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**PROGRESS REPORT OF THE COMMISSION ON THE ABUSE OF  
THE PRINCIPLE OF UNIVERSAL JURISDICTION**

## PROGRESS REPORT OF THE COMMISSION ON THE ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION

### I. INTRODUCTION

1. The 11<sup>th</sup> Ordinary Session of the Assembly 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matter with a view to finding a lasting solution to this problem and in particular to ensure that those warrants are withdrawn and are not executable in any country.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. It is to be recalled that progress Reports on the implementation of the above Decision were submitted to the Assembly in February 2009, in Addis Ababa, Ethiopia and in July 2009, in Sirte, Libya respectively. Following due consideration of the Progress Report of the Commission during its last session in Sirte, the Assembly adopted Decision Assembly/AU/Dec.243 (XIII) by which it requested, *inter alia*, the Commission to follow up on this matter and to report to the Assembly on progress made in the implementation of this Decision, in January/February 2010.

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

### II. ACTIONS TAKEN TO IMPLEMENT DECISION ASSEMBLY /AU/Dec.199 (XI)

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

4. It is to be recalled that the 11<sup>th</sup> Africa-EU Ministerial Troika Meeting held at the AU Headquarters in Addis Ababa on 20-21 November 2008, in addressing the concerns expressed by Africa on the application of the principle of universal jurisdiction, decided to set up an ad-hoc experts group to clarify the respective understanding of the principle on both sides. The experts submitted their report to the 12<sup>th</sup> Session of the Ministerial Troika held in Luxembourg on 30 April 2009. The Troika took note of the report of the independent Technical Ad-Hoc Experts Group and decided that it should be shared with the organs of the AU and EU as well as with Member States.

5. Since the publication of the Report of AU-EU Technical Ad hoc Expert Group on the principle of Universal Jurisdiction, only marginal progress had been made in the discussions between the African Union (AU) and the European Union (EU) on the matter of Universal jurisdiction. Thus, within the framework of the 13<sup>th</sup> Africa-EU Ministerial Troika Meeting held in Addis Ababa on 14<sup>th</sup> October 2009, the AU side observed that a greater spirit of cooperation through implementation of the recommendations addressed to the EU Member States in the Report of the AU-EU Technical Ad-hoc Experts Group on the principle of Universal Jurisdiction was necessary in order to address the AU concerns on the exercise of the principle of Universal Jurisdiction

6. In this regard, the AU side called for finding durable and urgent solutions to its concerns and to avoid the matter being addressed as a political issue only. The European Union (EU) underlined that the exercise of universal jurisdiction is a matter exclusively of national competence, which falls outside EU competence. In this regard, the EU expressed the view that the Sixth Committee of the United Nations General Assembly (UNGA) would be the correct forum in which this issue should be discussed. The AU side rejected this approach and insisted that the Assembly decision required a two track approach, one in relation to the EU and the other in relation to the UN. Furthermore, it was the view of the AU side that a matter that had the potential to adversely affect the relations between EU and Africa could not be characterised as a purely national issue.

7. To date the AU Commission has no information as to whether any or all of the recommendations made by the Technical ad-Hoc Experts Group have been implemented. It is to be noted that a number of the recommendations particularly those relating to immunities of State officials under international law would assist in reducing tension and insuring that the handling of cases of universal jurisdiction does not impair friendly international relations. These recommendations include the following:

*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.*

*R.10 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”.

8. Taking into account the EU position as expressed during the 12<sup>th</sup> and 13<sup>th</sup> AU-EU Ministerial Troika Meeting, the Commission believes that it will be difficult to find a durable solution in further discussions on this matter with the EU side.

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

9. The 64<sup>th</sup> Session of the United Nations General Assembly (UNGA) adopted on 14 September 2009 a Decision A/63/L100 to inscribe on its agenda, item 84 entitled “The Scope and Application of the Principle of Universal Jurisdiction”, for consideration by the Sixth Committee. This followed intense efforts by the African Group facilitated by the Permanent Mission of the United Republic of Tanzania, pursuant to the various Decisions adopted by the Assembly of the Union on the Abuse of the Principle of Universal Jurisdiction.

10. Pursuant to the above mentioned UNGA Decision, the Sixth Committee took up the issue on 20 and 21 October 2009 and approved on 12 November 2009 a Draft Resolution for consideration by the UNGA during its ongoing session. The UNGA adopted without a vote on 16 December 2009 Resolution A/RES/64/117 on the Scope and Application of the Principle of Universal Jurisdiction which stipulates, *inter alia*, as follows:

- “1. **Requests** the Secretary-General to invite Member States to submit, before 30 April 2010, information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice, and to prepare and submit to the General Assembly, at its sixty-fifth session, a report based on such information and observations;
2. **Decides** that the Sixth Committee shall continue its consideration of the scope and application of the principle of universal jurisdiction, without prejudice to the consideration of related issues in other fora of the United Nations;
3. **Decides** to include in the provisional agenda of its sixty-fifth session the item entitled “The scope and application of the principle of universal jurisdiction”.

11. During the consideration of the issue by the Sixth Committee, a Representative of the Commission was dispatched to New York to work with the African Group’ legal experts in order to devise an African strategy for engagement in the process based on the various Decisions adopted by the Assembly of the Union,

and the lessons learnt from the AU-EU discussions on this matter. On this occasion, the legal experts of the Members of the Non Aligned Movement (NAM) were also briefed by the Representative of the Commission on the background of the various Decisions adopted by the Assembly of the Union on the abuse of the principle of Universal Jurisdiction.

12. The Commission believes that the upcoming discussions at the level of the UNGA as well as its Sixth Committee will be an opportunity to forward the concerns expressed by the African Union on the abuse of the principle of universal jurisdiction, to identify areas where the application of the principle has not conformed to international law, and to push forward the AU proposal for establishment of an international regulatory mechanism.

13. Additionally, the Commission wishes to bring to the kind attention of all Member States that in implementing Decision Assembly/AU/Dec.243 (XIII), the Commission invited, through a Note Verbale, all Member States affected by the abuse of the principle of universal jurisdiction by non-African States against African leaders or State Officials to communicate to the Commission the list and details of pending cases. At the time this report was being prepared, only two (2) Member States (Uganda and Mali) had responded by indicating that none of their leaders or State officials were under any warrant of arrest issued by the judicial tribunals or courts of non-African States.

### III. CONCLUSIONS AND RECOMMENDATIONS

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

- i. **TAKE NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.243 (XIII) adopted in Sirte, Great Jamahiriya in July 2009;
- ii. **ALSO TAKE NOTE** of UNGA Resolution A/RES/64/L117 on the Scope and Application of the Principle of Universal Jurisdiction, adopted on 16 December 2009 by the UN General Assembly and **INVITE** all Member States to submit to the UN Secretary General, before 30 April 2010, information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice;
- iii. **REITERATE** its previous positions articulated in decisions Assembly/Dec.199(XI), Assembly/Dec.213(XII) and Assembly Decision/Dec.243 (XIII) adopted in Sharm el Sheikh, Addis Ababa and Sirte in July 2008, February 2009 and July 2009 respectively to the effect that there has been blatant abuse of the principle of universal jurisdiction particularly in some non African States and **CALLS** for immediate termination of all pending indictments;

- iv. **FURTHER REITERATE** 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. **CALL UPON** all concerned States to respect international law and particularly the immunity of state officials when applying the principle of universal jurisdiction;
- vi. **EXPRESS 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;
- vii. **INVITE** 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. **REQUEST** 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 ordinary session of the Assembly through the Executive Council in July 2010.