

INTERNATIONAL CRIMINAL COURT

THE CONTRIBUTION AFRICA CAN
MAKE TO THE REVIEW
CONFERENCE

**AMNESTY
INTERNATIONAL**



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CONTENTS

Introduction	1
1. Renewing support for the International Criminal Court	4
2. Preserving the integrity of the Rome Statute	5
3. Protecting the <i>proprio motu</i> powers of the Prosecutor	7
4. Preventing officials accused of genocide, crimes against humanity or war crimes from escaping justice.....	8
5. Protecting the independence of the Prosecutor	11
6. Recognizing justice as a firm foundation for lasting peace.....	11
7. Evaluating the proposal for a regional international criminal court.....	12
8. Improving state cooperation	12
ANNEX I – African Union Assembly Decision, July 2009.....	15
ANNEX II - Institute for Security Studies Briefing paper, October 2009.....	18

THE CONTRIBUTION AFRICA CAN MAKE TO THE REVIEW CONFERENCE

“[The African Union] REITERATES the unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union[.]”

**Thirteenth Ordinary Session of the African Union Assembly,
Sirte, Great Socialist People’s Libyan Arab Jamahiriya, 3 July
2009**

INTRODUCTION

This paper is published on the eve of a preparatory meeting for the 2010 Review Conference of African states parties to the Rome Statute of the International Criminal Court (Rome Statute), scheduled to take place from 3 to 6 November 2009 in Addis Ababa, Ethiopia, at the expert and ministerial level, and as the African Union Peace and Security Council meets in Abuja, Nigeria to discuss the situation in Darfur, Sudan.

In this paper, Amnesty International urges African states parties, as well as signatories attending the meeting in Addis Ababa as observers, to renew the strong support that they gave to the proposal more than a decade ago to establish a permanent international criminal court that would be able to investigate and, where there was sufficient admissible evidence, to prosecute those responsible for genocide, crimes against humanity and war crimes being committed against African victims and victims throughout the world when their own states were unable or unwilling genuinely to investigate and prosecute. This support for international justice has been repeatedly demonstrated by African states such as the Central African Republic, the Democratic Republic of the Congo and Uganda, each of which referred situations in their countries to the International Criminal Court; the Côte d’Ivoire, which made

a declaration pursuant to Article 12 (3) of the Rome Statute recognizing its competence over crimes committed in that country since September 2002, and Kenya, whose Minister of Justice has invited the Prosecutor to use his powers under Article 15 to seek permission to investigate crimes against humanity committed in that country nearly two years ago.¹ This public support for the International Criminal Court has recently been reiterated in the briefing paper prepared by the Institute for Security Studies, based in South Africa, after consultation with African civil society, in October 2009² and by four Nigerian civil society organizations which urged Nigeria not to invite a fugitive from international justice charged in an International Criminal Court warrant with crimes against humanity and war crimes.³

Recommendations. In particular, as explained below, Amnesty International urges African states that have ratified or signed the Rome Statute to:

- Support the International Criminal Court;
- Preserve the integrity of the Rome Statute;
- Protect the *proprio motu* powers of the Prosecutor (not used so far, but requested by Kenya Minister of Justice);
- Prevent officials accused of genocide, crimes against humanity or war crimes from shielding themselves from criminal responsibility in international or national criminal courts;
- Protect the independence of the Prosecutor from state review of decisions;
- Recognize that justice lays a firm foundation for lasting peace;

¹ Justice and Constitutional Minister, Mutula Kilonzo, is reported to have declared: "The ICC can sit in Kenya and we do not have to surrender anyone we just need to arrest them, put them in cells and take them before the court when that time comes[.]" "Kenya backs poll violence trials", BBC World, 2 October 2009 (<http://news.bbc.co.uk/1/hi/world/africa/8286733.stm>).

² Institute for Security Studies, Briefing paper on AU meeting Nov 3-6 to prepare for ICC Review Conference, 22 October 2009. This paper builds upon other African civil society statements adopted at meetings in Banjul, Cape Town and Kampala. See Forum on the Participation of NGOs preceding the 46th Ordinary Session of the African Commission on Human and Peoples' Rights, Karaiba Beach Hotel, the Gambia, 9 to 11 May 2009; Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union's Recent Decisions on Universal Jurisdiction and the Work of the International Criminal Court in Africa, 11 May 2009; Statement Expressing African Civil Society Support for International Justice, Kampala, 29 May 2009.

³ Nigerian Coalition for the International Criminal Court, Press release, 25 October 2009 (http://www.iccnw.org/documents/NCICC-Final_press_release.pdf); "Nigeria: Yar'Adua asked to order Al-Bashir's arrest or...", *Africa en ligne*, 25 October 2009 (<http://www.afriquejet.com/news/africa-news/nigeria-yar'adua-asked-to-order-al-bashir's-arrest-or.....-2009102536956.html>); Chinedu Offor, "Nigerian Rights Groups Protest Sudanese President's Visit", 23 October 2009 (<http://www.voanews.com/english/Africa/2009-10-23-voa50.cfm>).

- Evaluate carefully the positive and negative aspects of establishing a regional criminal court, in particular the costs; and
- Improve state-to-state cooperation in the investigation and prosecution of crimes under international law.

The proposed agenda for the preparatory meeting. The preparatory meeting, called for by the African Union Assembly on 3 July 2009, is expected to address a broad range of issues, including:

- “i.) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC;
- ii.) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year;
- iii.) Procedures of the ICC;
- iv.) Clarification on the Immunities of officials whose States are not party to the Statute;
- v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute;
- vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and
- vii.) Any other areas of concern to African States Parties.”⁴

Other areas of concern identified in the African Union Assembly decision include:

- the possible impact of the arrest warrant for President Bashir on negotiations to end the armed conflict in Darfur;
- the possibility that the African Court of Justice and Human Rights would be empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes;
- cooperation and capacity building to enhance the capacity of legal personnel regarding the drafting and safety of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation among judicial and investigative agencies;
- legal recourse procedures in the Rome Statute; and

⁴ Assembly/AU/Dec.245(XIII) Rev.1, adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People’s Libyan Arab Jamahiriya, 3 July 2009.

- the issue of immunity.⁵

Recent developments. In addition to the developments noted earlier, particularly the reaction of civil society in Africa regarding the African Union decision in July 2009, there have been expressions of support for the International Criminal Court by Kenya, South Africa and Botswana. President Omar Al Bashir has had to give up plans so far to travel to South Africa, Uganda, Venezuela and any other state party to the Rome Statute after African civil society objected and it became clear that he faced a serious risk that justice officials in these states would fulfil their obligations under the Rome Statute to arrest and surrender him to the International Criminal Court. The ministers participating in the recent session of the African Union–European Union Troika declared on 14 October 2009 that they “underlined their commitment to fighting impunity at the national, regional and international level in conformity with the principles of international law”.⁶

On 29 October 2009, former South African President Thabo Mbeki presented a report to the African Union Peace and Security Council session in Abuja, Nigeria supporting the International Criminal Court as a court of last resort if the Sudanese justice system, reinforced by an international component, was unable and unwilling genuinely to investigate and prosecute those responsible regardless of rank for crimes under international law committed in Darfur and to provide reparations to victims.⁷

1. RENEWING SUPPORT FOR THE INTERNATIONAL CRIMINAL COURT

African states parties and signatories to the Rome Statute should use the opportunities of both the preparatory meeting in Addis Ababa from 3 to 6 November 2009 and the stocktaking part of the Review Conference, which is scheduled to meet in Kampala, Uganda, from 31 May to 11 June 2010, to renew their long-standing support for the International Criminal Court.

The support of African states for the International Criminal Court before, during and after the Rome Diplomatic Conference was crucial. That strong support was reflected at the opening of the Rome Diplomatic Conference when Algeria, Angola, Botswana, Burkina Faso, Burundi,

⁵ *Ibid.*

⁶ 13th Africa-EU Ministerial Troika Meeting, Addis Ababa, 14 October 2009, p. 14 (http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/110576.pdf).

⁷ *Report of the African Union High-Level Panel on Darfur (AUPD)*, 29 October 2009, Presented at the Peace and Security Council 207th Meeting at the level of the Heads of state and Government in Abuja, Nigeria.

Cape Verde, Côte d'Ivoire, Egypt, Gabon, Ghana, Guinea, Kenya, Lesotho, Madagascar, Namibia, Niger, Nigeria, Republic of the Congo, Rwanda, Senegal, Sierra Leone, South Africa (on behalf of the Southern African Development Community), Sudan, Tanzania, Swaziland, Uganda and Zambia, as well as the Organization of African Unity, took the floor. Almost every one of these states subsequently ratified or signed the Rome Statute.

The stocktaking of international justice component of the Review Conference offers an unparalleled opportunity for African states to assess, together with states from around the world, how vigorously and effectively the International Criminal Court has been fulfilling its responsibility over the past decade to investigate and prosecute crimes under international law committed against African victims and victims from other states when their own states fail in their responsibilities to do so. It also is an unparalleled opportunity for each state participating in the Review Conference to assess how well it has been fulfilling its own complementarity obligations to investigate and prosecute these crimes and then to rededicate themselves to bringing those responsible regardless of rank to justice.

2. PRESERVING THE INTEGRITY OF THE ROME STATUTE

The Rome Statute is not perfect. It represents a delicate and not always happy compromise, balancing many unrelated articles and provisions. Although it may well have been almost the best that could have been achieved in the circumstances, Amnesty International made clear on the eve of the adoption of the Rome Statute that it was dismayed by many important provisions. Indeed, it continues to believe that many of the articles could be significantly improved.

However, the organization recognized from the moment the Rome Statute was adopted that any attempt to make major changes at the early stages of the new permanent International Criminal Court's existence in one area could lead immediately to calls for changes in other areas that are completely unconnected, but which are in their current form as part of the general political bargain reached at Rome. For that reason, when the International Criminal Court was at that time under intense attack by one state, Amnesty International joined the international consensus shared by other members of civil society and the Like-minded group of states that it was essential to protect the integrity of the Rome Statute. Although the threat to the Court's existence has receded somewhat, it has not yet gone away. Non-states parties can participate as observers at the Review Conference and, if some of them decide to participate, they might well press for amendments that would undermine the International Criminal Court in return for ending their opposition to the Court. For these reasons, Amnesty International continues to believe that until the International Criminal Court is firmly on its feet and the campaign against it has been decisively defeated that it would be very risky to seek substantive changes other than the four envisaged under the Rome Statute or the Final Act.

Amnesty International believes that referral of situations being considered by the Security Council to the prosecutor is one positive way of bringing cases before the International Criminal Court.⁸ Permitting such referrals makes unnecessary the establishment of *ad hoc* tribunals in the future. It also enables the Security Council in Chapter VII situations to exercise its powers under that Chapter to assist the court in implementing its orders and judgments, particularly when there has been a complete breakdown of national systems or even defiance of the international criminal court. Nevertheless, the Security Council cannot refer individual cases, but only entire situations. The referral must not limit the power of the prosecutor to investigate on his or her own initiative individual cases within the natural geographic and temporal scope of the situation or to suspects of a particular nationality, in contrast to the geographic limits on the Prosecutor with regard to the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the temporal and nationality limits with regard to the ICTR.

Amnesty International has consistently opposed permitting the Security Council, a political body, to have the power, whether through Article 16 or some other procedure, to prevent or delay a prosecution either of the nationals of its members or those of other states by an international criminal court from the moment such control of the docket was proposed by the International Law Commission.⁹ Such power gives the Security Council the ability to give persons suspected or accused of the gravest possible crimes under international law blanket amnesties, undermining the rule of law and the very reason for a permanent, international criminal court. It would be inconsistent with the fundamental principle that there can be no peace without justice. The organization has also consistently opposed the use by the Security Council of Article 16 to suspend investigations and prosecutions as an obstruction of justice.¹⁰ However, the best method for the foreseeable future to address this political interference, sadly, built into the Rome Statute, will be to persuade permanent and non-permanent members of the Security Council to refrain from ever using it again.

⁸ Amnesty International, *International criminal court: Making the right choices – Part I defining the crimes and permissible evidence and initiating a prosecution*, AI Index: IOR 40/001/1997, January 1997, pp. 111-112.

⁹ *Ibid.* See also Amnesty International, *Memorandum to the International Law Commission: Establishing a just, fair and effective permanent international criminal tribunal*, AI Index: IOR 40/007/1994, 12 June 1994 (<http://asiapacific.amnesty.org/library/Index/ENGIOR400071994?open&of=ENG-325>) (“Any suggestion that the Prosecutor has not proceeded with a case for reasons of international politics or the wishes of one or more states would seriously damage the authority of the Tribunal.”).

¹⁰ See, for example, Amnesty International, *International Criminal Court: the unlawful attempt by the Security Council to give US citizens permanent impunity from international justice*, AI Index: IOR 40/006/2003, May 2003; *International Criminal Court: Security Council renewal of unlawful Resolution 1487 providing impunity for peace-keepers would be a further set-back for international justice*, AI Index: IOR 51/006/2004, May 2004.

3. PROTECTING THE *PROPRIO MOTU* POWERS OF THE PROSECUTOR

To ensure that the International Criminal Court is an effective complement to national courts in cases of genocide, crimes against humanity and war crimes, it must be able to exercise its jurisdiction in any case falling within its jurisdiction when states are unable or unwilling to bring to justice those responsible for such crimes. One essential method to ensure that the Court is able to do so is for the Prosecutor to have the power to initiate investigations based on information from any reliable source and to conduct prosecutions without political interference. Needless to say, the two other trigger mechanisms of the Court's jurisdiction, states and the Security Council, are *political* bodies. The UN Guidelines on the Role of Prosecutors provides that they shall carry out their functions impartially and that they must have the independence to decide whether to investigate or prosecute.¹¹ In addition, the *proprio motu* powers of the Prosecutor under Article 15 of the Rome Statute – the power to initiate an investigation on his or her own initiative, subject to judicial authorization in every instance - are essential, as the chances that the Security Council or states parties will refer all situations which should be investigated by the Prosecutor are slim.

As provided by the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute)¹² and the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute),¹³ the Rome Statute permits the Prosecutor to initiate investigations *motu proprio* on the basis of information on crimes within the jurisdiction of the Court.¹⁴ However, unlike the ICTY and ICTR Statutes, the Rome Statute provides a judicial guarantee that such a power will be exercised in a neutral and non-politically motivated manner.

The Rome Statute provides that if the Prosecutor concludes that there is a reasonable basis

¹¹ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹² Article 18 (1) of the ICTY Statute provides:

“The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”

¹³ Article 17 (1) of the ICTR Statute provides:

“The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”

¹⁴ Rome Statute, art. 15 (1).

on which to proceed with an investigation he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the International Criminal Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the International Criminal Court with regard to the jurisdiction and admissibility of a case. In any case, states may challenge the admissibility of a case on the grounds referred to in article 17 or challenge the jurisdiction of the International Criminal Court. In addition, decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber.

The Prosecutor has never exercised the *motu proprio* power in any case.

4. PREVENTING OFFICIALS ACCUSED OF GENOCIDE, CRIMES AGAINST HUMANITY OR WAR CRIMES FROM ESCAPING JUSTICE

African states parties and signatories to the Rome Statute should strongly defend the provisions of that instrument which exclude any claimed immunity for state officials, regardless of rank, including heads of state, from prosecution for the worst imaginable crimes in the world – genocide, crimes against humanity and war crimes – committed against African victims and victims in other regions.

Article 86 of the Rome Statute provides that each state party to the Rome Statute has a legal obligation to cooperate with the arrest and surrender of any person charged by the International Criminal Court. The obligation exists regardless of whether the accused is a head of state or not. Article 27 (Irrelevance of official capacity) of the Rome Statute provides:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

All other international criminal courts statutes have similarly rejected claimed immunities of heads of state charged with genocide, crimes against humanity and war crimes.¹⁵ Indeed, every single instrument adopted since the Second World War by the international community expressly involving crimes under international law has rejected immunity from prosecution for such crimes for any government official.¹⁶ Those instruments articulated a customary international law rule and general principle of law. Every international court to consider the question since the adoption of the Rome Statute has concluded that heads of state cannot successfully assert any purported immunity from prosecution for genocide, crimes against humanity or war crimes.¹⁷ As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia concluded on 12 October 2009:

“[O]ne of the fundamental aims of international criminal courts and tribunals is to end impunity and ensure that serious violations of international humanitarian law are prosecuted and punished. Individuals accused of such crimes can have no legitimate

¹⁵ Charter of the International Military Tribunal at Nuremberg, art. 7; Charter for the International Military Tribunal of the Far East, art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7; Statute of the International Criminal Tribunal for Rwanda, art. 6; Statute of the Special Court for Sierra Leone, art. 6 (2); UNTAET Regulation 2000/15 establishing the Special Panel for Serious Crimes in Dili, Timor-Leste, art. 15; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 29.

¹⁶ Allied Control Council Law No.10, art. II (4) (a) ('The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.');

U.N. G.A. Res. 95 (i), 11 Dec. 1946; 1948 Convention for the Prevention and Punishment of the Crime of Genocide, art. IV ('Persons committing genocide or any of the acts enumerated in Article III [conspiracy to commit, direct and public incitement to commit, attempt to commit and complicity in genocide] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals');

1950 Nuremberg Principles, principle III ('The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.');

1954 Draft Code of Offences against the Peace and Security of Mankind, art. 3 ('[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.');

1973 Convention on the Prevention and Punishment of the Crime of *Apartheid*, art. III ('International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State . . .');

1991 Draft Code of Crimes against the Peace and Security of Mankind, art. 13 (Official position and responsibility) ('The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.');

1996 Draft Code of Crimes against the Peace and Security of Mankind, art. 6 (Official position and responsibility) ('The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.').

¹⁷ *Democratic Republic of the Congo v. Belgium (Arrest Warrant Case)*, Judgment, I.C.J., 14 Feb. 2002, para. 61; *Prosecutor v. Milosevic*, Indictment, Case No. IT-99-37, Trial Chamber, 22 May 1999; *Prosecutor v. Taylor*, Decision on immunity from jurisdiction, Case No. SCSL-2003-01-I, Appeals Chamber, 31 May 2004.

expectation of immunity from prosecution.”¹⁸

Article 27 of the Rome Statute is not negated by the reference in Article 98 (1) to states’ “obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State”.¹⁹ That provision does not imply that the states participating in the Rome Conference accepted the existence of immunity of heads of state for crimes under international law after excluding it in Article 27. As two of the drafters of this provision have confirmed, this provision was inserted to address the inviolability of diplomatic premises, immunities which were not expressly addressed in Article 27.²⁰

In addition to the legal concerns about the basis for the African Union 3 July 2009 decision, Amnesty International is concerned that its adoption will be misinterpreted as a sign that African states parties to the Rome Statute oppose the International Criminal Court’s work to bring to justice those responsible for committing the worst imaginable crimes against African victims. Of course, such contentions ignore the wide support of African states in the establishment of the International Criminal Court and the fact that – with the exception of Darfur – all situations under investigations were referred to the Prosecutor by the African states parties themselves. Amnesty International strongly welcomes the fact that African states parties such as Botswana, Chad, Kenya and South Africa in recent months have made strong statements countering this perception by clarifying that their governments will cooperate fully with the Court.

¹⁸ *Prosecutor v. Karadzic*, Decision on Karadzic’s appeal of Trial Chamber’s decision on alleged Holbrooke agreement, Case No. IT-95-/18-AR 73.4, ICTY App. Ch., 12 Oct. 2009, para. 52.

¹⁹ Paragraph 1 of Article 98 (Cooperation with respect to waiver of immunity and consent to surrender) reads:

“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

²⁰ Claus Kress and Kimberly Prost, ‘Article 98 (Cooperation with respect to waiver of immunity and consent to surrender)’, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Munich: C.H. Beck, Oxford: Hart and Baden-Baden: Nomos, 2nd ed., 2008, 2006-2007 (footnote omitted) ([I]t was this type of immunity [state or diplomatic immunity regarding property] that was the main driving force behind paragraph 1, the paradigm case being the customary inviolability of diplomatic premises as codified in article 22 of the Vienna Convention on Diplomatic Immunities’).

5. PROTECTING THE INDEPENDENCE OF THE PROSECUTOR

African states parties and signatories to the Rome Statute should do their utmost to protect the independence of the Prosecutor of the International Criminal Court, who acts, not on behalf of or against any state, but solely on behalf of the international community to investigate and prosecute the most horrendous crimes: genocide, crimes against humanity and war crimes. As noted above, international standards require protection of the independence of prosecutors. Therefore, it is a matter of concern that it has been suggested that states develop guidelines and a code of conduct for the exercise of discretionary powers by the Prosecutor to initiate cases – subject to judicial authorization - under Article 15 of the Rome Statute and that a regional state review mechanism be established to assess decisions whether the Prosecutor could seek to investigate senior state officials. Such a mechanism is antithetical to any competent, independent and impartial court and must be squarely rejected. Indeed, the Assembly of States Parties has been careful in its consideration of the question of establishing an oversight mechanism for the International Criminal Court to ensure that it would not infringe upon the Prosecutor's independence.

6. RECOGNIZING JUSTICE AS A FIRM FOUNDATION FOR LASTING PEACE

"In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished."

-- Kofi Annan, United Nations Secretary-General

Amnesty International rejects the argument that justice must be sacrificed to ensure peace. Peace is not merely the absence of violence or conflict. Sustainable peace is based on rebuilding a society in which individuals can live their lives free from fear; in which perpetrators know that impunity will not be tolerated; in which victims understand that the state will bring perpetrators to justice and take measure to protect victims and provide reparations. In short, a sustainable peace is founded on the principle that violations of human rights or humanitarian law will be neither tolerated nor rewarded.

In a speech delivered on the 60th anniversary of the Geneva Conventions, Secretary General Ban Ki-moon reaffirmed the indivisibility of peace and justice, “The debate on how to ‘reconcile’ peace and justice or how to ‘sequence’ them has lasted more than a decade. Today, we have achieved a conceptual breakthrough: the debate is no longer between peace and justice but between peace and what kind of justice.”²¹

7. EVALUATING THE PROPOSAL FOR A REGIONAL INTERNATIONAL CRIMINAL COURT

The proposal to give the African Court of Justice and Human Rights jurisdiction over crimes under international law such as genocide, crimes against humanity and war crimes needs to be evaluated most carefully, weighing both possible advantages and disadvantages, including, in particular, the huge cost to the African Union and its member states if the Court were to assume such a criminal jurisdiction. In February 2009, the African Union Assembly asked the African Union Commission, in consultation with the African Commission on Human and Peoples’ Rights and the African Court of Justice and Human Rights, “to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity”.²² It urged the African Union Commission to expedite such consideration, but, as of the date of this paper, that body had not completed its review of this complex question.

Whether the recent proposal by the African Union will offer a truly workable and effective mechanism is highly debatable. According to reports, the aim is to make the International Criminal Court ‘court of last resort in criminal cases’. However, this proposal would seem to be dictated more by current political exigencies than the need to establish an effective court that is able to confront the many human rights challenges facing Africa. The Rome Statute makes it clear that the ICC is a court of last resort, and will only exercise jurisdiction where states are unable or unwilling to deal with the matter. Making the African Court a court of first instance in criminal matters would deny states the opportunity to address crimes under international law nationally before seeking international accountability. Likewise, giving the African Court jurisdiction on crimes under international law would unnecessarily duplicate what already exists, thanks to the immense contribution and support by African States.²³

²¹ SG/SM/12494/L/T/4417/HR/5002, 26 September 2009.

²² Decision Assembly/Dec.213(XII), February 2009.

²³ Thirty out of the 110 states party to the Rome Statute are Africans and five out of 18 Judges are Africans too.

Also, while the establishment of an effective African Court of Justice and Human Rights is important for addressing violations of human rights of Africans and ensuring accountability of states (which is often lacking at the national level), overburdening the court with criminal jurisdiction will drain scarce resources of an already overstretched system; and distract the court from pursuing its original mandates effectively. This will render ineffective the investigation and prosecution of crimes under international law. In view of the difficulties of the African Union members to pay assessments, it would not be easy for the African Court to deal with investigations and prosecutions of complex criminal cases, in accordance with the highest standards of due process of law which, by their nature, are extremely expensive. Additional investment in premises, facilities and security will likely be necessary. If these costs were drawn from the existing budget of the African Court it will undoubtedly seriously undermine its work, resulting in another financial crisis which will cause delays and undermine its credibility. Of course, a delay in setting up the African Court with a new jurisdiction, because of difficulties in securing adequate funding – as illustrated by the failure to try *Hissène Habré* in Senegal -, would send an ambiguous message about the commitment of African states to end impunity.

Also, the popular perception among African civil society seems to be that the exercise is being undertaken to score political points with the ICC rather than address the need for justice and international accountability for crimes under international law. Extending criminal jurisdiction to the African Court in order to make optional the jurisdiction of the ICC is a breach of states' good faith obligation. Therefore, what is needed is for AU member states that have ratified or signed the Rome Statute to enter into a constructive dialogue with the ICC, with a view to greater understanding of its jurisdiction and role, and improved cooperation.

In sum, Amnesty International expresses its concern about the African Court of Justice and Human Rights, if finally vested with jurisdiction over crimes under international law committed in Africa.

8. IMPROVING STATE COOPERATION

The encouragement by the African Union Assembly in its 3 July 2009 decision of member states to improve state-to-state cooperation in the investigation and prosecution of crimes under international law is greatly welcomed. It encouraged

“Member States to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and safety of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies”²⁴

²⁴ Assembly/AU/Dec.245(XIII) Rev.1, 3 July 2009.

Amnesty International has identified the largely ineffective global framework of inter-state cooperation with regard to the investigation and prosecution of crimes under international law as one of the most serious flaws in the emerging international system of justice. Although there are a number of regional treaties providing for extradition and mutual legal assistance, there is no single international or regional treaty that has effective extradition and mutual legal assistance provisions with regard to all crimes under international law. Such a treaty would exclude improper grounds for refusal with respect to such crimes, such as nationality, amnesty, immunities, *ne bis in idem* and dual criminality, and include effective human rights safeguards to ensure that no one will be extradited to a state where that person would face the risk of the death penalty, torture or other ill-treatment or unfair trial and that no mutual legal assistance is provided where it would lead to such human rights violations. Amnesty International has repeatedly urged states to begin drafting such a treaty.²⁵

Such a treaty could complement the work of the International Criminal Court and the organization hopes that members of the African Union will begin consultations at the meeting in Addis Ababa on how to take this proposal forward, at the international and regional level. For example, the stocktaking component of the Review Conference could provide an excellent opportunity to discuss how to draft such a treaty.

Amnesty International has also identified the limited resources allocated in all regions of the world to investigation and prosecution of these crimes and the failure to train justice system officials and staff as serious weaknesses in the international community's responses to crimes under international law. It hopes that member states of the African Union will recommend that the same resources be devoted to the investigation and prosecution of crimes under international law such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances, as states now devote to the investigation and prosecution of terrorist crimes, transnational organized crime and piracy.

Finally, both of these initiatives should be undertaken as part of a comprehensive, long-term global action plan to end impunity, including through the use of universal jurisdiction, which needs to be developed in consultation with states, intergovernmental organizations (including international criminal courts) at the international and national level and civil society.²⁶

²⁵ Amnesty International, *Ending impunity: Developing and implementing a global action plan using universal jurisdiction*, AI Index: IOR 53/005/2009, October 2009. See also Statement to Interpol in Ottawa, June 2007: *Universal jurisdiction: Improving the effectiveness of state cooperation*, AI Index: IOR 53/006/2007 (<http://amnesty.org/en/library/asset/IO53/007/2007/en/dom-IO530072007en.html>); Statement to Interpol in Lyon, 16 June 2005: *Universal jurisdiction: The challenges for police and prosecuting authorities in using it*, AI Index: IOR 53/007/2007, June 2005 (<http://asiapacific.amnesty.org/library/Index/ENGIOR530072007?open&of=ENG-385>). Amnesty International has made detailed recommendations to the European Union about steps it should take in the fight against impunity. See, for example, its statement to the European Union, 20 November 2006, *European Union: Using universal jurisdiction as a key mechanism to ensure accountability*, AI Index: IOR 61/013/2007.

²⁶ Amnesty International, *Ending impunity: Developing and implementing a global action plan using universal jurisdiction*, AI Index: IOR 53/005/2009, October 2009.

ANNEX I – AFRICAN UNION

ASSEMBLY DECISION, JULY 2009

Assembly/AU/Dec.245(XIII) Rev.1

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

DECISION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Doc. Assembly/AU/13(XIII)

The Assembly,

- 1. TAKES NOTE** of the recommendations of the Executive Council on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC);
- 2. EXPRESSES ITS DEEP CONCERN** at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed El Bashir of the Republic of The Sudan;
- 3. NOTES WITH GRAVE CONCERN** the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;
- 4. REITERATES** the unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union;
- 5. REQUESTS** the Commission to ensure the early implementation of Decision Assembly/Dec.213(XII), adopted in February 2009 mandating the Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity;
- 6. ENCOURAGES** Member States to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and safety of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of

cooperation amongst judicial and investigative agencies;

7. FURTHER TAKES NOTE that any party affected by the indictment has the right of legal recourse to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity;

8. REQUESTS the Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels (Foreign Affairs and Justice) but open to other Member States at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled for Kampala, Uganda in May 2010, to address among others, the following issues:

i.) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC;

ii.) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year;

iii.) Procedures of the ICC;

iv.) Clarification on the Immunities of officials whose States are not party to the Statute;

v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute;

vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and

vii.) Any other areas of concern to African States Parties.

9. DEEPLY REGRETS that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, **REITERATES ITS REQUEST** to the UN Security Council;

10. DECIDES that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan ;*

11. EXPRESSES CONCERN OVER the conduct of the ICC Prosecutor and **FURTHER DECIDES** that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, *inter alia*, guidelines and a code of conduct for exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute;

12. UNDERSCORES that the African Union and its Member States reserve the right to take

any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent;

13. FINALLY REQUESTS the Commission to follow-up on the implementation of this Decision and submit a report to the next Ordinary Session of the Assembly through the Executive Council in January / February 2010 and in this regard **AUTHORIZES** expenditure for necessary actions from arrears of contributions.

* Reservation entered by Chad

ANNEX II - INSTITUTE FOR SECURITY STUDIES BRIEFING PAPER, OCTOBER 2009

This thoughtful briefing paper issued by the Institute for Security Studies in South Africa on the African Union meeting on the Review Conference of the International Criminal Court scheduled for November 3-6, 2009, October 21, 2009 was developed through a consultative process and input from a number of African civil society groups, including activists from Sierra Leone, Uganda, Nigeria, Kenya, South Africa and Liberia, as well as international organizations with a presence in Africa. The document builds upon a statement signed by more than 160 African civil society groups in July calling on African states parties to the Rome Statute to reaffirm their support for the International Criminal Court after the African Union 3 July 2009 decision on non-cooperation with the International Criminal Court at its July 2009 summit.

Introduction

The African Union (AU) Commission has scheduled a meeting from November 3 to 6 in Addis Ababa (AU November meeting) to prepare for the Review Conference of the International Criminal Court (ICC) that will be held in Kampala in May 2010. The AU November meeting is intended for African ICC states parties, but non-states parties are expected to be able to participate.

This briefing paper urges ICC states parties to address the AU November meeting in a way that will protect the mission and the mandate of the ICC to ensure fair and effective justice for the worst crimes committed against Africans and others. While the ICC is not without shortcomings, the ICC should be supported as a crucial court of last resort to prosecute serious crimes in violation of international law when national justice systems are unable or unwilling to investigate and prosecute. **Two of the most fundamental principles that should be protected at the AU November meeting, which are essential to avoid politically motivated manipulation of the court and to ensure that the court can carry out its mandate to punish the most serious crimes, are:**

- **the ability of the ICC and its prosecutor to operate independently—without external influence—and impartially—without bias or the perception of bias; and**
- **the irrelevance for ICC prosecutions of a suspect's official position—such as a head of state.**

This briefing paper has been developed through a process of consultation with African civil society groups and international organizations with a presence in Africa. The paper builds upon a statement signed by more than 160 African civil society groups on July 30, 2009 calling on African ICC states parties to reaffirm their support for the ICC after the AU adopted

a decision on non-cooperation with the ICC at its July 2009 summit, which is discussed below. The paper—which is being utilized in advocacy by civil society across Africa with their respective governments and domestic media in advance of the AU November meeting—discusses: I) major developments leading up to the AU November meeting on the ICC Review Conference; II) the need for ICC African states parties to remain steadfast to a fair, effective ICC at the November meeting; and III) recommendations on specific agenda items expected to be discussed at the November meeting.

I. Major Developments Leading Up to the AU November Meeting on the ICC

There have been several important developments regarding the AU and the ICC in advance of the November meeting on the ICC Review Conference:

February 2009: AU summit in Addis Ababa adopts a decision at its 12th Ordinary Session expressing serious concern about the ICC prosecutor's request for an arrest warrant for Sudanese president Omar al-Bashir, and requests that the AU Commission convene a meeting of African ICC states parties to "exchange views on the work of the ICC in relation to Africa." (Assembly/AU/Dec.221(XII))

June 2009: Meeting of ICC African states parties in Addis Ababa highlights the need for African ICC states parties to reaffirm their commitment to the ICC and to combat impunity. Recommendations include, among others, the need for a preparatory meeting of African state parties to prepare for the ICC Review Conference.

July 2009: AU summit in Sirte adopts a decision at its 13th Ordinary Session calling for AU member states not to cooperate in the arrest and surrender of Sudanese president Omar al-Bashir to the ICC because the UN Security Council has failed to act on the AU's request for a deferral of the ICC's case against President al-Bashir. (Assembly/AU/Dec. 245(XIII) Rev.1) **As Botswana and South Africa pointed out subsequent to the summit, the AU July decision contradicts the obligations of ICC states parties to cooperate with the ICC. The AU decision also is contrary to article 4 of the AU's Constitutive Act, which rejects impunity for serious crimes.** The AU decision in addition requests that the AU Commission convene a meeting to prepare for the ICC Review Conference that addresses a series of issues discussed below.

II. The Need to Remain Steadfast to a Fair, Effective ICC at the AU November Meeting

A key concern for the AU November meeting to prepare for the ICC Review Conference is the expected attendance of non-states parties to the ICC. Non-states parties—who worked to secure the AU decision on non-cooperation with the ICC in July, and who oppose the court because its efforts to ensure accountability threaten their political leadership—can be expected to create an extremely difficult climate at the meeting. As in July, they can be expected to press for proposals that undercut the court and to seek to present the ICC as operating contrary to the will of people in Africa.

A central complaint by some African officials is that the ICC's exclusive focus on investigations in Africa to date suggests that the court is unfairly targeting Africa. It is important to clarify misconceptions: African governments voluntarily referred three out of the four situations currently before the ICC. The fourth situation, Darfur, was referred to the ICC

by the UN Security Council in a resolution supported by Benin and Tanzania, who were elected members of the Security Council at that time. Furthermore, as stated in a concept note prepared by the AU Commission in advance of the June meeting on the ICC in Addis, “considering that African States constitute the largest regional grouping of States that have accepted the jurisdiction of the ICC, it is perhaps not surprising that it is more likely (at least statistically) that more prosecutions will arise from African States.”

Nevertheless, legitimate grounds for dissatisfaction with the ICC and the uneven reach of international justice exist. Officials from and supported by powerful states are less vulnerable to prosecutions for serious crimes. **However, African civil society firmly believes that the solution is to work to extend—rather than curtail—accountability. Otherwise, victims will be denied redress, and a culture of impunity will be strengthened. This would be wholly inconsistent with the rejection of impunity in article 4 of the AU’s Constitutive Act.**

African states have been committed to the fair, independent, impartial and effective functioning of the ICC since even before the court was established. In 1997 and 1998, African states came together to adopt the Southern African Development Community (SADC) Principles and Dakar Declaration in support of an international criminal court consistent with these principles. African ICC states parties will need to remain steadfast in their commitment to avoid negative outcomes at the AU November meeting. **Adequate preparation and planning in the days leading up to the AU November meeting will be crucial. This can be achieved through consultation with relevant representatives of other African ICC states parties in capitals, Addis Ababa, and New York. This can also be achieved by sending high-level experts and officials on the ICC from your country, namely from your ministry of justice, foreign affairs and office of the attorney general, to the AU November meeting.**

III. Specific Recommendations on AU November Meeting Agenda Items

The AU’s July decision on the ICC provides that the AU November meeting to prepare for the ICC Review Conference will address the following issues, on which recommendations are detailed below:

1. UN Security Council authority to refer and defer ICC cases under articles 13 and 16 of the Rome Statute of the International Criminal Court (Rome Statute);
2. Regional input in evaluating evidence and decisions to proceed with ICC prosecutions, especially in cases against senior officials;
3. Clarification of immunities of officials of non-states parties before the ICC, including the implications of the application of articles 27 and 98 of the Rome Statute;
4. Guidelines and a code of conduct for the ICC prosecutor, particularly in his authority to commence investigations on his own initiative; and
5. ICC procedures and any other areas of concern.

- 1. UN Security Council authority to refer and defer ICC cases*

The UN Security Council has the power to refer and defer cases under articles 13 and 16 respectively of the Rome Statute. Referral by the UN Security Council is a crucial element of the ICC's ability to ensure justice for serious crimes no matter where they are committed: Security Council referrals allow crimes committed on the territory of non-states parties to come under the ICC's jurisdiction. Security Council referrals as a result strengthen the reach of the ICC to prosecute serious crimes. At the same time, following a Security Council referral, the ICC prosecutor is obliged by the Rome Statute to make an independent determination as to whether to proceed with an investigation (which determination is subject to oversight by judges in the pre-trial chamber).

Security Council deferrals under article 16 of the Rome Statute, however, allow a political body to impose decisions on the ICC and limit the ICC's capacity to prosecute crimes under its jurisdiction. Deferrals furthermore increase the possibility that prosecutions will not take place. The credibility of the ICC as a judicial institution demands that the ICC be protected from external influence. Security Council deferrals should therefore be avoided, and if utilized then only in exceptional circumstances to address threats to international peace and security consistent with the council's powers under chapter VII of the UN Charter.

As stated in the 1997 SADC principles, "while recognizing the role of the Security Council in maintaining international peace and security[,] the independence and operations of the Court and its judicial functions must not be unduly prejudice[d] by political considerations." This same principle should apply to other political bodies, including the African Union, to preserve and promote the ICC's independence. Irrespective of a position on the appropriateness of Security Council deferrals, regional views on deferrals should not be a basis for withholding cooperation with the court. This would make the court's ability to carry out its functions dependent on decisions of political bodies. Furthermore, ICC states parties as sovereign states have an international treaty obligation under the Rome Statute to cooperate with the ICC. Decisions by regional bodies such as the AU on non-cooperation in the ICC's case against al-Bashir contravene the duty of cooperation and place African ICC states parties in an awkward position.

2. Obtaining regional input on evaluating evidence and decisions to prosecute

Regional engagement between the ICC, states and intergovernmental institutions is essential for the success and credibility of the ICC and can be valuable to fairly and effectively ensuring justice for serious crimes. One key area is promoting greater ratification of the ICC's Rome Statute. Comprehensive ratification is the best way to ensure that the ICC can prosecute serious crimes in all parts of the world and promote the more even application of the law. African ICC states parties should call for the AU to develop a plan to promote widespread ratification of the Rome Statute within and beyond Africa.

A second key area for regional engagement relates to cooperation with the ICC. As the court lacks a police force to enforce its judicial orders, the ICC is reliant on cooperation by states and intergovernmental institutions. African ICC states parties should call for the AU to facilitate greater cooperation between the AU and the ICC through the establishment of an ICC-AU Liaison Office in Addis Ababa and the conclusion of an agreement between the AU and the ICC on cooperation. These are two measures, which have been taken by the United Nations with positive results. African ICC states parties should also call for the AU to extend

an invitation to the ICC to sessions of the AU Assembly. This can help promote more effective cooperation, but also understanding and discussion of concerns between the AU and the ICC.

In contrast to the options for regional engagement above, the possibility raised in the AU's July decision on the ICC, that regional input be obtained on evaluating evidence or decisions to investigate or prosecute, especially in cases involving senior officials, would enable outside forces to interfere with the court's judicial work and should not be allowed. This type of input could limit the court's ability to prosecute the most serious crimes and its real or perceived ability to function independently and impartially. Notably, states—including African states—consistently rejected proposals in negotiations to establish the ICC that would base the ability of the ICC to exercise jurisdiction on consent by states or political bodies (such as the Security Council) as it would hamper the court's ability to carry out its judicial mandate, especially in sensitive cases.

3. Immunity based on official position of officials from non-states parties

This is a complex legal issue and to date the ICC has not issued a ruling that expressly addresses immunity of officials from non-states parties in the context of the relationship between articles 27 and 98 of the Rome Statute. The African Union may seek to intervene with the court on this matter as *amicus curiae* in future proceedings under Rule 103 of the ICC Rules of Evidence and Procedure.

It is nevertheless important to note that the ability of the ICC to prosecute individuals regardless of their official position, even when they are senior leaders, under article 27 of the Rome Statute is vital to the court's mission to ensure that those responsible for the "most serious crimes of concern to the international community" are not left unpunished. Often, high-level officials are the most responsible for serious crimes: even though they may not physically have committed the crimes, they ordered, facilitated or encouraged their commission.

The African Commission has questioned whether official position may be relevant if the UN Security Council refers a situation involving a non-state party, especially where the council does not expressly address immunities of suspects, as in the situation of Darfur. The argument is furthered because article 98 of the Rome Statute provides that states are not required to take actions that are contrary to their obligations regarding immunity under international law. (MinICC/Legal/3)

However, there is strong legal support for the view that there is no immunity relating to serious crimes based on official position for protection under article 98. Allowing immunity based on official position in cases of a Security Council referral would moreover frustrate the purpose of these referrals. Security Council referrals ensure that the ICC can prosecute alleged perpetrators in states that are not states parties to the court. Finally, allowing immunity based on official position in cases of a Security Council referral would frustrate the object and purpose of the ICC's Rome Statute to limit impunity for the worst crimes.

4. Guidelines and a code of conduct for the ICC prosecutor

In order to have an independent and effective court, the prosecutor must be empowered to

operate independently, including to commence investigations on his own initiative, *proprio motu*, provided under article 15 of the Rome Statute. Given the frequency of state complicity when atrocities are committed, the possibility of the prosecutor to respond independently to allegations of crimes—an authority that the prosecutor has yet to exercise—is indispensable. An international criminal court that could not investigate in the face of overwhelming information from victims and survivors would be of questionable legitimacy.

Both the Dakar Declaration and SADC Principles underscore the need for the prosecutor's independence to be guaranteed, and this independence should be preserved in any proposals on the work of the prosecutor.

At the same time, the Rome Statute provides that the judges review the prosecutor's decision to open an investigation, which helps to ensure that decisions are fair and properly based on evidence. In addition, the court's Assembly of States Parties is empowered to address prosecutorial misconduct. Furthermore, ICC states parties can under the Rome Statute refer crimes committed on the territory of other states parties to the ICC if serious crimes are believed to have been committed there.

5. *ICC procedures and other areas of concern, along with the importance of maintaining an overarching commitment to the ICC*

The ICC has an extremely challenging mission and mandate and not surprisingly, the court is far from a perfect institution. It is vital that ICC policies and practice improve over time and we encourage African ICC states parties to actively engage in the positive development of the court, especially at regular sessions of the court's Assembly of States Parties.

At the same time, the ICC remains one of the most important checks against unbridled impunity. This is especially with regard to more politically sensitive cases, which can be difficult to address before domestic courts, such as when heads of state or senior leaders are implicated in the commission of atrocities.

Rejection of impunity is a core element of the AU's Constitutive Act. Moreover, civil society firmly believes that justice is crucial to establishing rule of law and sustainable peace on the continent. Beyond the issues identified for discussion at the AU November meeting, African ICC states parties should use the November meeting as an important opportunity to affirm their support for the ICC by underscoring:

- The ICC's important role in ensuring justice for serious crimes for African victims;
- The ICC's function as a crucial court of last resort when national justice systems are unable or unwilling to investigate and prosecute;
- States parties' commitment to press for wider ratification of the Rome Statute; and
- States parties' commitment to cooperate with the ICC, including in arrest and surrender.

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