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FOSTERING AN EU APPROACH TO SERIOUS INTERNATIONAL CRIMES

Joint Hearing of the Committee on Civil Liberties, Justice and Home Affairs and the Subcommittee on Human Rights

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BACKGROUND PAPER

"The serious crimes within the jurisdiction of the [International Criminal] Court are of concern to all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof."

Council Common Position 2003/444/CFSP, 16 June 2003

"The European Parliament welcomes the progress made in the application of the principle of universal jurisdiction in respect of crimes against humanity, genocide and torture."

Resolution on the proceedings against Rios Montt, 26 October 2006



REALISED WITH THE FINANCIAL SUPPORT OF THE AGIS PROGRAMME OF THE EUROPEAN COMMISSION

PURPOSE AND OBJECTIVES OF THE CONFERENCE

The fight against impunity for 'serious international crimes' such as genocide, crimes against humanity, war crimes and torture¹ has made considerable advances in the past years. The establishment of the ad-hoc tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia are some examples of international efforts to address such crimes. These efforts have been complemented by national investigations and prosecutions of those accused of serious international crimes, particularly in member States of the European Union (EU).

The EU is supportive of international justice mechanisms and the fight against impunity is an important element of its Common Foreign and Security Policy (CFSP). This commitment is illustrated by its series of common positions on the ICC,² the Cooperation and Assistance Agreement between the EU and the ICC³ as well as the recent EU Guidelines adopted by on promoting compliance with international humanitarian law⁴ as well as its 2001 Guidelines on EU Policy towards third countries on torture and cruel, inhuman and degrading treatment and punishment.⁵

Nonetheless, international justice mechanisms are limited by jurisdiction and scope, leaving gaps in justice that must be filled by 'national authorities, the international community and the ICC' working together to ensure that all perpetrators are brought to justice.⁶

The European Union and its member States and affiliated countries have an important role to play in closing these gaps and eradicating safe havens. All member States have ratified the relevant international treaties and are bound by principles of customary international law, and consequently have obligations to comply effectively with these obligations, particularly in respect of those accused of serious international crimes found within their territories.⁷ In practice, however, these commitments are only rarely complied with. A large number of alleged perpetrators are known to be living within the territories of EU member States and victims' access to justice is limited. The reasons for poor compliance are multiple, and include the inaction of national authorities and the insufficiency of domestic legislation.

¹ This conference is discussing the most serious violations of human rights and humanitarian law amounting to crimes under international law over which states have universal jurisdiction and/or the duty to prosecute or extradite alleged offenders. These crimes include, but are not necessarily limited to, genocide, crimes against humanity, war crimes, and are referred to in this document as 'serious international crimes'.

² Council Common Position 2003/444/CFSP of 16 June 2003 on the ICC (Official Journal L 150 of 18.06.2003).

³ Agreement between the International Criminal Court and the European Union on cooperation and assistance, Council of the European Union, entry into force 1 May 2006.

⁴ (2005/C 327/04), adopted by the Council of the European Union.

⁵ Guidelines for EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Punishment or Treatment (General Affairs Council of 9 April 2001).

⁶ Paper on some policy issues before the Office of the Prosecutor, ICC-OTP 2003, page 3, available at: http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf

⁷ All EU Member States have ratified the Geneva Conventions and its first Protocol, the UN Convention against Torture, the Genocide Convention and, except for the Czech Republic, the Rome Statute of the International Criminal Court.

The purpose of this Conference is to explore how the EU as an institution, and the member States can ensure that safe havens are eradicated; that international obligations are implemented and exercised in practise. The conference will enable government representatives, civil servants, practitioners, policy makers and others to consider and address the main challenges and options for the way forward will be identified.

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As two organisations with mandates to ensure justice for victims, REDRESS & FIDH have been examining the commitment of the EU and its member States to the fight against impunity over several years. A first series of meetings on the internal obligations of EU member States were held in July⁸ and November⁹ 2003, with the aim of bringing the laws and practices of EU member states on the exercise of 'extraterritorial jurisdiction' closer together and encouraging the various bodies and institutions of the European Union to collaborate more effectively in the investigation and prosecution of the most heinous crimes: genocide, crimes against humanity, war crimes and torture.

During these initial meetings in 2003, the need to enhance European consensus on the fight against impunity was explored and first discussions on the feasibility and desirability of common guidelines on serious international crimes were discussed, including the utility of a Framework decision on serious international crimes, as well as the need and modalities to enhance cooperation between member States in investigations and prosecutions.

The recommendations of these first meetings remain relevant and pressing. There have been a number of new developments since these first meetings which serve to underscore the importance of an EU approach and attest to the commitment of EU institutions and member States in this field, as follows:

- ***Several relevant decisions and resolutions have been adopted*** including the European Union Guidelines on promoting compliance with international humanitarian law, adopted by the General Affairs and External Relations Council in December 2005¹⁰. The Cooperation and Assistance agreement between the EU and the ICC was concluded 4 months later on 10 April 2006, highlighting that the support for the ICC 'is a priority for the EU'.¹¹ On 16 March 2006, the European Parliament passed a resolution on "Impunity in Africa and in particular the case of Hissène Habré," reiterating that the fight against impunity is one of the cornerstones of the Union's human rights policy and called "on the Commission, the Council and the Member States of the African Union to continue to pay attention to this issue." Further, the

⁸ See <http://www.redress.org/conferences/ConferenceJul2003.htm>.

⁹ See <http://www.redress.org/conferences/ConferenceNov2003.htm>.

¹⁰ http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_327/c_32720051223en00040007.pdf

¹¹ Press Release, available at

<http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/05/86&format=HTML&aged=1&language=EN&guiLanguage=en> ; the agreement is available at <http://www.iccnw.org/documents/EU-ICCcooperationAssistanceAgreement10April2006.pdf>

resolution called on Member States “to do whatever they can to ensure that ... victims of such crimes committed in Africa or developing crimes receive compensation.”¹² In its resolution on the proceedings against Rios Montt, on 26 October 2006, the European Parliament “welcomes the progress made in the application of the principle of universal jurisdiction in respect of crimes against humanity, genocide and torture (...) the same procedure should be followed under similar circumstances in taking action against dictators and persons responsible for mass human rights violations”.¹³

- **EU member States have strengthened their capacity to cooperate** in the investigation and prosecution of serious international crime through the establishment and -to date- three meetings of the European Network of Contact Points in respect of persons responsible for crimes against humanity, war crimes and genocide.¹⁴

- **A series of criminal prosecutions have been brought in the territories of member States, leading to convictions.** For example, in the United Kingdom, Faryadi Sarwar Zardad was convicted in July 2005 for torture and other offences in Afghanistan and sentenced to twenty years imprisonment; Ely Ould Dah was convicted in July 2005 in absentia to ten years imprisonment in France for torture committed in Mauritania; in June 2005, a Belgian jury convicted two Rwandan businessmen for their participation in the Rwandan genocide to 9 and 12 years imprisonment respectively and a Hague district court convicted in October 2005 two Afghan asylum seekers for their participation in torture in Afghanistan in the 1980's.¹⁵

- **The EU is growing and changing:** The accession of Bulgaria and Romania on 1st January 2007 will complete the fifth enlargement, following the accession of ten Member States in May 2004. Enlargement has been at the heart of the EU's development over several decades, and has assisted in consolidating democracy, human rights and stability across the continent. Making certain that new and future member States are part of dialogues on the implementation of international law obligations and contribute effectively to EU cooperation mechanisms is vital to the eradication of safe havens within Europe.

This Conference will explore these developments and their impact on meeting international law obligations in the EU and ending safe havens for some of the most serious international crimes: genocide, crimes against humanity, war crimes and torture.

¹² available online at: <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//TEXT+TA+P6-TA-2006-0101+0+DOC+XML+V0//EN&LEVEL=2&NAV=X&L=EN>.

¹³ <http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2006-0466&language=EN>.

¹⁴ Established by Council decision of 13th June 2002, its most recent (3rd) meeting having taken place in The Hague on 22-23 May 2006.

¹⁵ A summary of these and other cases and legislative developments is available in the FIDH & REDRESS 'EU update on Serious International Crimes', June 2006, at <http://www.redress.org/publications/EU%20Report%20vol%201%20June%202006%201%20.pdf>; the Legal Action Group of FIDH is acting on behalf of victims of international crimes in several proceedings, see http://www.fidh.org/article.php3?id_article=2497 (French only).

The role of EU institutions

While the role of member States is crucial, individual States cannot combat impunity for serious international crimes in isolation. The very nature of these crimes requires international cooperation and assistance. Different interpretations of legal obligations and different approaches to the implementation of these obligations in practice undermine efforts to a consistent practice. A European approach to these crimes, is desirable and has proved to be successful in other areas of international and transnational crime, such as in the fight against terrorism where the existing competencies under the third pillar have been applied to harmonise the procedural and substantive criminal law of member States and several Framework decisions have been adopted to overcome the challenges in the fight against terrorism.

(1) The Implementation of International Law Obligations

Whilst international treaties impose the same obligations on all States parties, member States have incorporated them into national law in different ways. The differences are most striking in respect of the definition of crimes as well as in the States' approach to the exercise of extraterritorial jurisdiction over these crimes.

Several member States have taken advantage of their ratification of the ICC Statute by adopting new criminal codes or sections of existing codes to address the crimes within the jurisdiction of the ICC Statute. However, many member States have yet to fully implement their international obligations into domestic law, whether these stem from the ICC Statute and/or other ratified international treaties such as the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment and Punishment, the Geneva Conventions of 1949 and their additional protocols.

Particular challenges are faced by new member States confronted with a range of EU compliance obligations requiring urgent attention, in addition to international law obligations. Other obstacles to national implementation can in some cases include cumbersome lawmaking procedures, and a lack of resources, including relevant legal expertise and experience.

(2) Components of a Regular Enforcement of International Criminal Justice

The responsibility of national courts/States to enforce international law is emphasised by the Rome Statute of the ICC which reminds that the effective prosecution of the 'most serious crimes' must be 'ensured by taking measures at the national level and by enhancing international cooperation'.¹⁶ This is reiterated by the complementarity principle set out in the Rome Statute. Universal Jurisdiction is an important complement to other International Justice mechanisms.

Practical arrangements should be in place that enable national authorities to adequately investigate a case. The Appeals Chamber of the ICTR in this respect provided some guidance as to what is expected from national jurisdiction when transferring a case. The court rejected a motion by the prosecution to transfer one of its cases to the Kingdom of Norway as the Norwegian Criminal Code did not contain

¹⁶ Preamble of the Rome Statute of the International Criminal Court.

any provision over the offence of genocide and the alleged perpetrator would have had to be tried under the relevant homicide provisions instead.¹⁷

(3) Jurisdiction and Admissibility

Victims' access to justice in third states is often hampered by obstacles imposed by domestic law. While these obstacles vary, certain trends can be seen. For example, the courts of certain member States have interpreted or read in procedural requirements which do not exist under international law (e.g., the requirement of a connection or nexus with the country for its courts to be able to assert jurisdiction, this being mainly the presence of the perpetrator on the territory in order for an investigation to be opened or for an indictment to be issued). Certain States have read in conditions or discretions which have in some cases hampered investigations or prosecutions. While discretions might operate to prevent the filing of frivolous complaints, in the absence of clear and transparent criteria for their exercise, discretion leaves victims entirely at the mercy of the national authority deciding whether or not their complaint will be investigated. This is made further problematic where victims do not have the possibility to review the exercise of discretion, and/or where the exercise of discretion is at the hands of political as opposed to judicial authorities.

Certain courts have conceived of a principle of 'subsidiarity' to give priority jurisdiction to the courts of the territorial state and/or international tribunals. This 'principle' which is not based in international law is challenging to apply in that it will be difficult for courts to determine whether authorities of the territorial state are in fact carrying out good faith investigations or prosecutions. The risk of impunity increases where national authorities of the forum state (state where the complaint is filed) refuse to investigate because there might be the chance for investigations carried out by the national authorities in the territorial state at some point in the future.

Although the very nature of international crimes constituting genocide, crimes against humanity, war crimes and torture invariably includes a state element, certain courts have ruled that states are immune from civil suit, even where international crimes are alleged, and despite the well recognised principle of no immunity as expressed in Article 27 of the Rome Statute. Here, the practice of member States is widely divergent. Most member States with a civil law tradition in which civil claims for damages are regularly attached to criminal prosecutions have determined immunities in line with international criminal law standards - there is no immunity for the most serious international crimes, aside perhaps for the very limited exceptions set out in the Congo v. Belgium case. The United Kingdom, on the other hand, with a common law tradition in which civil claims for damages are dealt with separately from criminal proceedings, has determined immunities in line with separate state immunity legislation, finding a bar to civil proceedings.¹⁸ The Secretary General of the Council of Europe, in its June 2006 recommendations on the question of secret detention and transport of detainees suspected of terrorist acts, has recommended to reconsider the

¹⁷THE PROSECUTOR v. Michel BAGARAGAZA, *Case No. ICTR-05-86-AR11bis*, decision of 30 August 2006, available at <http://69.94.11.53/ENGLISH/cases/Bagaragaza/decisions/300806.htm>.

¹⁸ See REDRESS, IMMUNITY v. ACCOUNTABILITY: Considering the Relationship between State Immunity and Accountability For Torture and Other Serious International Crimes (December 2005).

relationship between State immunity and human rights and to establish clear exceptions to State immunity in cases of serious human rights abuses.¹⁹

(4) Investigation of Serious International Crimes

While the legal framework providing for the exercise of extraterritorial jurisdiction over international crimes is an important starting point for their investigation, arrangements to enforce this legislation in practice are of equal importance. This may include setting up specialised units within the police, prosecution and immigration services, designed to effectively investigate and, where applicable, prosecute serious international crimes. The complexity of serious international crimes such as genocide, crimes against humanity, war crimes and torture, poses a number of specific challenges. The alleged crimes relate to incidents which are often said to have occurred several years or even decades before the investigation is opened and in countries far away from the investigating state ('forum state'). Evidence may be located far from the investigating state, possibly spread over several countries, and investigators must understand the nature of the political context and events which are said to have led to the alleged crimes. Mutual legal assistance between the forum country and territorial and third States is of vital importance. This can be problematic with countries where no functioning judicial system or governmental structures exist and is virtually impossible when there is a refusal of cooperation.

A small number of countries have set up specialised units and successfully investigated and prosecuted international crimes committed for instance in Afghanistan, Democratic Republic of Congo, Iraq, Liberia, Rwanda and Uganda. The importance of specialised units has been recognised by the European Union in its Framework decision on the 'investigation and prosecution of genocide, crimes against humanity and war crimes', which requests member States to 'consider the need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question'.²⁰ To date, only four member States have effectively complied with this recommendation and set up sufficiently equipped specialised units.²¹

Without such arrangements, cases have been dependent on the initiatives of NGOs and individual civil servants within the relevant Ministries of the forum state. Taking into account the extraterritorial convictions of perpetrators of international crimes within member States over the past five years, only two have occurred in countries where no specialised units exist- France and Spain.²² In these two countries, civil parties played a crucial role in initiating the complaints.

¹⁹ SG(2006)01 of 30 June 2006, available at:

http://www.coe.int/t/dc/press/source/20060907_DocSG_en.doc.

²⁰ Article 4 of the Framework decision at <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/270.pdf>

²¹ The countries are Belgium, Denmark, the Netherlands and the United Kingdom. Norway also has a specialised unit.

²² For an overview of cases over the past three years see FIDH & REDRESS, EU Update on Serious International Crimes, June 2006, at

<http://www.redress.org/publications/EU%20Report%20vol%201%20June%202006%201%20.pdf>

(5) Prosecuting and Defending Those Accused of International Crimes

Prosecuting and defending serious international crimes based on extraterritorial jurisdiction is challenging in various respects: where trials are held in front of a jury, laymen may be faced with complex legal concepts such as command responsibility and with crimes of an extraordinary nature, committed in a country some of the jurors might never have heard of. Special arrangements need to be made to enable witnesses to be heard, either via video- conference or by enabling witnesses to attend the trial in person. Protective measures need to be in place to secure witnesses' safety.

Trials must equally respect the right of the accused to a fair trial, including the opportunity for the defence to adequately prepare the case and to examine and confront witnesses, and to adduce its own evidence.

(6) National and EU Cooperation

On the national level, the effective application of extraterritorial jurisdiction requires cooperation between immigration, law enforcement and prosecution authorities and, where applicable, the investigative judge, as well as those responsible for mutual legal assistance.

International cooperation is equally important. This was recognised by the EU in the Framework decision on the 'Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' ('the Network').²³ The Framework decision is aimed at facilitating contacts between professionals specialised in the investigation and prosecution of international crimes and to increase the cooperation and exchange of information between them. It requires member States to designate a contact point in charge of international crimes- and the list of contact points is now available and in use. The Network to date has met three times and while the first meetings have mainly served the purpose of facilitating bi-lateral contacts, the need for a practical use of the Network has been underscored at the last meeting and practitioners have emphasised the need to increase the practical impact of the Network. In addition to facilitating improved judicial and police cooperation, this could include regular exchange of information on the lessons learned in the investigations and prosecutions of international crimes, the provision of specialised training and consideration of the role of the EU as an institution to render practical assistance in any investigations abroad.

In the context of streamlining judicial and police cooperation, a number of mechanisms have been established in the context of the EU's Justice and Home Affairs policy (the "third pillar" of the EU). These include the European Police Office (Europol), Eurojust and the European Judicial Network. While their mandates do not expressly extend to the serious international crimes under consideration by this conference: genocide, crimes against humanity, war crimes and torture, these mechanisms have nonetheless the ability to enhance mutual cooperation and may be well placed to play a more significant role in relation to these international crimes,

²³ (2002/494/JHA) of 13 June 2002, available at: <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/265.pdf>

either through the explicit extension of their mandate to include such crimes or by strengthening working relations with the Network. The European Judicial Training Network (EJTN) and the European Police College (CEPOL) could, for instance provide training to investigators, prosecutors and judges.

Following the establishment of the Network of contact points and the increase of prosecutions of international crimes, Interpol in 2004 organised an Expert meeting on international crimes, which brought together experts from over ninety countries to discuss how to improve the coordination of information exchange. Two meetings have taken place so far and while the functions are similar to those of the Network, Interpol has the capacity to bring together delegates from its 184 Member Countries. As an international police body, however, the emphasis is solely on police cooperation. In the context of this initiative, Interpol is setting up a database with information on specific cases, past and ongoing and designed to enable practitioners to know which Member Country has investigated in which country and which authorities are currently investigating which cases.

(7) A Unified European Framework

The EU is already committed to establishing a framework, designed to create an area of freedom, security and justice and to promote the fight against impunity externally. An increase of measures adopted under the third pillar of the EU with a direct impact on the internal policies of member States would be consistent with EU policy and would render the external promotion of justice and accountability more credible and effective.

An example of what can be achieved by measures taken under the third pillar, designed to improve cooperation in the fight against international crime is the European approach to the fight against terrorism. With a special coordinator for the cooperation and a Framework Decision that harmonises substantial criminal law and provides for extraterritorial jurisdiction of member States over terrorism, no efforts have been avoided to achieve the common goal- effectively combating terrorism. An EU approach to the investigation and prosecution of serious international crimes such as genocide, crimes against humanity, war crimes and torture, building on the this experience in the fight against terrorism, could ensure that member States comply with their international treaty obligations while at the same time provide national authorities with the relevant support and cooperation crucial for effectively ending safe havens.

Options for Discussion

EU support for international justice mechanisms should be understood as a broader commitment to justice for serious international crimes, which would be comprised of a series of interconnected activities, required by the very nature of international crimes which touch on both Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA).

Support could include:

- ***The adoption of a Framework decision***

A framework decision could ensure that international treaties are consistently applied throughout the EU and overcome existing hurdles hindering inter-State cooperation and cooperation with international courts and tribunals. Existing Framework decisions such as the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings or the Guidelines on International Humanitarian Law adopted in the context of the EU's Foreign and Security Policy may also serve as a basis for further action.

- ***An increase of cooperation and practical support***

The setting up of the Network of Contact Points responsible for genocide, crimes against humanity and war crimes is an important step forward in facilitating accountability for international crimes. The EU should consider to strengthen the Network by making more resources available and giving it a more independent structure that will guarantee its regular functioning irrespective of the holder of the Presidency.

- ***EU Level Counterparts***

Since the issue of international crimes falls within the domain of CFSP as well as JHA, an institutionalised dialogue will benefit the EU policy on the fight against impunity for international crimes. This should include regular exchange between the COJUR working group on the ICC within CFSP and the CATS working group on police and judicial cooperation within JHA. As a consequence, serious international crimes should not remain within the domain of the GAERC conclusions but should be an item for discussion on the agenda of JHA Council sessions. The conclusions of Network meetings must be communicated not only to the working groups but also to the relevant committees in the European Parliament as required by Article 3 of the Framework Decision. Further impetus for an effective dialogue could be achieved through the cooperation with NGOs and academics working in this field.

Actions of Member States

While the EU has an important role to play, Member States are required to fulfil their international obligations to ensure that the EU develops into an area of freedom, security and justice. This includes:

- ***Consider setting up specialised units***

To overcome the challenges of a complex investigation and prosecution of international crimes, Member States should consider setting up units within the police, prosecution and immigration services with a focus on international crimes. This will

ensure an exchange of experiences made by practitioners, establish expertise of how to best overcome obstacles and ensure consistent practice, thereby eventually render such investigation more effective and efficient.

- ***Ensure support for the EU Network***

The EU Network is dependant on the attendance by representatives of Member States and in this respect, the latter must ensure to send those in charge of international crimes- police investigators, prosecutors and officials of the Ministry of Justice- to attend each Network meeting. The conclusions of meetings should be reported back to the Ministries to ensure an exchange of information and a follow up on a national level.

- ***Ensure compliance with international law obligations***

Member States should ensure that their national legislation is in line with their obligations, including to provide victims with access to enforceable remedies and prevent alleged perpetrators from benefiting from impunity.