

May 22, 2015

Foreign Ministers and Justice Ministers
African States Parties to the International Criminal Court

Dear Foreign and Justice Ministers:

We write ahead of the 25th African Union Summit, which will take place in South Africa from 7 to 15 June 2015, to highlight important progress by Africa in ensuring justice for the gravest crimes and areas where your leadership is needed to further support accountability.

Our organisations are among the most active partners of an informal group of African civil society organisations and international organisations with a presence in Africa that work to ensure the fight against impunity succeeds whenever serious crimes in violation of international law are committed. The following are in our estimation some of the notable developments that we believe merit your further introspection and action.

1. Positive Developments in Support of Justice for Grave Crimes

The trial of former Chadian President Hissène Habré is set to begin in **Senegal** in July 2015 before the Extraordinary African Chambers (EAC). Habré has been charged with war crimes and crimes against humanity committed during his tenure as President. The case is one of the first in Africa to apply the principle of universal jurisdiction, and his trial will be the first time the courts of one country try the former ruler of another for alleged international crimes.

Credit goes to the government of Senegal which has shown courage and leadership by establishing the EAC, and also to the African Union which, in February 2013, resolved to support the prosecution of those most responsible for international crimes committed in Chad between 1982 and 1990.

South Africa is continuing to pursue domestic accountability for international crimes. In a landmark judgement handed down by the highest court in the country in October 2014, the Constitutional Court ruled that South African authorities should investigate alleged crimes against humanity perpetrated in Zimbabwe, also under the principle of universal jurisdiction.

The **Central African Republic** National Transitional Council took decisive action for justice for victims of atrocities committed in that country by adopting a law to establish a Special Criminal Court within the national justice system in April. The Special Criminal Court, which includes national and international judges, will prosecute individuals accused of responsibility for war crimes and crimes against humanity in the Central African Republic since 2003.

Dominic Ongwen, a leader of the notorious Lord's Resistance Army, was surrendered to face charges of war crimes and crimes against humanity at the International Criminal Court (ICC) in January. Ongwen had emerged from the bush in the Central African Republic after some 10 years on the run, and is now in ICC custody awaiting a confirmation of charges hearing. The support of the governments of the **Central African Republic** and **Uganda** helped make Ongwen's transfer to the ICC possible and in March, Ugandan President Yoweri Museveni publicly committed to assisting the ICC in its case against Ongwen.

The ICC Office of the Prosecutor's interface with victims of the conflict in northern Uganda earlier this year led to the conclusion that, among other issues, the ICC needs more time to work out a process through which victims can participate in the trial process. Ongwen's confirmation of charges hearing has as a result been pushed back to early 2016.

The Justice Minister of **Senegal**, Hon. Sidiki Kaba, became President of the Assembly of States Parties (ASP) of the ICC at its 13th session in New York in December 2014. Minister Kaba has pledged to strengthen the ICC's relationship with Africa, and his role as ASP President is an important opportunity for Africa to demonstrate positive leadership on the ICC. In March 2015, Kenyan Judge Joyce Aluoch was also elected vice president of the ICC.

During the December ASP session, President Catherine Samba-Panza of the **Central African Republic** expressed her deep gratitude to the ICC for assisting her country in the wake of serious crimes committed in CAR. Many other African ICC states parties—including **Burkina Faso, Cote d'Ivoire, Democratic Republic of Congo, Gambia, Ghana, Lesotho, Malawi, Namibia, Nigeria, Senegal, Sierra Leone, South Africa, and Zambia**—expressed their strong support for the ICC.

From the foregoing, it is our considered opinion that the fight against impunity is best served when African States are proactive in developing mechanisms that foster accountability while also promoting complementarity and cooperation with international mechanisms.

2. Continued Challenges for Fighting Impunity

Despite the positive developments noted above, the cause of justice continues to face challenges in Africa. International crimes continue to be committed in African states – such as South Sudan – with little or no accountability. A large majority of African ICC states parties lack legislation that fully incorporates genocide, war crimes, and crimes against humanity and cooperation with the International Criminal Court in domestic law.

Victims of serious crimes committed in violation of international law may feel further victimised by the injustice when the state does not take steps to remedy the harm caused to them. Moreover, the impunity gap potentially breeds resentment among victims.

The AU rotating chair for 2015, Zimbabwean President Robert Mugabe, threatened in January to push for African ICC members to withdraw from the ICC at the upcoming summit. In its decisions, the AU has also continued to call for members not to cooperate in the arrest of Sudanese President Omar al-Bashir, who is subject to two ICC warrants, and for the case against Kenyan Deputy President William Ruto to be suspended.

The ICC Prosecutor has on several occasions expressed challenges faced by her office in prosecuting the Kenyan cases at the ICC, emanating from witness interference and tampering, lack of cooperation, and other legal and political hurdles put up by the government of Kenya. The Prosecutor has since filed an appeal at the ICC Appeals Chamber seeking to have a finding that Kenya has failed to cooperate with the ICC in contravention of its obligations under the ICC's Rome Statute.

In July 2014, the AU adopted amended protocol to expand the jurisdiction of the African Court of Justice and Human Rights to cover serious crimes committed in violation of international law

among others. This is a significant development. However, the amended protocol includes immunity before the court for senior state officials and heads of states and governments, thus perpetuating the culture of impunity with which Africa struggles.

We consider these developments to be counter-productive and they threaten to undermine the African Union's stated commitment to fight impunity in conformity with the provisions of Article 4 (h) and (o) of the Constitutive Act of the African Union.

3. Recommendations

We call on your governments to enhance the capacity of AU mechanisms to respond to conflict situations in a manner that both seeks to pre-empt the occurrence of international crimes and facilitates accountability within transitional justice frameworks in the aftermath of such conflicts.

We encourage African states to strengthen the principle of complementarity by calling for and supporting credible national proceedings as a means to bridging the impunity gap in relevant situations, such as the Central African Republic.

We call on your government to express support for the ICC at the AU summit and to commit to cooperating with the ICC. Although imperfect, the ICC is a crucial court that can be strengthened and should be supported. Minister Kaba, as President of the ICC's Assembly of States Parties, could serve as an important resource in such efforts.

We are aware that many African ICC members support the ICC and regularly express that support at the ICC's Assembly of States Parties. However, very few governments express that support in AU discussions where the ICC comes under attack. This creates significant risks for the ICC's legitimacy around the world given that Africa enjoys the largest regional representation in the ICC's membership, as well as a considerable percentage of judges and staff of the court.

We encourage your governments to unequivocally express their support for the ICC and to ensure that such support is reflected in the decisions, declarations, and resolutions of the Assembly of the African Union.

We also call on African states to reconsider and revise their stand on immunities for sitting heads of state and government along with senior government officials brought before the jurisdiction of the African Court of Justice and Human Rights. The immunities clause approved during the 23rd AU summit undermines the wider commitment to fight impunity as expressed in Articles 4(h) and (o) of the Constitutive Act of the African Union.

African states that have yet to do so are encouraged to reflect on adopting ICC implementing legislation at the domestic level and providing victims of international crimes the opportunity to participate in legal proceedings including in the form of reparative rights. Victims of serious crimes should have the opportunity to be involved in the judicial process in a manner that is consistent with their status and rights as victims and internationally recognised standards of fairness.

Protection of witnesses inside and outside of the courtroom is also needed to ensure effective proceedings at the national level. We call upon all states to establish witness protection

legislation, mechanisms, and programs, to ensure that witnesses are adequately protected before, during, and after the investigation and adjudication of international crimes.

We hope that you will grant these issues your due consideration and wish you successful deliberations at the summit.

Sincerely,

Arche d'Alliance (DRC)
Association des Victimes du 28 Septembre 2009 (Guinea)
Centre for Accountability and Rule of Law-Sierra Leone
Centre for Human Rights and Rehabilitation (Malawi)
Children's Education Society (Tanzania)
Civil Resource Development and Documentation Centre (Nigeria)
Coalition Burundaise pour la CPI
Coalition for the ICC
Coalition Ivoirienne pour la CPI
Coalition nationale pour la CPI de la RDC
Fédération Internationale des Droits de l'Homme
Fondation Congolaise pour la Promotion des Droits humains et la Paix
Foundation for Human Rights Initiative (Uganda)
Groupe de Travail sur les Instruments Internationaux (Côte d'Ivoire)
Human Rights Network - Uganda
International Commission of Jurists
International Crime in Africa Program of the Institute for Security Studies
Human Rights Watch
Kenya Human Rights Commission
Kenya Section of the International Commission of Jurists
Ligue pour la Paix, la Justice et les Droits de l'Homme (DRC)
Ligue pour la Promotion et le Développement Intégral de la Femme et de l'Enfant (DRC)
Media Foundation for West Africa (Ghana)
Mouvement pour la Defense des Droits de l'Homme et d'Action Humanitaire (CAR)
Nigerian Coalition for the ICC
Observatoire Ivoirien des Droits de l'Homme (Côte d'Ivoire)
Rencontre Africaine Pour la Défense des Droits de l'Homme (Senegal)
Réseau Equitas Côte d'Ivoire
Rights and Rice Foundation (Liberia)
Southern African Litigation Centre (South Africa)
Synergie des ONGs pour la lutte contre les Violences Sexuelles (DRC)
Uganda Coalition for the ICC
La Voix des Sans-Voix pour les droits de l'homme (DRC)
West Africa Bar Association (Nigeria)
Women Advocates Research and Documentation Center (Nigeria)