

January 26, 2012

Foreign Ministers
African states parties to the International Criminal Court

Dear Foreign Minister,

On the occasion of the 18th Ordinary Session of the Assembly of the African Union (AU)—which will take place in Addis Ababa, Ethiopia, on January 29-30, 2012—we, the undersigned African civil society organizations and international organizations with a presence in Africa, write to share some important developments affecting international criminal justice in Africa and to encourage African states parties to reaffirm their strong support for the International Criminal Court (ICC) and its goal of ending impunity for grave international crimes.

Our organizations note that the ICC is not on the formal agenda of the AU Assembly at the upcoming summit. The summit is however an opportunity for gathered African states parties to informally exchange observations about recent developments and discuss concrete steps that they and the AU can take to advance justice for the victims of crimes under international law, in accordance with Article 4 of the African Union Constitutive Act.

Significant moment in the evolution of the ICC and need for renewed support from Africa

2011 was marked by a number of important developments for justice for crimes under international law, such as a higher number of ratifications of the ICC Statute than in previous years, strong popular calls for justice in North Africa, and important elections to top positions at the ICC that will result in a change of leadership at the institution in 2012.

Six new states ratified the ICC Statute in 2011, thus affirming their support to the values of justice and accountability it embodies. Among these six states, two are African (Tunisia and Cape Verde), thus bringing the total number of African states that are parties to the court's treaty to 33—still the largest geographical group in the membership of the court. The court now enjoys support from 120 nations around the world, with ongoing consideration of possible additional ratifications, including African countries such as Côte d'Ivoire and Egypt. Mali has also become the first African state party to enter into an enforcement of sentences agreement with the ICC.

The popular uprisings in North Africa have brought to light the strong desire for justice of populations that had been subjected to repressive rule for several decades. Because of these clear aspirations, ratification of the ICC Statute as well as national prosecutions of grave human rights violations are on the agenda of some of the new governments in that region. Government changes in North Africa have the potential to bring a positive shift in the way these countries approach the ICC and accountability for grave crimes. This, in turn, could lead to a more positive atmosphere on these issues at the AU in the future.

In December 2011, members of the ICC Assembly of States Parties (ASP) elected two Africans, Fatou Bensouda and Chile Eboe Osuji, for the positions of the chief prosecutor and judge of the ICC respectively. The two candidates supported by the AU were elected to these

positions based on their merit, strong qualifications and experience in international law. Currently, 5 of the 18 ICC judges are from Africa.

The appointment of African officials to senior offices at the ICC reflects the important role that individual Africans are playing in contributing to the success of the court and is of great significance to promoting mutual understanding and strengthening cooperation between the ICC and the AU. Our organizations hope that African states and the AU will lend their support to the newly elected ICC prosecutor, while fully respecting her independence.

The new prosecutor and the ICC face important challenges at this juncture. With the addition of three new situations (Kenya, Libya and Côte d'Ivoire), the ICC has almost doubled its work-load in not even two years. However, despite this increase in activities, in December 2011, the ASP imposed budgetary cuts on the ICC for 2012 beyond those suggested by the ASP's expert financial body. It is clear that the coming year will be challenging for the ICC to implement its mandate within the resources approved by its member countries.

Another major challenge to the court's authority and ability to deliver justice is of course the fact that several suspects against whom the court has issued arrest warrants have still not been arrested and surrendered for trial, in relation to situations in Uganda, the Democratic Republic of Congo, the Darfur region of Sudan, and Libya. A further challenge is that numerous victims in the 8 countries under preliminary examinations in 4 different continents are still waiting the ICC to advance justice.

In the face of these challenges, and because all situations currently under investigation at the ICC are in Africa, renewed support from African states and the AU are of particular importance. The ICC and the AU indeed share a commitment to end impunity for the perpetrators of the worst crimes around the world.

In this regard, we would like to highlight three areas of action for your consideration:

- **Renew and strengthen dialogue between the AU and the ICC:** Despite past differences of opinion between the ICC and AU, the two institutions have made efforts to strengthen their ties and collaborate with each other as illustrated by the joint seminar between the ICC and the AU which took place at the AU headquarters, in Addis Ababa, on July 18-19, 2011. This type of exercise should be renewed, and complemented by other regular meetings and exchange of views between the ICC, African states, and AU officials.
- **Reconsider the creation of an ICC liaison office in Addis Ababa:** our organizations continue to believe that such an office would greatly contribute to consolidating the understanding and relationship between the ICC and the AU. African states parties should propose that its establishment be reconsidered and make efforts to reach out to African states non-parties to the ICC to explain its proposed purpose and functions.
- **Uphold cooperation obligations under the ICC Statute:** Full cooperation with the ICC and respect for the court's decisions are of paramount importance to preserve the court's effectiveness and ability to deliver justice. In this light, we renew our appreciation to African states parties which have publicly affirmed that they will abide by their obligations under the ICC Statute, notably with regards to the execution of pending arrest warrants. These include Botswana and South Africa (in relation to

the situation in Darfur), the Central African Republic, the Democratic Republic of Congo, and Uganda (in relation to the situation in Uganda), and Burkina Faso, Mali, and Niger (in relation to the situation in Libya).

The undersigned organizations also congratulate African states parties for adopting, along with other ICC member countries, important ASP procedures to deal with occurrences of non-cooperation with the court. This non-cooperation protocol foresees two steps: 1) an early warning mechanism through which the President of the ASP will use his good offices, with the assistance of regional focal points, to approach the state party which may find itself in breach of its ICC obligations with a view to promoting full cooperation; 2) once the court has referred an issue of non-cooperation, the bureau of the ASP will take some steps to have a dialogue with the concerned state party and report to the full ASP. These procedures are crucial to encourage full cooperation with the court. To be effective, the procedures will require the full support of African states.

Promoting justice before national courts

In light of the ICC's limited resources, the court cannot be the sole actor in pursuing the fight against impunity. Under the ICC Statute, states retain the primary responsibility to bring to justice those responsible for war crimes, crimes against humanity, and genocide. Recalling the centrality of the principle of "complementary" jurisdiction in the Rome Statute system, the undersigned organizations encourage African states parties to the ICC to remain fully committed to complementarity and national prosecutions of grave international crimes. To that effect, our organizations call on African states parties to enact effective implementing legislation of the ICC Statute where such legislation is lacking and to support work towards strengthening of domestic systems to handle international crimes.

Concerns over the expansion of the African Court's jurisdiction

In advance of the AU summit of June 18, 2011, many of the undersigned organizations wrote to African states parties regarding the intention of the AU to expand the jurisdiction of the African Court of Justice and Human Rights (African Court) to include prosecution of individuals for genocide, war crimes, and crimes against humanity.

Increased avenues for accountability are positive in principle. However, we are concerned about the proposed expansion of the court for a number of reasons. Notably, the African Court already faces serious challenges implementing its current mandate and giving it jurisdiction over a distinct type of offenses (crimes under international law committed by individuals, as opposed to human rights violations by states) would require significant time to establish new expertise and a vast overhaul in the way the court is currently set-up.

Consequently, our organizations encourage African states parties to insist on a number of conditions to ensure that the expansion of the African court's jurisdiction will advance the cause of justice for crimes under international law, including the following:

- Wider consultation with civil society and officials of the existing African Court and African Commission on Human and Peoples' Rights regarding expansion of the African Court's jurisdiction;
- Adherence by the African Court to international standards and best practices

regarding any prosecutions of serious crimes in violation of international law;

- Recognition that AU member states have the primary obligation to investigate and, if there is sufficient evidence, prosecute persons suspected of crimes under international law before their national courts;
- Matching political commitment to expand the African Court's jurisdiction and personnel, financial and material resources to enable operations in accordance with international standards and best practices; including effective protection and support for victims and witnesses, outreach to victims and affected communities, pre-trial detention, investigations and prosecutions, trials and imprisonment;
- Clarity regarding the relationship between an expanded African Court and the ICC.

We hope this information is useful and wish you fruitful consultations at the upcoming summit.

Sincerely,

1. Action of Christian Activists for Human Rights in Shabunda (ACADHOSHA), Democratic Republic of Congo
2. African Assembly for the Defense of Human Rights (RADDHO), Senegal
3. African Association for Human Rights (ASADHO), Democratic Republic of Congo
4. Amnesty International, Ghana
5. Amnesty International, Senegal
6. Amnesty International, Togo
7. Association of Human and Prisoner Rights (ADHUC), Brazzaville, Republic of Congo
8. Benin Coalition for the ICC, Benin
9. Burundi Coalition for the ICC, Burundi
10. Cameroon Coalition for the ICC, Cameroon
11. Central African Republic Coalition for the ICC, CAR
12. Centre for Accountability and Rule of Law, Sierra Leone
13. Centre for Human Rights and Rehabilitation (CHRR), Malawi
14. Children Education Society (CHESO), Tanzania
15. Civil Resource Development and Documentation Centre (CIRDDOC), Nigeria
16. Club of Friends of Congolese Law, Democratic Republic of Congo
17. Coalition of Eastern NGOs (CENGOS), Nigeria
18. Coalition for the International Criminal Court, with offices in Benin and the Democratic Republic of Congo
19. Congolese Coalition for Transitional Justice (CCJT), Democratic Republic of Congo
20. Congolese Initiative for Justice and Peace (ICJP), Democratic Republic of Congo
21. Human Rights Network-Uganda (HURINET), Uganda
22. Human Rights Watch, with offices in the Democratic Republic of Congo, Kenya, Rwanda and South Africa
23. International Commission of Jurists, Kenya
24. International Crime in Africa Programme (ICAP), Institute for Security Studies (ISS), South Africa
25. Ivorian Coalition for the ICC, Côte d'Ivoire

26. League for Peace, Human Rights and Justice (LIPADHOJ), Democratic Republic of Congo
27. National Coalition on Affirmative Action (NCAA), Nigeria
28. Network of Human Rights Associations from Sud Kivu (RADHOSKI), Democratic Republic of Congo
29. Nigeria Coalition on the ICC (NCICC), Nigeria
30. Speak Human Rights & Environmental Initiative, Mauritius
31. Southern Africa Litigation Centre, South Africa
32. Synergy of Congolese NGOs for Victims (SYCOVI), Democratic Republic of Congo
33. Uganda Coalition on the International Criminal Court, Uganda
34. West African Bar Association (WABA), Nigeria