

Amnesty International's recommendations on international justice issues to the Swedish Presidency of the European Union

1 July 2009 – 31 December 2009

Amnesty International sets out below its recommendations to the Swedish Presidency of the European Union (EU) for the term July-December 2009 (Swedish Presidency) on how the EU should strengthen and improve its efforts to ensure international justice in EU member states and in other countries around the world and follow up Amnesty International's recommendations to the previous Presidencies of the European Union on this subject.

In particular, the organization makes suggestions with regard to the effective implementation of the European Union Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court (Common Position) and the related Action Plan of 4 February 2004, in order to:

1. Achieve universal ratification and implementation of the Rome Statute of the International Criminal Court (Rome Statute) and the Agreement on Privileges and Immunities of the Court (APIC);
2. Preserve the integrity of the Rome Statute and APIC;
3. Ensure the arrest and surrender of all persons subject to International Criminal Court (ICC) arrest warrants for crimes under the Rome Statute;
4. Strengthen the Africa-EU Strategic Partnership; and
5. Promote effective cooperation between states.

1. Ratification and implementation of the Rome Statute and APIC

Sweden, which played a key role as a member of the Like-Minded Countries in the drafting and adoption of the Rome Statute and its supplementary instruments, should urge the EU to continue its efforts to ensure universal ratification and effective implementation of the Rome Statute and APIC. Despite recent challenges to the ICC, Amnesty International believes that EU encouragement could persuade some states in every region of the world to ratify the Rome Statute, particularly in the period before the first Review Conference (31 May to 11 June 2010). Amnesty International has welcomed the European Parliament Resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union's policy on the matter (2008/2336(INI)) (European Parliament Resolution):

- Calling on the Council and the Commission to continue their efforts to promote universal ratification and implementation of the Rome Statute and APIC;
- Demanding that the Czech Republic ratifies the Rome Statute without delay;
- Asking all EU presidencies to raise the importance of cooperation with the ICC in all EU summits and dialogues with third countries;
- Urging all EU member states to step up cooperation with the Court and to conclude bilateral agreements on the enforcement of sentences, as well as on the protection of witnesses and victims and calling on the EU and its member states to provide the ICC with all necessary assistance in its ongoing cases.

Recommendations. Amnesty International recommends that the Swedish Presidency should take the following steps to improve the effectiveness of these efforts, in close cooperation with civil society organisations:

- Amnesty International welcomes news that the President of the Czech Republic signed on 8 July 2009 the accession to the Rome Statute. We urge the Czech Republic to complete the

accession process by depositing the instrument of accession with the United Nations Secretary-General, as soon as possible;

- Urge the three EU Member States (Czech Republic, Malta and Spain) that have not yet done so, to ratify APIC as soon as possible;
- Urge all EU Member States, including Sweden regarding complementarity obligations, that have not yet done so, or have done only it partially, to enact or amend existing legislation, in a transparent manner and close coordination with civil society organizations at the earliest possible stage of the process, including both complementarity and cooperation obligations under the Rome Statute, as recommended by Amnesty International in its paper, *Checklist for Effective Implementation*, AI Index: IOR 40/XXX/2000, XXX 2000;
- Promote ratification and implementation of the Rome Statute and APIC, in the context of EU external relations with all non-EU member states, including, in particular, Cape Verde, Indonesia, Moldova, Mozambique and Solomon Islands, having regard to recent developments in these countries that present an opportunity to move forward with the ratification process, as well as the positive impact that they would represent in both the regional and global contexts;
- Encourage ratification and effective implementation of the Rome Statute and APIC in events or partnership agreements involving other inter-governmental organizations, such as the African Commission on Human and Peoples' Rights and other organs of the African Union (AU), the Association of Southeast Asian Nations, the Commonwealth, the Community of Portuguese Speaking Countries, the Economic Community of West African States, the League of Arab States, the Organization of American States (which adopted on 4 June 2009 Resolution AG/RES. 2505 (XXXIX-O/09), on the promotion of the International Criminal Court, as a follow-up to previous Resolutions), the *Organisation Internationale de la Francophonie*, the Organization for Security and Cooperation in Europe, the Southern African Development Community and the United Nations Security Council; and
- Resume the confidential exchange of information regarding on developments on ratification and implementation with civil society.

2. Integrity of the Rome Statute

The EU should take effective steps to protect the Rome Statute in a broad range of situations, including preventing damaging amendments during the Review Conference that will take place in 2010 and persuading states to repudiate impunity agreements that they have signed or ratified with other states. Paragraph 17 of the European Parliament Resolution urges Romania to rescind its Bilateral Immunity Agreement with the USA and Paragraph 26 urges all EU member states to collaborate in international criminal justice mechanisms and especially in bringing fugitives to justice.

Recommendations. Amnesty International calls on the EU to:

- Welcome, in all meetings with US officials, positive statements concerning the ICC. In this regard, Amnesty International welcomes Paragraph 28 of the European Parliament Resolution noting with satisfaction the statement by Ambassador Susan E. Rice, US Permanent Representative in the Security Council, on 29 January 2009, referring that the ICC "looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur".
- Include the subject of the ratification of the Rome Statute and cooperation with the ICC in the agenda of all bilateral démarches with the US;
- Encourage states that have signed bilateral impunity agreements to not ratify them and those who have done so to abrogate them;

- Urge states to ensure that the integrity of the Rome Statute is protected at the Review Conference.

3. Ensuring the cooperation with the ICC and the arrest and surrender of persons named in ICC arrest warrants

The EU has taken a number of steps to support the ICC's investigations in Sudan and Uganda. For example, its support was crucial to ensure that the Security Council adopted the Presidential Statement on 16 June 2008 urging the government of Sudan to cooperate with the Court, consistent with resolution 1593 (2005). According to Paragraph 26 and 27 of the European Parliament Resolution, the European Parliament notes with concern the persistent failure of Sudan to arrest and transfer to the ICC Ahmad Harun and Ali Kushayb, deplores that the ICC arrest warrant for Bosco Ntaganda has not yet been executed, demanding his immediate arrest and surrender, and noting with concern that "the ICC arrest warrants for four members of the Lord's Resistance Army have still not been executed. In addition, several EU statements expressed the support and the cooperation with the ICC.¹ However, the EU must do more to ensure that all persons named in arrest warrants, regardless of rank or official status, whether the warrant is sealed or unsealed, are arrested and surrendered to the ICC.

Recommendations. Amnesty International urges the EU to:

- Resist pressure to obstruct international justice by making a request under Article 16 of the Rome Statute to defer any prosecutions;
- Encourage the UN to cooperate fully with the ICC and to press all states to ensure that persons named in such warrants, regardless of rank or official status, whether the warrant is public or sealed, to arrest and surrender those persons to the ICC without delay;
- Call for the Security Council to reject any proposal that it make a request pursuant to Article 16 of the Rome Statute to the ICC to defer any prosecution and take effective steps to secure the arrest and surrender of persons named in arrest warrants, without delay.

4. The Africa-EU Strategic Partnership

The Joint Africa-EU Strategy. The Lisbon Declaration of 9 December 2007, on the Joint Africa-EU Strategy (Joint Strategy), includes, among other objectives, the strengthening and promotion of peace, security, democratic governance and human rights. According to Paragraph 30, under the priority area of Governance and Human Rights, of the Joint Strategy:

"Africa and the EU will also work together on a global level and international fora, including in the UN Human Rights Council, for the promotion and protection of human rights and international humanitarian law and for the effective implementation of international and regional human rights instruments. Both sides also commit themselves to fight impunity in all its forms. The most serious crimes of concern to the international community as a whole, especially crimes against humanity, war crimes and genocide, should not go unpunished and their prosecution should be ensured by measures at both domestic and international level. In this context, the partners agree that the establishment and

¹ Declaration by the Presidency on behalf of the European Union following the start of the Thomas Lubanga trial at the ICC in January 2009, Council of the European Union, 28 January 2009.

Declaration by the Presidency on behalf of the European Union on the current situation in Province Orientale, DRC (LRA), Council of the European Union, 20 February 2009.

Declaration by the Presidency on behalf of the European Union concerning the situation in eastern Democratic Republic of the Congo, Council of the European Union, 20 February 2009.

Declaration by the Presidency on behalf of the European Union following the ICC decision concerning the arrest warrant for President Al-Bashir, Council of the European Union, 6 March 2009.

the effective functioning of the International Criminal Court constitute an important development for peace and international justice”.

The Action Plans. The first Action Plan, covering implementation of the Joint Strategy for the period 2008-2010 includes, as an expected outcome in Priority Action 1 in the area of Democratic Governance and Human Rights, progress in the areas of prevention of ill-treatment and torture and the promotion of international justice, among others.

Priority Action 2 in the area of Migration, Mobility and Employment refers as an objective, to “effectively combat trafficking in human beings through a victim-centred approach, in particular of women and children”, including as activities to sign and ratify relevant international conventions and to “Establish or reinforce the necessary legal framework, prepare national and regional strategies and action plans, and ensure effective implementation and enforcement”. In this respect, Article 7 (2) (c) of the Rome Statute defines as a crime against humanity “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.

However, although Amnesty International welcomes these first steps, the organization regrets that the first Action Plan does not include an effective program to implement Paragraph 30 of the Joint Strategy. To improve the protection of African victims of crimes under international law, the Swedish Presidency should work to ensure the effective implementation of this paragraph in coordination with the AU. In this respect, Amnesty International would like to highlight paragraph 98 of the Joint Strategy, stating that the “African Union has emerged as a natural interlocutor for the EU on continental issues and as the most important institutional partner for the EU”.

According to the final document of the 12th Africa-EU Ministerial Troika Meeting, 28 April 2009, the Ministers recalled the need to fight impunity within national and international law to ensure that perpetrators of grave offences, such as war crimes, crimes against humanity, genocide and torture, do not do so with impunity, but are brought to justice.

Amnesty International urges the EU to work closely with the AU in ensuring that Paragraph 30 of the Joint Strategy, the related recommendations in the Priority Action Plans and the call mentioned above be effectively implemented in the near future.

Recommendations. In particular, Amnesty International is calling on the EU and the AU to:

- Encourage all members of the AU that have not done so yet to ratify the Rome Statute and APIC;
- Encourage the members of the AU that have not done so, or have done only it partially, to enact or amend existing legislation, in a transparent manner and close coordination with civil society organizations starting at the earliest possible stage of the process, in order to effectively comply with their international obligations, including the exercise of both principles of complementarity and cooperation under the Rome Statute;
- Encourage the members of the AU to not sign or ratify bilateral impunity agreements and those who have ratified these agreements to abrogate them;
- Encourage members of the AU to press that the organization brings into effect the agreement with the ICC on cooperation;
- Implement effectively paragraphs 107 to 110 of the Joint Strategy, recognizing civil society contribution and participation in the implementation of the Joint Strategy and its Action Plans.

6. Promotion of effective cooperation between states

Amnesty International is also suggesting that the Swedish Presidency should take a number of important steps to ensure that the EU provides further support to global efforts at the national level to enforce international criminal law through more effective cooperation between states.

Amnesty International welcomed Article 23 (2) of Council Decision 2009/426/JHA of 16 December 2008 stating that the Secretariat of the European Network of Contact Points in respect of Persons responsible for Genocide, Crimes Against Humanity and War Crimes (European Network), shall form part of staff of Eurojust and that it may draw on Eurojust's administrative resources.

Recommendations. The organization reiterates its recommendations to the previous EU Presidencies and in *Amnesty International's recommendations to the European Union on improving the effectiveness of international justice*, AI Index: IOR 53/010/2007, 31 August 2007, that the EU should take the following steps to address impunity:

- Expand the European Network's mandate to include torture and other serious crimes under international law;
- Provide the European Network with sufficient resources, similar in scale to the resources devoted to other serious crimes;
- The appointment of a European Network coordinator within the new Secretariat as soon as possible to plan and organize meetings and adopt, in consultation with the Contact Points and civil society, an action plan similar to the EU action plan on the ICC to improve efforts at the national level to end impunity.
- Establish a secure on-line data exchange network devoted to crimes under international law. Paragraph 30 of the Presidency Conclusions of the Brussels European Council on 21 and 22 June 2007 (Presidency Conclusions), requests "the Council to ensure that national criminal records systems become inter-connected through a European network as soon as possible". Although Amnesty International welcomes this paragraph, the organization recommends that it be implemented strictly in accordance with human rights including the protection of personal data processed in the framework of police and judicial cooperation in criminal matters;
- Establish an EU investigation unit to coordinate national investigations, including through the use of joint international investigation teams, as part of a new shared responsibility model for the international community to respond to crimes under international law;
- Establish an effective EU-wide victim and witness protection program, including the relocation of victims and witnesses and their families, which would provide protection for victims, witnesses and their families before during and after the proceedings, as appropriate, including in other EU countries;
- Strengthen cooperation between European Network and EU institutions outside the territory of EU member states (including EU missions, such as police missions and EU peacekeeping missions) to facilitate investigations, extradition, mutual legal assistance, surrender to international criminal courts and national prosecutions;
- Publish information about the European Network, including dates, locations and provisional agendas of planned meetings in advance of meetings, as well as reports of these meetings, and other information relevant to state-to-state cooperation on crimes under international law.

7. Defending universal jurisdiction to end impunity for crimes under international law

It is of the utmost importance that the EU and its member states resist recent attacks by certain states and the unfortunate and unprecedented initiative by the AU launched in July 2008 calling for all states to cease issuing any arrest warrants based on universal jurisdiction until all legal and political issues have been "exhaustively discussed" by the African Union, the EU and the United Nations (UN). However, not only are such warrants permitted under international law, but national courts are obliged to issue such warrants when persons are suspected of certain crimes under international law, such as grave breaches of the Geneva Conventions of 1949 and Protocol I to those

conventions and torture, when the courts are in a state that has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

There is, however, no evidence whatsoever of selective or abusive exercise of universal jurisdiction against African leaders and, should it ever occur, states have a range of remedies, including filing an application in the International Court of Justice. There is considerable evidence that police, prosecutors and investigating judges are taking their responsibilities to investigate and prosecute crimes committed against African victims, as well as victims in many other areas of the world, when those victims have been unable to obtain justice at home.

On 16 April 2009 the AU-EU Expert Report on Universal Jurisdiction, No. 8672/09, was published. From the perspective of victims of crimes under international law and their families, the AU/EU Expert Report is a considerable advance over the 18 April 2008 AU Report of the Commission on the abuse of the Principle of Universal Jurisdiction, which it supplants. In particular, the AU/EU Expert Report contains extensive information about state practice in AU and EU member states provided by Amnesty International and other non-governmental organizations. There are a number of positive aspects about this report, for example, its findings that “[p]ositive international law recognises no hierarchy among the various bases of jurisdiction that it permits”; the majority of AU member states have universal jurisdiction legislation which, with one aborted attempt to prosecute a former African head of state in the courts of an AU state, their police and prosecutors have failed or refused to use; AU and EU states have provided for universal jurisdiction over crimes under customary international law as well as over crimes listed in treaties; 13 African states have abolished in national law, or have agreed to do so, provisions recognizing claims of immunity by state officials for crimes under international law; the broad range of nationalities of suspects or accused who have been investigated or prosecuted in EU courts on the basis of universal jurisdiction; and clarification that some of the cases that have been cited as evidence of abuse of universal jurisdiction have actually been based on passive personality jurisdiction.

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

Amnesty International recommends that the EU should energetically defend, in all forums, including in the UN General Assembly and the Security Council, the legitimacy of the exercise of universal jurisdiction over conduct amounting to crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances, provided that the proceedings are in accordance with the right to fair trial and other international human rights law and standards and exclude the death penalty.