland respectively.

<sup>97</sup> War Crimes Act 1991, section 1(2).

<sup>98</sup> War Crimes Act 1991, section 1(2).

<sup>99</sup> International Criminal Court Act 2001, section 68.

<sup>100</sup> International Criminal Court (Scotland) Act 2001, section 6.

<sup>101</sup> Law N° 95-1 of 2 January 1995, article 1 and Law N° 96-432 of 22 May 1996, article 1 respectively.

<sup>102</sup> War Crimes Act 1991, section 1(1)(a).

<sup>103</sup> Code of Criminal Procedure, Part 1, articles 10(1*bis*) and 12*bis*.

<sup>104</sup> Penal Code, Chapter 1, section 12.

<sup>105</sup> Geneva Conventions Act 1962 (as amended by Geneva Conventions (Amendment) Act 1998), section 3(3).

<sup>106</sup> Criminal Justice (United Nations Convention against Torture) Act 2000, section 5(2); International Criminal Court Act 2006, section 9(2).

General is needed before a prosecution may be brought for at least certain such offences.<sup>107</sup>

(v) In Spain, proceedings for serious crimes of international concern must be brought in a specified superior court, namely the Audiencia Nacional.<sup>108</sup>

(vi) Since the exercise of prosecution is normally discretionary, it will be for the competent prosecuting authorities to assess the advisability of prosecution and its chances of success. In many countries where prosecution is obligatory, the obligation is offset by other considerations. For instance, in Germany, although prosecution is usually mandatory, prosecutors may decide not to prosecute crimes committed abroad by reference to certain specified criteria, and they have decided not to prosecute on numerous occasions.<sup>109</sup>

(vii) Legislation or common law may oblige national courts to respect those immunities from criminal process accorded state officials by international law, whether customary or conventional.<sup>110</sup> EU Member States have taken varying views on the extent to which these immunities apply in respect of serious crimes of international concern. At least one Member State (Belgium, 1999-2003<sup>111</sup>) has, in the past, statutorily abrogated the availability of international immunities in respect of genocide, crimes against humanity and war crimes. In a second (the Netherlands), one court has held that international immunities pose no bar to prosecution for international crimes.<sup>112</sup> In a third (Italy), the highest court of appeal has held that state immunity, an immunity *ratione materiae* or functional immunity, is unavailable in respect of international crimes that violate *jus cogens*, such as war crimes.<sup>113</sup> In yet another state (the UK), the highest appellate court

<sup>107</sup> Geneva Conventions Act 1957, section 1A(3); Criminal Justice Act 1988, section 135 (torture within the meaning of the Torture Convention); War Crimes Act 1991, section 1(3); International Criminal Court Act 2001, sections 53(3) and 60(4).

<sup>108</sup> Law 6/1985 of 1 July 1985 on the Competence of the Courts, article 65.

<sup>109</sup> Code of Criminal Procedure, section 153f. It was on the basis of these criteria that the German Federal Prosecutor, on 10 February 2005, dismissed a criminal complaint against US Secretary of Defense Donald Rumsfeld and ten named and further unnamed persons in relation to allegations of mistreatment amounting to crimes under the Code of Crimes against International Law: see 45 ILM 119 (2006). See also the decision of 13 September 2005 of the Higher Regional Court (5th Criminal Division), Stuttgart, in relation to the same allegations: 45 ILM 122 (2006). The Federal Prosecutor dismissed a second complaint based on the same facts on 27 April 2007. The criteria in section 153f of the Code of Criminal Procedure also underpinned the Federal Prosecutor's refusal of 30 March 2006 to open an investigation into the alleged criminal responsibility of the Uzbek Minister for the Interior Zakirjon Almatov in respect of the events of 13 May 2005 in Andijan, Uzbekistan. A motion to reconsider the decision was dismissed on 16 October 2006.

<sup>110</sup> Among such national law will be legislation to give effect to the European arrest warrant. In this regard, note article 20 of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), which deals with privileges and immunities.

<sup>111</sup> See Law of 15 June 1993 on the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977, as amended by the Law of 10 February 1999 on the punishment of grave breaches of international humanitarian law, article 5(3). But see now Code of Criminal Procedure, Chapter I, Part One, article 1*bis*, introduced by the Law of 5 August 2003 amending the Law of 15 June 1993 on the punishment of grave breaches of international humanitarian law, as amended by the Laws of 10 February 1999 and 23 April 2003.

<sup>112</sup> *Wijngaarde et al. v Bouterse*, order of 20 November 2000, District Court of Amsterdam. The order was quashed on other grounds by the Supreme Court on 18 September 2001.

<sup>113</sup> *Lozano*, ILDC 1085 (IT 2008), 24 July 2008, Court of Cassation (passive personality jurisdiction).

has held that state immunity does not bar the prosecution of a former head of state for torture pursuant to the Convention Against Torture 1984.<sup>114</sup> On the other hand, other courts (e.g. the Belgian Court of Cassation<sup>115</sup> and lower courts,<sup>116</sup> the French Court of Cassation,<sup>117</sup> the UK magistrates' courts<sup>118</sup> and the Spanish Audiencia Nacional<sup>119</sup>) and prosecutorial authorities (e.g. the Danish prosecuting authorities,<sup>120</sup> the prosecutors of the Tribunal de Grande Instance and Court of Appeal of Paris<sup>121</sup> and the German Federal Prosecutor<sup>122</sup>) have upheld immunities in these or similar circumstances.

25. Beyond these legal limitations, certain practical limitations to the exercise of universal jurisdiction exist. The first is the difficulty of collecting evidence in relation to crimes committed abroad, especially when the state where the crime is alleged to have occurred refuses to co-operate. Prospective evidentiary problems are a major reason why few prosecutors in EU Member States have initiated proceedings on the basis of universal jurisdiction to date. A second practical limitation is the awareness on the part of many prosecuting authorities and courts of the diplomatic sensitivities at stake when the conduct of a serving, and in some cases former, state official is involved.

<sup>114</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 24 March 1999, House of Lords.

<sup>115</sup> *Abbas Hijazi et al. v Sharon et al.*, 127 ILR 110, 121, 12 February 2003, Court of Cassation.

<sup>116</sup> A number of complaints filed in Belgium by private parties, before the *Sharon* case and the amendments of 5 August 2003 to the Code of Criminal Procedure, were dismissed on the basis of respect for the immunity of a foreign head of state: see the complaints against Cuban President Fidel Castro, Iraqi President Saddam Hussein, Ivorian President Laurent Gbagbo, Mauritanian President Maaouya Ould Sid'Ahmed Taya, Rwandan President Paul Kagame, President of the Central African Republic Ange-Félix Patasse and President of the Republic of Congo Denis Sassou Nguesso. A complaint filed against Yasser Arafat, President of the Palestinian Authority, was dismissed on analogous grounds. For more on Belgian practice in relation to universal jurisdiction, see [www.ulb.ac.be/droit/cdi](http://www.ulb.ac.be/droit/cdi) under 'Dossiers'.

<sup>117</sup> *SOS Attentats et Béatrice Castelnau d'Esnault c. Gadafy*, 125 ILR 490, 508, 13 March 2001, Court of Cassation.

<sup>118</sup> *Re Mugabe*, ILDC 96 (UK 2004), 14 January 2004, Bow Street Magistrates' Court; *Re Mafaz*, 128 ILR 709, 12 February 2004, Bow Street Magistrates' Court; *Re Bo Xilai*, 128 ILR 713, 8 November 2005, Bow Street Magistrates' Court.

<sup>119</sup> *Hassan II*, 23 December 1998, Audiencia Nacional (Central Examining Magistrate N° 5); *Obiang Nguema et al.*, 23 December 1998, Audiencia Nacional (Central Examining Magistrate N° 5); *Castro*, 4 March 1999, Audiencia Nacional (Plenary) and 13 December 2007, Audiencia Nacional (Plenary); *Rwanda*, 6 February 2008, Audiencia Nacional (Central Examining Magistrate N° 4) (immunity of President Paul Kagame).

<sup>120</sup> In 2001 the Danish authorities rejected an application for the prosecution of Carmi Gillon, the Israeli ambassador accredited to Denmark, who, in his former capacity as the head of the General Security Services (GSS or Shin Bet), was alleged to have been responsible for acts of torture carried out by the service. The Ministry of Justice stated that the special rules on diplomatic immunity enshrined in the Vienna Convention on Diplomatic Relations 1961 trumped the general rules embodied in the Torture Convention to the extent of the inconsistency.

<sup>121</sup> On 16 November 2007, the District Prosecutor (Procureur de la République) of the Tribunal de Grande Instance of Paris announced that he would not investigate a complaint filed with him alleging that former US Secretary of Defense Donald Rumsfeld had ordered and authorised torture. The decision was explained by the Public Prosecutor (Procureur Général) of the Court of Appeal of Paris in a letter of 27 February 2008 as being based on considerations of immunity. A complaint filed against President Mugabe in France in 2003 was also rejected, out of respect for the immunity of a foreign head of state.

<sup>122</sup> See the decision of the German Federal Prosecutor of 24 June 2005 refusing to open an investigation into allegations of crimes against humanity committed while in office by the former head of state of China, Jiang Zemin, and the similar refusal of 28 April 2005 in respect of the Vice-President of Chechnya, Ramzan Kadyrov.

26. Proceedings on the basis of universal jurisdiction been instituted to date in only eight of the twenty-seven Member States of the EU, namely Austria, Belgium, Denmark, France, Germany, the Netherlands, Spain and the UK. The number of cases brought in these eight states pursuant to universal jurisdiction has been relatively small. Such proceedings have been instituted or sought against nationals of a variety of states, namely Afghanistan,<sup>123</sup> Argentina,<sup>124</sup> Bosnia-Herzegovina,<sup>125</sup> the Central African Republic,<sup>126</sup> Chile,<sup>127</sup> China,<sup>128</sup> Côte d'Ivoire,<sup>129</sup> Cuba,<sup>130</sup> the Democratic Republic of the Congo,<sup>131</sup> El Salvador,<sup>132</sup> Equatorial Guinea,<sup>133</sup> Iran,<sup>134</sup> Iraq,<sup>135</sup> Israel,<sup>136</sup> Guatemala,<sup>137</sup> Mauritania,<sup>138</sup>

<sup>123</sup> *Zardad*, 19 July 2005, Central Criminal Court (England, UK); *Public Prosecutor v H*, ILDC 636 (NE 2007), 29 January 2007, Court of Appeal of The Hague (Netherlands); *Public Prosecutor v Hesam and Jalalzoy*, 8 July 2008, Supreme Court (Netherlands); *Public Prosecutor v F*, ILDC 797 (NE 2007), 25 June 2007, District Court of The Hague (Netherlands).

<sup>124</sup> *Cavallo*, 1 September 2000, Audiencia Nacional (Central Examining Magistrate N° 5) and order of 14 March 2008, Audiencia Nacional (Plenary) (Spain); *Scilingo*, 1 October 2007, Supreme Court (Spain).

<sup>125</sup> See e.g. *Public Prosecutor v Tadić*, 13 February 1994, Federal Supreme Court (Germany); *Javor et al. v X*, 127 ILR 126, 132, 26 March 1996, Court of Cassation (France); *Public Prosecutor v Cvjetković*, 13 July 1994, Supreme Court/31 May 1995, Landesgericht Salzburg (Austria); *Public Prosecutor v Knesević*, 11 November 1997, Supreme Court (Netherlands); *Public Prosecutor v Djajić*, 23 May 1997, Bavarian Supreme Court (Germany); *Public Prosecutor v Jorgić*, 30 April 1999, Federal Supreme Court (Germany); *X v SB and DB*, 11 December 1998, Federal Supreme Court (Germany); *Public Prosecutor v Sokolović*, 21 February 2001, Federal Supreme Court (Germany); *Public Prosecutor v Kusljić*, 21 February 2001, Federal Supreme Court (Germany).

<sup>126</sup> See above, note 115, for the complaint in Belgium against President Ange-Félix Patasse.

<sup>127</sup> *Chili Komitee Nederland v Pinochet*, 4 January 1995, Court of Appeal of Amsterdam (Netherlands); *Unión Progresista de Fiscales de España et al. v Pinochet*, 5 November 1998, Audiencia Nacional (Plenary) (Spain); *Aguilar Diaz et al. v Pinochet*, order of 6 November 1998, Tribunal of First Instance of Brussels (Belgium); *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 24 March 1999, House of Lords (England, UK).

<sup>128</sup> See e.g. above, note 121, for the refusal of the German Federal Prosecutor to investigate former President Jiang Zemin. See also *Re Bo Xilai*, 128 ILR 713, 8 November 2005, Bow Street Magistrates' Court (England, UK); *Tibet*, order of 10 January 2006, Audiencia Nacional (Plenary) (Spain); *Falun Gong*, 22 October 2007, Constitutional Court (Spain).

<sup>129</sup> See above, note 115, for the complaint in Belgium against President Laurent Gbagbo.

<sup>130</sup> See above, note 115, for the complaint in Belgium against President Fidel Castro. See also *Castro*, 4 March 1999, Audiencia Nacional (Plenary) and 13 December 2007, Audiencia Nacional (Plenary) (Spain).

<sup>131</sup> *Public Prosecutor v Ndombasi*, 16 April 2002, Court of Appeal of Brussels (Belgium).

<sup>132</sup> *El Salvador*, 13 January 2009, Audiencia Nacional (Central Examining Magistrate N° 6) (Spain).

<sup>133</sup> *Obiang Nguema et al.*, 23 December 1998, Audiencia Nacional (Central Examining Magistrate N° 5) (Spain).

<sup>134</sup> A complaint filed in Belgium by private parties, before the *Sharon* case in the Court of Cassation and the 5 August 2003 legislative amendments, against former President Ali Akbar Hashemi Rafsanjani did not go forward.

<sup>135</sup> See above, note 115, for the complaint in Belgium against President Saddam Hussein. See also the case report to the Public Prosecutor of Vienna concerning Izzat Ibrahim Khalil Al Doori, submitted by Peter Pilz on 13 August 1999 (Austria).

<sup>136</sup> See e.g. above, note 119, for the application for the prosecution of Ambassador Carmi Gillon in Denmark. See also *Abbas Hijazi et al. v Sharon et al.*, 127 ILR 110, 121, 12 February 2003, Court of Cassation (Belgium); *Re Mofaz*, 128 ILR 709, 12 February 2004, Bow Street Magistrates' Court (England, UK); *Ben-Eliezer et al.*, 29 January 2009, Audiencia Nacional (Central Examining Magistrate N° 4) (Spain). In September 2005, an arrest warrant was issued in the UK for Major General Doron Almog, suspected of responsibility for grave breaches of the Geneva Conventions in the Occupied Palestinian Territory, but General Almog fled the jurisdiction to avoid arrest. In May 2008, an application was made in the Netherlands for the arrest of Ami Ayalon, Minister Without Portfolio in the Israeli government, in relation to allegations of torture committed while he was the Director of the GSS; he too managed to leave the jurisdiction.

<sup>137</sup> *Menchú Tum et al. v Ríos Montt et al.*, ILDC 137 (ES 2005), 26 September 2005, Constitutional Court (Spain).

<sup>138</sup> See above, note 115, for the complaint in Belgium against President Maaouya Ould Sid'Ahmed Taya. See also *Fédération Internationale des Ligues des Droits de l'Homme et al. v Ould Dah*, 8 July 2002, Court of Appeal of Nîmes/1 July 2005, Nîmes Assize Court (France). This last case was taken to the European Court of Human Rights, which on 17 March 2009 declared the application inadmissible for lack of breach of article 7 of the European Convention on Human Rights. The Court, however, upheld recourse to universal jurisdiction for acts of torture. See *Ould Dah v France*, Application N° 13113/03, decision on admissibility, 17 March 2009.

Mexico,<sup>139</sup> Morocco,<sup>140</sup> Peru,<sup>141</sup> the Republic of Congo,<sup>142</sup> Rwanda,<sup>143</sup> Suriname,<sup>144</sup> Tunisia,<sup>145</sup> the United States of America,<sup>146</sup> Uzbekistan<sup>147</sup> and Zimbabwe.<sup>148</sup> A complaint was also lodged against the President of the Palestinian Authority.<sup>149</sup> Some of these suspects have been serving state officials, including heads of state, heads of government, foreign ministers, ministers of defence and others. Others have been former state officials. Others still have been private individuals, and in one case a private corporation has been indicted.<sup>150</sup> Some proceedings have been initiated by the prosecuting authorities, but many others have been brought or sought by private individuals. There have been differing outcomes in these proceedings. Some prosecutions have led to convictions. The majority of cases have been discontinued on various grounds, including the recognition of immunities accorded by international law. The prosecutorial discretion not to bring proceedings has been exercised in many cases. In several cases, proceedings were deferred in favour of proceedings in the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>151</sup> or the International Criminal Tribunal for Rwanda (ICTR).<sup>152</sup>

27. Criminal proceedings have been instituted or sought in EU Member States against African officials, including heads of state, on extraterritorial bases of jurisdiction other than universal jurisdiction<sup>153</sup> and in respect of crimes other than

<sup>139</sup> *Atenco*, order of 2 July 2008, Audiencia Nacional (Central Examining Magistrate N° 3) (Spain).

<sup>140</sup> *Hassan II*, 23 December 1998, Audiencia Nacional (Central Examining Magistrate N° 5) (Spain); *Sahara*, 30 October 2007, Audiencia Nacional (Central Examining Magistrate N° 5) (Spain). A complaint filed in Belgium (pre-*Sharon* and pre-5 August 2003) by private parties against former Minister for the Interior Driss Basri did not go forward.

<sup>141</sup> *Fujimori*, 42 ILM 1200 (2003), 20 May 2003, Supreme Court (Spain).

<sup>142</sup> See above, note 115, for the complaint in Belgium against President Denis Sassou Nguesso. See also *Ndengue et al.*, 10 January 2007, Court of Cassation (France).

<sup>143</sup> See e.g. *Dupaquier et al. v Munyeshyaka*, 127 ILR 134, 6 January 1998, Court of Cassation (France); *Public Prosecutor v Higaniro et al.*, 8 June 2001, Brussels Assize Court (Belgium); *Nzabonimana and Ndashyikirwa*, 29 June 2005, Brussels Assize Court (Belgium); *Ntuyahaga*, 5 July 2007, Brussels Assize Court (Belgium); *Rwanda*, 6 February 2008, Audiencia Nacional (Central Examining Magistrate N° 4) (Spain).

<sup>144</sup> *Wijngaarde et al. v Bouterse*, 18 September 2001, Supreme Court (Netherlands).

<sup>145</sup> *Gharbi et al. c. Ben Saïd*, 15 December 2008, Strasbourg Assize Court (France).

<sup>146</sup> See above, notes 108 and 120 for the complaints in Germany and France against Secretary of Defense/former Secretary of Defense Donald Rumsfeld. See also *Bush et al.*, 24 September 2003, Court of Cassation (Belgium); *Jiménez Sánchez et al. v Gibson et al.*, ILDC 993 (ES 2006), 11 December 2006, Supreme Court/13 May 2008, Audiencia Nacional (Spain). A complaint lodged in Belgium by private parties on 14 May 2003 against General Tommy Franks was forwarded to the US. At the end of March 2009, the Audiencia Nacional (Central Examining Magistrate N° 5) asked the prosecutor to open an investigation into the alleged responsibility of former US Attorney General Alberto Gonzales and other former US officials for acts of torture and grave breaches of the Geneva Conventions.

<sup>147</sup> See above, note 108 for the complaint in Germany against Minister for the Interior Zakirjon Almatov.

<sup>148</sup> See above, note 120, for the complaint filed against President Robert Mugabe in France in 2003. See also *Re Mugabe*, ILDC 96 (UK 2004), 14 January 2004, Bow Street Magistrates' Court (England, UK).

<sup>149</sup> See above, note 115, for the complaint in Belgium against Yasser Arafat, President of the Palestinian Authority.

<sup>150</sup> *Attorney General v Total SA et al.*, ILDC 748 (BE 2007), 28 March 2007 and 29 October 2008, Court of Cassation (Belgium).

<sup>151</sup> See e.g. the accused Tadić, whose case in Germany was deferred in favour of proceedings in the ICTY.

<sup>152</sup> See e.g. the accused Nahimana, Ruggiu, Bagasora, Ntuyahaga, Ndayambaje and Kanyabashi, cases against whom in Belgium were deferred in favour of proceedings in the ICTR.

<sup>153</sup> Proceedings pending in Belgium against former President of Chad Hissène Habré are based on passive personality jurisdiction. The same goes for the case opened in France in respect of certain Rwandan state officials.

serious crimes of international concern.<sup>154</sup> Since these cases do not implicate universal jurisdiction, they fall outside the scope of the present report.

### III. JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

#### III.1 Introduction

28. Universal criminal jurisdiction relates to the competence of a state under international law to assert the jurisdiction of its courts over given conduct. In the past, the assertion of universal jurisdiction was the only way by which suspected perpetrators of serious crimes of international concern could be brought to justice in situations where the state where the alleged crimes occurred and, where these differed from the foregoing, the state of nationality of the offender or victims was manifestly unwilling or unable to prosecute.<sup>155</sup> Today, the establishment of international criminal courts and tribunals provides an additional mechanism for the prosecution of such crimes in these circumstances. At the same time, temporal, geographical, personal and subject-matter limitations on the jurisdiction of international criminal courts and tribunals mean that universal jurisdiction remains a vital element in the fight against impunity. For example, the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) extends only to the period beginning on 1 January 1991 and only to the territory of the former Socialist Federal Republic of Yugoslavia.<sup>156</sup> The jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) is restricted to the period beginning 1 January 1994 and ending 31 December 1994 and to the territory of Rwanda, as well as to that of neighbouring states in respect of crimes committed by Rwandan citizens.<sup>157</sup> The Special Court for Sierra Leone (SCSL) enjoys jurisdiction solely over 'persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.<sup>158</sup> And the jurisdiction of the Special Tribunal for Lebanon is limited to the prosecution of 'persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons'.<sup>159</sup>
29. As a technical and conceptual matter, universal jurisdiction is to be distinguished at all times from the jurisdiction of international criminal courts and tribunals. Universal jurisdiction relates to the competence of a state to prosecute persons

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<sup>154</sup> Cases are currently pending in France against certain serving African heads of state in relation to allegations stemming from property dealings.

<sup>155</sup> Recall, however, both the International Military Tribunal established at Nuremberg and the International Military Tribunal established at Tokyo at the conclusion of the Second World War by the victorious Allied Powers.

<sup>156</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex (as amended), article 8.

<sup>157</sup> Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex (as amended), article 7.

<sup>158</sup> Statute of the Special Court for Sierra Leone, UN Doc. S/2002/246, Appendix II, annex, article I(1).

<sup>159</sup> Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757 (2007), 30 May 2007, Annex, article 1.

before its own courts, rather than to the prosecution of those same persons before an international judicial body.

### III.2 The International Criminal Court

30. Given the limitations on the jurisdictions of the ICTR and SCSL, the two other international criminal tribunals with competence in relation to conduct on African territory, the most significant international criminal court or tribunal in the present context is the permanent International Criminal Court (ICC). The ICC, established by way of treaty under the Rome Statute 1998,<sup>160</sup> enjoys jurisdiction *ratione materiae* over genocide, crimes against humanity, war crimes and the crime of aggression,<sup>161</sup> although it is unable to exercise its competence over the last until agreement has been reached on the definition of the offence.<sup>162</sup> When it comes to the Court's jurisdiction *ratione loci* and *ratione personae*,<sup>163</sup> the existence of jurisdiction is inseparable from the circumstances of its exercise, and the latter is dealt with in articles 12(2) and 12(3) of the Statute ('Preconditions to the exercise of jurisdiction'), which refer in turn to article 13 ('Exercise of jurisdiction'). What these provisions say in effect is that, where a situation has been referred to the ICC by a state party to the Statute or where an investigation has been initiated by the Prosecutor *proprio motu*, the Court is able to exercise its jurisdiction over the relevant offences only when these are alleged to have been committed on the territory or by a national of a state party.<sup>164</sup> Where a situation is referred to the ICC by the United Nations Security Council, on the other hand, the Court's competence is unlimited as to the place of commission or the nationality of the offender. As for the Court's jurisdiction *ratione temporis*, the ICC has jurisdiction only with respect to crimes committed after the Statute's entry into force on 1 July 2002.<sup>165</sup> Furthermore, where a state becomes a party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that state, unless the state has made a declaration under article 12(3).<sup>166</sup>
31. Article 27 of the Rome Statute renders the official capacity of an accused irrelevant for the purposes of trial before the ICC. More specifically, article 27(2) provides that immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. Also of significance is article 98(1) of the Statute, which provides that the ICC may not

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<sup>160</sup> Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90 ('Rome Statute').

<sup>161</sup> Rome Statute, article 5(1).

<sup>162</sup> Rome Statute, article 5(2).

<sup>163</sup> As further regards the ICC's jurisdiction *ratione personae*, no-one shall be criminally responsible under the Statute for conduct prior to the Statute's entry into force on 1 July 2002, as laid down in article 24(1); and, in accordance with article 26, the Court has no jurisdiction over persons who were under the age of 18 at the time of the alleged commission of the crime.

<sup>164</sup> In both cases, a state accepting the Court's jurisdiction in accordance with paragraph 3 of article 12 will also suffice.

<sup>165</sup> Rome Statute, article 11(1).

<sup>166</sup> Rome Statute, article 11(2).

proceed with a request under article 89(1) for the surrender of a person to the Court if this would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of the immunity. The provision makes no reference to the personal immunity of heads of state, heads of government and foreign ministers, but the object and purpose of the provision demands that the term ‘diplomatic’ immunity be interpreted to encompass these other immunities of the same genus. Article 98(1) applies only in respect of persons and property of a third state: as regards States Parties *inter se*, the immunities from foreign legal process otherwise available under international law pose no bar to the surrender of persons to the Court.

32. The ICC regime is premised on the principle of ‘complementarity’.<sup>167</sup> Complementarity is embodied in article 17 of the Rome Statute and relies on the concept of admissibility. What it means in practice is that states (and not just states parties) are entitled to pre-empt the prosecution of crimes within the Court’s jurisdiction: if a state investigates and/or prosecutes a given case itself or has done so, and does or has done so genuinely<sup>168</sup>, the case becomes inadmissible before the ICC. At the same time, a state is not obliged to prosecute first but may instead refer the case directly to the Court.

#### IV. THE KEY POINTS OF AU-EU CONCERN OVER UNIVERSAL JURISDICTION

##### IV.1 African concerns

33. African states welcome the principle of universal jurisdiction, and are committed to addressing impunity, as shown by Article 4(h) of Constitutive Act of the African Union 2000 and as emphasized in subsequent AU decisions.<sup>169</sup> Article 4(h) of the Constitutive Act, in laying down the right of the AU to intervene in a Member

<sup>167</sup> The preamble’s tenth recital emphasises ‘that the International Criminal Court established under this Statute shall be complementary to national jurisdictions’, and article 1 provides that ‘[a]n International Criminal Court is hereby established ... and shall be complementary to national jurisdictions’.

<sup>168</sup> Article 17(2) of the Rome Statute indicates that in order to determine a state’s unwillingness to prosecute genuinely in a particular case, the Court shall consider whether ‘(a) The proceedings were or are being undertaken or the national decision [not to prosecute] was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.’

<sup>169</sup> Decision Assembly/AU/Dec. 199(XI), 1 July 2008 and Decision Assembly/AU/Dec. 240(XII), 4 February 2009.



State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, amounts to a statement that impunity for these crimes is unacceptable to AU Member States. But there are national legal and institutional constraints on the capacity of many African states to address these crimes and to prosecute perpetrators of them. Consideration should be given to building the national legal capacity of African states to combat genocide, crimes against humanity, war crimes and torture.

34. As some members of International Law Commission have observed, assertion by national courts of the principle of universal jurisdiction has led to misunderstandings and to aggravation of inter-state tensions, and has given rise to perceptions of abuse on political or other grounds. African states take the view that they have been singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European states is politically selective against them. This raises a concern over double standards, and the concern is heightened by multiple charges being brought against officials of African states in the jurisdictions of different European states. The African perception is that the majority of indictees are sitting officials of African states, and the indictments against such officials have profound implications for relations between African and European states, including the legal responsibility of the relevant European states. As one leader of a European state has intimated, the powers of investigative judges relating to indictments against officials of foreign states need to be reviewed by amending the relevant legislation.
35. Indictments issued against foreign state officials exercising representative functions on behalf of their states by low-level judges, often sitting alone without the benefit of collective knowledge and decision-making in judicial terms, tend to undermine the dignity of the state officials concerned and put at risk friendly relations between sovereign states.
36. Public issuance of indictments and warrants of arrest on an *ex parte* basis, instead of a summons to appear<sup>170</sup> or equivalent measure not entailing the arrest of the addressee, of those sitting officials of African states entitled to personal and functional immunity creates an international stigma against them, undermining their dignity and that of their states, and is in violation of certain of their fundamental rights, in particular the presumption of innocence.
37. Indictments issued by European states against officials of African states have the effect of subjecting the latter to the jurisdiction of European states, contrary to the sovereign equality and independence of states. For African states, this evokes memories of colonialism.

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<sup>170</sup> This is an order from the court to appear before it which does not entail the arrest of the addressee.

38. In so far as the indictment of sitting state officials is concerned, there is disregard for immunities enjoyed by state officials under international law. Consequently, any such indictment severely constrains the capacity of African states to discharge the functions of statehood on the international plane.

#### **IV.2 European concerns**

39. It is apparent to the independent experts appointed by the EU that Member States of the EU, like African states, view the exercise of universal jurisdiction as an essential weapon in the fight against impunity for serious crimes of international concern. They appear to consider the exercise of universal jurisdiction as an important measure of last resort which is necessary to ensure that perpetrators of serious crimes of international concern do not go unpunished whenever the state where the crime has allegedly been committed and the state(s) of nationality of the suspect and victims are manifestly unwilling or unable to prosecute.
40. The independent experts appointed by the EU understand the concern expressed by AU Member States. In their view, however, these concerns should not be overstated. Criminal proceedings initiated against African state officials on the basis of universal jurisdiction represent only a part of the total number of exercises of universal jurisdiction by EU Member States. Proceedings have been instituted or sought against nationals, whether officials or otherwise, from states of most other regions of the world.<sup>171</sup> Moreover, those proceedings which have resulted in an actual indictment, let alone trial and conviction, remain an exception. In many cases, proceedings have been discontinued out of respect for the immunities accorded state officials by international law.
41. The independent experts appointed by the EU believe it is crucial to emphasize the attachment of the various national legal traditions within the EU to the cardinal constitutional principle of the independence of the judiciary. They believe that any measures proposed to address the concerns of AU Member States regarding the exercise of universal jurisdiction by EU Member States must take as a starting point the non-negotiable character of this principle.
42. It is also crucial to appreciate that the EU's competence in matters of criminal jurisdiction is limited. Within the EU, the exercise of jurisdiction in matters of criminal law is to a large extent a subject-matter falling under the respective national competences of the 27 Member States of the Union. Any measures proposed to meet the concerns expressed by AU Member States over the exercise of universal jurisdiction by EU Member States must be premised on an understanding of the limited competence of the Union in this regard.

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<sup>171</sup> See above, section II.2.

43. It is worth pointing out, however, that in Title VI of the Treaty on the European Union (TEU) EU Member States have agreed to cooperate in relation to police and judicial co-operation in criminal matters, as a result of which the EU is competent to undertake common action on judicial co-operation in criminal matters. Under article 31(1) TEU, common action by EU Member States on judicial cooperation in criminal matters may relate to the following subject-matters:
- (a) facilitating and accelerating co-operation between competent ministries and judicial or equivalent authorities of the EU Member States, including, where appropriate, co-operation through Eurojust, in relation to proceedings and the enforcement of decisions;
  - (b) facilitating extradition between Member States;
  - (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation;
  - (d) preventing conflicts of jurisdiction between Member States; and
  - (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking.

Co-operation is effected via the measures cited in Article 34 TEU (consultation among EU Member States with a view to coordination; and, in addition to Council common positions, Council framework decisions, other Council decisions and EU conventions). In accordance with article 34(2) TEU, such Council measures can be proposed by any Member State or by the European Commission, and require unanimity in the Council.

44. It is apparent to the independent experts appointed by the EU that EU Member States emphasize the need for African states to institute proceedings against suspected perpetrators of serious crimes of international concern, whether on the basis of universal jurisdiction or of other, more traditional bases of jurisdiction, e.g. territoriality, nationality, passive personality, *etc.* There seems to be a strength of feeling among EU Member States that African statements of concern over the assertion of universal jurisdiction by national courts of EU Member States need to be backed by a real willingness on the part of African states to prosecute the relevant crimes themselves. It is worth recalling that EU Member States have already offered their logistical support for the realization of efforts to this end.
45. The independent experts appointed by the EU recall that there have been circumstances in which African states have expressed their intention to prosecute (mostly on the basis of territoriality or nationality) serious crimes of international

concern allegedly committed in Africa and to this end have addressed requests for extradition to certain EU Member States. It pays to recall too that the inability of the courts of the requested states to satisfy themselves that certain fundamental human rights guarantees would be respected on the surrender of the suspects to the requesting states explains the lack of success of these requests to date. EU Member States clearly take the view that the effective implementation of international legal standards relating to conditions of detention and fair trial is a prerequisite to the accession to such requests in the future, especially given these states' legal obligations in respect of extradition under the European Convention on Human Rights.

## V. RECOMMENDATIONS

46. According to the terms of reference, the experts were to make recommendations with a view to fostering better mutual understanding between the AU and EU regarding universal jurisdiction. The following recommendations are addressed to the governments of AU and EU Member States and to the AU and EU institutions, organs and bodies, as appropriate.
- R1. All states should strive to put an end to impunity for genocide, crimes against humanity, war crimes and torture, and prosecute those responsible for such crimes. States are also legally bound to prosecute treaty crimes, whenever they are parties to such treaties.<sup>172</sup>
- R2. Article 4(h) of the Constitutive Act of the African Union lays down the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. Article 4(h) amounts to a statement that impunity for these crimes is unacceptable to AU Member States. In order to complement Article 4(h), African States should be encouraged to adopt national legislative and other measures aimed at preventing and punishing war crimes, genocide and crimes against humanity. To this end, the AU Commission should consider preparing model legislation for the implementation of measures of prevention and punishment.
- R3. To the same end, in accordance with the AU Assembly's Decision 213(XII) of 4 February 2009, the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, should examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.<sup>173</sup>

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<sup>172</sup> See above, section I.1.

<sup>173</sup> Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Decision Assembly/AU/Dec. 213(XII), 4 February 2009.

- R4. Those Member States of the AU and EU which have persons suspected of serious crimes of international concern within their custody or territory should promptly institute criminal proceedings against these persons, unless they decide to extradite them to the state in the territory of which the relevant conduct is alleged to have occurred (the 'territorial state'), the state of nationality of the suspect (the 'suspect's national state') or the state of nationality of the victims (the 'victims' national state') on the condition that the latter state is willing and able to conduct a fair trial consistent with international human rights standards and to ensure respect for the internationally-guaranteed human rights of detainees.
- R5. In order to help ensure respect for the rights of detainees, those Member States of the AU and EU which are states parties to the Convention against Torture 1984 should fully implement the Convention in their respective national legal orders. Those AU and EU Member States which have not yet become parties to the Convention should be encouraged to do so and to accept the right of individual communication to the UN Committee against Torture.
- R6. When exercising universal jurisdiction over serious crimes of international concern such as genocide, crimes against humanity, war crimes and torture, states should bear in mind the need to avoid impairing friendly international relations.
- R7. Where national criminal justice authorities have initiated investigations and collected compelling evidence of serious crimes of international concern allegedly committed abroad against non-nationals by non-nationals, and where the suspect is a foreign state official exercising a representative function on behalf of his or her state, these authorities should consider refraining from taking steps that might publicly and unduly expose the suspects, thereby discrediting and stigmatizing them, curtailing their right to be presumed innocent until found guilty by a court of law and hampering the discharge of their official functions.
- R8. Those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities.
- R9. In prosecuting serious crimes of international concern, states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction, since such crimes, while offending against the international community as a whole by infringing universal values, primarily injure the community where they have been perpetrated and violate not only the rights of the victims but also the general demand for order and security in that community. In addition, it is within the territory of the state of alleged commission that the bulk of the evidence will usually be found.

- R10. Where those national criminal justice authorities considering exercising universal jurisdiction believe that the territorial state or the suspect's or victims' national state is willing and able to bring him or her to trial in accordance with international human rights standards, they should confidentially disclose the indictment (or any other instrument containing the charges), along with all the evidentiary material collected, to the criminal justice authorities of the relevant state, together with a request that these authorities investigate the alleged crimes and, where the evidence calls for this, prosecute the suspect. Where, however, those national criminal justice authorities considering exercising universal jurisdiction have serious reasons to believe that the territorial state and the suspect and victims' national states are manifestly unwilling or unable to prosecute the suspect, and the suspect is a foreign state official exercising a representative function on behalf of his or her state, they should seek and issue a summons to appear or equivalent measure, rather than an arrest warrant, to enable the suspect to appear before the court and to produce, with the assistance of counsel, any exculpatory evidence in his or her possession.
- R11. Given the grave nature of serious crimes of international concern such as genocide, crimes against humanity, war crimes and torture, AU and EU Member States may wish to consider legislating to specify an appropriate level of court at which proceedings in respect of such crimes must be instituted. They might also envisage providing specialist training in the prosecution and judging of such crimes.
- R12. Where a state, either on its own initiative or at the request of another state, has arrested a person suspected by a foreign state of a serious crime of international concern, it should take into consideration the appeal made in 2005<sup>174</sup> by the Institut de droit international, whereby '*Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender*'.
- R13. Where a state has arrested a person suspected by a foreign state of a serious crime of international concern allegedly perpetrated in the latter state, and where the former state considers that the latter state is manifestly unwilling or unable to conduct a fair trial consistent with international human rights standards and to ensure respect for the internationally-guaranteed human rights of detainees, it

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<sup>174</sup> Resolution III of the Cracow session of the Institut de droit international, 'Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes', in Institut de droit international, *Annuaire*, Volume 71 (2006), Part II, 297.

should, before refusing extradition and exercising universal jurisdiction, notify the requesting state through diplomatic channels of its decision and take into due consideration any representations made by the latter in relation to the proper conduct of trial proceedings and conditions of detention in that state.

- R14. Where a state which has apprehended a person suspected by a foreign state of a serious crime of international concern extradites that person to the requesting state, the latter state should inform the former state on a regular basis of the progress of the criminal proceedings.
- R15. AU Member States should consider establishing judicial ‘contact points’ with Eurojust,<sup>175</sup> with a view to exploring and strengthening international co-operation in matters of criminal justice between AU Member States and EU Member States. The AU may wish to consider co-ordinating the appointment of judicial contact points from an appropriate number of states prepared to represent the interests of the main regions of Africa, as well as one contact point from the AU itself.
- R16. The EU network of contact points on genocide, crimes against humanity and war crimes<sup>176</sup> should consider discussing and developing ways forward in relation to the concerns expressed by AU Member States over the exercise of universal jurisdiction over African nationals by some EU Member States. The EU network and the AU Commission should consider establishing co-operation with each other in this regard.
- R17. The relevant EU bodies should assist AU Member States in capacity-building in legal matters relating to serious crimes of international concern, for example within the framework of the Africa-EU Strategic Partnership. Such matters might include training in the investigation and prosecution of mass crimes, the protection of witnesses, the use of appropriate forensic methods, and so on.

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<sup>175</sup> Eurojust is an EU body established in 2002 to stimulate and improve co-ordination between the criminal justice authorities of the Member States in dealing with the investigation and prosecution of serious cross-border crime, terrorism and organised crime, in particular drug trafficking, money laundering and trafficking in human beings. It hosts meetings between investigators and prosecutors from the various Member States on individual cases, on more strategic issues and on specific types of criminality. See [www.eurojust.europa.eu](http://www.eurojust.europa.eu). For an account of Eurojust judicial ‘contact points’ with third states, see Eurojust Annual Report 2007, 52. The only AU Member State to have appointed a contact point to date is Egypt.

<sup>176</sup> See Council Decision 2002/494/JHA 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.





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