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Protecting the Mission and Mandate of the International Criminal Court

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.**

TABLE OF CONTENTS

Major Developments	1
Need to Remain Steadfast	2
Recommendations	3

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.

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:

Protecting the Mission and Mandate of the International Criminal Court

Accountability in Africa

This briefing paper has been 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 the statement that was signed by more than 160 African civil society groups in July calling on African ICC states parties to reaffirm their support for the ICC after the AU adopted a decision on noncooperation with the ICC at its July 2009 summit.

The paper is intended to be used in advocacy by civil society across Africa with their respective governments and domestic media before the AU meeting in Addis Ababa on 3-6 November to prepare for 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. (MinICC/Rpt.)

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.

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." (MinICC/Legal/3)

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.**

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 fur-

thered 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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ICTJ New York
5 Hanover Square. Floor 24
New York, NY USA 10004
