

AFRICAN UNION

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ASSEMBLY OF THE AFRICAN UNION

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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 principle of universal jurisdiction is well established in international law. Universal jurisdiction does not apply to all international crimes, but rather to a very limited category of offences. It allows a State to exercise its domestic jurisdiction to indict and prosecute perpetrators of serious offences such as piracy, torture, genocide, war crimes and crimes against humanity occurring outside its territory irrespective of nationality of the perpetrators. The African Union respects this principle, which is enshrined in Article 4(h) of the constitutive Act.

2. It is to be recalled that following grave concerns expressed on the abusive application of the principle of universal jurisdiction as well as a request made by the Conference of AU Ministers of Justice and/or Attorneys General, held at the AU Headquarters in Addis Ababa on 18 April 2008, the Commission undertook a comprehensive study on the application and scope of the principle of universal jurisdiction. The study was submitted to the Executive Council and the Assembly of the African Union in July 2008, in Sharm el Sheikh, Egypt.

II. DECISION ASSEMBLY /AU/DEC.199(XI)

3. Following due consideration of the Report of the Commission, the 8th Ordinary Session of the Assembly of Heads of State and Government of the African Union, held in Sharm El Sheik in Egypt in July 2008, in its decision Assembly/AU/Dec.1999 (XI), expressed concern on the abuse of the principle by some non-African States and resolved, *inter alia*, as follows:

- “ 1. **TAKES NOTE** of the Report of the Commission on the abuse of the Principle of Universal Jurisdiction pursuant to the recommendation of the Ministers of Justice/Attorneys General in Addis Ababa, Ethiopia on 18 April 2008;
2. **RECALLS** the Johannesburg Declaration of the Pan-African Parliament dated 15 May 2008;
3. **RECOGNIZING** that universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice, which is in line with Article 4(h) of the Constitutive Act of the African Union;
4. **NOTING** the Brazzaville statement by the Inter-ministerial Committee of the International Conference on the Great Lakes Region dated 22 May 2008;
5. **RESOLVE** as follows:
 - i. The abuse of the Principle of Universal Jurisdiction is a development that could endanger International law, order and security;
 - ii. The political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders,

particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States;

- iii. The abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations;
- iv. Those warrants shall not be executed in African Union Member States;
- v. There is need for establishment of 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.

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;

8. ALSO REQUESTS all UN Member States, in particular the EU States, to impose a moratorium on the execution of those warrants until all the legal and political issues have been exhaustively discussed between the African Union, the European Union and the United Nations”.

4. The indictments issued by individual judges in some European countries against African personalities have also been challenged by the Pan-African Parliament, the Intergovernmental Authority on Development (IGAD), the International Conference on the Great Lakes Region (IC/GLR), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the East African Legislative Assembly (EALA) and the Economic Community for Central African States (ECCAS) as well as some individual African States. They have also been challenged by the accused persons themselves in the French and the Belgian Courts and by the Rwandese Government in the International Court of Justice in The Hague. Further, these warrants have not been accepted by Interpol and thus have not issued the red notices on that basis.

5. This report presents a summary of the actions taken to implement the above mentioned Assembly decision *viz a viz* the United Nations and the European Union.

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

a) Actions taken in respect of the United Nations

6. The decision of the Assembly requested, amongst other things, 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. Pursuant to that decision, the matter was brought to the attention of the United Nations General Assembly by H.E. Mr. Jakaya M. Kikwete, the President of the United Republic of Tanzania, in his statement to the UN General Assembly in September 2008. Subsequently, a communication was also sent by Tanzania to the President of the General Assembly. The AU Commission also brought the matter to the attention of the Secretariat of the United Nations. This issue is also on the agenda of, and under consideration by the International Law Commission, within the context of its ongoing work on the immunity of State Officials..

8. Additionally, a delegation of the African Union led by the Minister of Justice of Tanzania (Hon. Mathias Chikawe) accompanied by the Minister of Justice/Attorney General of Rwanda (Hon. Tharcisse Karugarama) and the AU Legal Counsel (Mr. Ben Kioko) travelled to New York in December 2008, and held discussions on this matter with the African Group and subsequently with the Non Aligned Movement Group. The delegation also held a meeting with H.E. Mr. Miguel d'Escoto Brockmann, President of the 63rd session of the United Nations General Assembly since 16 September 2008, in the presence of Amb. Lamamra, Commissioner Peace and Security and the Permanent Representatives of Tanzania and the AU to the UN.

b) Actions undertaken in respect of the European Union

9. The decision of the Assembly requested, *inter alia*, 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.

10. In implementation of Assembly decision, this matter was brought to the attention of the European Union at the 10th Africa-EU Ministerial Troika meeting held in Brussels on 16th September 2008 in the context of the partnership between the African Union and the European Union. The Ministers, noting the African Union concerns, agreed that further discussions be held on the subject between the African Union and European Union. The issue was also discussed at the College-to-College Meeting (European Union and the African Union Commission, held in Brussels, Belgium, on 1st October 2008.

11. Despite Assembly Decision ASSEMBLY/AU/Dec.199 (XI) requesting all EU States, to impose a moratorium on the execution of arrest warrants until all the legal and political issues have been exhaustively discussed between the African Union,

the European Union and the United Nations as well as high level discussions between the AUC and EU, Mrs Rose Kabuye, State Chief of Protocol to the President of Rwanda was arrested on 9 November 2008 in Germany, pursuant to an arrest warrant issued by a French judge, while she was on official mission. She was subsequently transferred to France after having been in custody in Germany for about a week. Upon arrival in France she was taken before a judge then granted bail, pending trial.

12. The Commission issued a protest note to the governments of France, Germany and the EU expressing its dismay that despite Assembly decision as well as ongoing consultations, the arrest warrant was executed and a senior official arrested. The Pan African Parliament, Kenya, Uganda and Rwanda also expressed dismay and grave concern at this development.

13. Additionally, the matter was also discussed at the 11th AU/EU Ministerial Troika meeting held in Addis Ababa, Ethiopia, 20-21 November 2008, during which the two parties recognized that the issue has negative consequences for the relationship between the AU and the EU. The Troika agreed to set up a technical ad-hoc expert group to clarify their respective understanding on the African and EU side on the principle of universal jurisdiction and report to the next Troika meeting in April 2009, and submit a preliminary report before the end of January 2009.

14. The relevant part of the Communiqué (paragraph 12) of the 11th AU-EU Ministerial Troika held from 20-21 November 2008 (Addis Ababa), reads as follows:

“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.”

15. Pursuant to this decision of the 11th 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 12th Ministerial EU-AU Troika that will take place at the end of April 2009.

16. According to the Terms of Reference set out for the Expert Group, its report would lay out:

- 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;
- The respective understandings on the African and EU side 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.

17. The AU Commission and the European Commission each appointed three (3) experts (six altogether) assisted by a Secretariat of four (4) officials, two from the AU and two from the EU. The AU expert team is headed by a former President of the International Court of Justice and two academicians. The European Union side is composed of three (3) academicians, one of whom is a former President of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.

18. At its first meeting in Brussels 14-15 January 2009, the Expert Group agreed, *inter alia*, on its methods of work by electing its Co-Chairmen (Dr. Mohammed Bedjaoui and Professor Antonio Cassese).

IV. SUMMARY OF PROGRESS OF THE WORK OF THE EXPERTS AND OF THEIR KEY RECOMMENDATIONS

19. During the first meeting, the experts identified the issues that require their attention in order to deal exhaustively with the matter. The principle of universal jurisdiction under international law was discussed and distinctions were drawn between the jurisdiction of international criminal tribunals on the one hand, and the exercise of universal jurisdiction and related concepts by individual states on the basis of their national laws, on the other. The Experts also exchanged views on the approaches to universal jurisdiction in the national laws of European States and noted the position of the African Union on the issue of universal jurisdiction. National laws of African states on universal jurisdiction will be discussed by the Experts at their next meeting. The Experts further considered statements of concern expressed by African and European States regarding the exercise of universal jurisdiction. Finally the Experts also examined possible recommendations concerning the exercise of universal jurisdiction in order to foster a better mutual understanding between the AU and the EU of the objectives of universal jurisdiction.

20. At the end of this meeting, the experts agreed on the following recommendations set out in paragraphs 18 to 21:

a) “Proposed Contents of the Experts’ Report

21. The report will cover the following points: (1) The definition and content of universal jurisdiction in international law, and distinction with other bases of

jurisdiction under international law; and, the absence of hierarchy of internationally permissible jurisdictions; (2) An outline of approaches to universal jurisdiction in the national laws of Member States of the EU and the AU; (3) Jurisdiction of the International Criminal Court; (4) Key points of AU-EU concern over universal jurisdiction; and (5) Recommendations and Guidelines on the conditions for exercising universal jurisdiction by EU and AU Member States.

b) Proposed Preliminary/Draft Recommendations

22. The proposed recommendations would be addressed primarily to the authorities of the State that is willing to exercise universal jurisdiction over international crimes allegedly committed abroad against non-nationals by persons who have the status of serving senior state officials and deal with:

- Striking a careful balance between fighting against impunity and preserving peaceful international relations
- Treatment of the alleged perpetrator (respect for the presumption of innocence and for the discharge of official functions);
- Respect for the *immunities* to which State officials may be entitled;
- Mode of notification of indictments and (e.g., preference for summons to appear or equivalent measures rather than arrest warrants);
- Giving effect to proposed policy *guidelines* for the exercise of Universal jurisdiction;
- Possible EU-based mechanisms coordinating prosecutorial and judicial action in the exercise of universal criminal jurisdiction, including liaising and cooperating with Member States of the African Union and the African Union;
- Capacity- building in legal matters including judicial training within the framework of the Africa-EU Strategic Partnership;
- Adoption of national legislative and other measures in Africa for preventing and punishing war crimes, genocide torture and crimes against humanity;
- Ratification by all States of relevant international treaties, including the 1984 Convention Against Torture and Degrading or Inhuman treatment and acceptance of the right of individual petition to UN treaty bodies;
- Prompt institution in all States of criminal proceedings against perpetrators of international crimes, or the extradition of such persons.

c) Proposed Guidelines on Conditions for the Exercise of Universal Jurisdiction

23. Pursuant to the proposed recommendations, the Experts also propose to formulate detailed policy guidelines for the exercise of universal jurisdiction, covering the following three subject matters: (A) General principles on Universal jurisdiction over international crimes; (B) Conditions for the exercise of Universal jurisdiction; and

(C) Arrest of persons charged abroad with international crimes and conditions for their extradition to the requesting state.

d) Next Steps

24. The Experts will hold a second meeting in March 2009, in Addis Ababa, during which they will decide on the need for any further meetings. The final report will be prepared in time for the 12th Ministerial EU-AU Troika that will take place at in April 2009.”

V. CONCLUSIONS AND RECOMMENDATIONS

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

26. The Commission believes that the work already undertaken by the Independent Experts group is credible and has gone a long way in addressing all the concerns expressed by the African Union and to finding a lasting solution that would address the negative consequences that the abusive application of the principle of universal jurisdiction poses to the partnership between Africa and the European Union.

27. The Commission recommends that the exercise already commenced should be given a chance and the matter could be reviewed at the next Summit in July 2009.

28. Accordingly, it is recommended to the Assembly as follows:

- i. TAKES NOTE of the Progress Report of the Commission on the Implementation of the Assembly Decision Assembly/AU/ Dec.199(XI) adopted by the Assembly in Sharm El-Sheikh, Egypt, in July 2008 on the Abuse of the Principle of Universal Jurisdiction;
- ii. ALSO TAKES NOTE of the work of the AU-EU Technical Ad-hoc Expert Group set up by the 11th 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. EXPRESSES its regret that in spite of its previous Summit decision calling for a moratorium and whilst the African Union and the European Union were already in discussion to find a durable solution to this issue, a warrant of arrest was executed against a senior African State Official thereby creating unnecessary tension between the AU and the EU;
- iv. REITERATES its appeal to all UN Member States, in particular the EU States, to impose a moratorium on the execution of warrants issued by individual European States until all the legal and political issues have been exhaustively discussed between the African Union, the European Union and the United Nations;

- v. FURTHER REITERATES its appeal to the Chairperson of the African Union to follow-up on this matter with a view to ensuring that it is exhaustively discussed at the level of the United Nations Security Council and the UN General Assembly;
- vi. URGES the AU and EU Commissions to extend the necessary support to the Joint Technical Ad-hoc Expert Group;
- vii. 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.

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