

Recommendations by African civil society groups and international organisations with a presence in Africa for the International Criminal Court’s Assembly of States Parties 13th Session from December 8-17, 2014

The December session of the Assembly of States Parties (ASP) of the International Criminal Court (ICC) comes at an important time for African ICC states parties. The ASP is set to have its first African president, with Senegal Justice Minister Sidiki Kaba designated to assume this role at the session. Five African judges are also candidates for election to the bench. In addition, this past year, Central African Republic requested that the ICC open a second investigation into crimes committed there, and the ICC prosecutor announced the opening of an investigation in September 2014, bringing the court’s total number of situations under investigation to nine.

At the same time, the ICC continues to face challenges in its ability to function independently and effectively as a result of decisions by the African Union and initiatives by the government of Kenya. The ICC is not a perfect institution, but it remains a crucial court of last resort in addressing international crimes. In this context, we urge your government to use the upcoming ASP to work to strengthen—as opposed to undermine—the ICC. Below are analysis and recommendations that we hope will be helpful in pursuing that objective. The statement was drafted by six African organisations and international organisations with a presence in Africa, and endorsed by many more that are listed at the end of this document.

Elect the most highly qualified judges

At the upcoming ASP, the Assembly will elect six new judges to replace the current judges whose terms of office will expire in March 2015. These elections are crucially important as having a qualified bench is essential to the ICC’s ability to operate effectively.

In 2011, the ASP established an Advisory Committee on Nominations of Judges of the International Criminal Court (ACN) to provide the ASP with technical information on the qualifications of candidates, and the ACN has issued a report on its findings.¹ We urge African ICC states parties to closely consider the ACN’s report and the qualifications of the candidates, and to elect the most qualified candidates within the parameters of the requirements for this election regarding geographic representation, gender, etc.

Protect the ICC’s independence of judicial processes

The government of Kenya has proposed a supplementary agenda item for this ASP session, “Special Session to discuss the Conduct of the Court and the Office of the Prosecutor.”² Kenya’s request implicates judicial activity—including pending decisions in cases before the ICC—in regard to crimes committed during the 2008 post-election violence in Kenya. While there is real need to strengthen the court’s functioning, Kenya’s request could open the door to the possibility of the Assembly’s interference in the court’s judicial functions.

¹ Assembly of States Parties, Report of the Advisory Committee on Nomination of Judges on the work of its third meeting, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-22-ENG.pdf, September 29, 2014.

² Assembly of States Parties, List of supplementary items requested for inclusion in the agenda of the thirteenth session of the Assembly, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-34-Rev1-ENG.pdf, November 14, 2014.

The independence of the court's judicial role is central to its legitimacy, and the delicate balance in the delivery of justice between the rights of accused persons to a fair trial and those of the victims must also be safeguarded. Article 112 of the ICC's Rome Statute on the role of the ASP notably accords the ASP a role in providing "management oversight" to court principals, but only with respect to "administration of the Court." We call upon African governments to refrain from debates that could undermine the ICC's independence and to emphasize the importance of respect for the Court's independent judicial functions.

Maintain support for the ICC as a crucial court of last resort and work to extend the reach of justice wherever the worst crimes are committed

In the recent past, the ICC and more so, the Office of the Prosecutor, has come under significant attack from the African Union, the government of Kenya, and several African leaders that have sought to undermine its ability to function effectively with needed support. Notably, the African Union has repeatedly called for AU members to withhold cooperation in the execution of the arrest warrant for ICC fugitive and Sudanese President Omar al-Bashir since 2009. Most recently, Kenya's UN ambassador in a statement at the General Assembly following the presentation of the ICC's 2014 annual report, suggested the ICC is interested in "quasi-judicial theater that is not in the pursuit of justice and the fight against impunity." The statement also may have implied that the continued existence of the court should be assessed, noting that in the absence of the ICC's "noble objectives" and "urgent" needs of justice, "it would be our historical duty to put the ICC to rest."

We recall that the ICC was established, with the large support of African states, to deal with the gravest crimes that shock the conscience of mankind, and that the ICC will only intervene where a state is unwilling or unable to prosecute the crimes. Unfortunately, states continue to fail to establish domestic mechanisms to ensure that victims of gross human rights violations are able to obtain justice and reparations. In Africa, a continent that is too often engulfed in impunity and lack of accountability for serious crimes, the ICC sometimes offers the only option for justice for victims of mass atrocities. Victims are at the center of the Rome Statute system, and the prosecution of atrocities is a critical factor in ending impunity for African and other victims.

In addition, claims that the ICC unfairly targets Africa are not supported by the facts. While all of the situations currently under investigation are in Africa, all except one came about because the governments on whose territories the crimes were committed requested the ICC's involvement (Central African Republic, Côte d'Ivoire, Democratic Republic of Congo, Mali, and Uganda), or the UN Security Council referred the situation to the ICC (Darfur, Sudan and Libya). The only instance where the Office of the Prosecutor acted entirely on its own initiative is Kenya.

At the same time, we recognize that there are double standards in the delivery of international justice. Some powerful states have not joined the court and the UN Security Council has used its power to refer situations to the ICC inconsistently. But justice should not be denied where it is possible on account of the lack of universal ratification of the ICC's Rome Statute. African governments should press for justice wherever the worst crimes are committed, such as in Syria, and use their voices in support of victims everywhere. At the end of the day, victims are victims, whether African or otherwise.

Ensure the ICC has adequate resources

At the upcoming session, the ASP will also approve the court's budget. The ICC has faced challenges in conducting investigations and prosecutions in situations before the court due to limited resources, which the Prosecutor recently acknowledged in the Prosecutor's investigation in Libya. African ICC states parties should work with other states parties to ensure the Court has adequate support to conduct its work and the Office of the Prosecutor is properly resourced to conduct its work in all nine situations under investigation. This includes rejecting initiatives that would place arbitrary caps on budgetary increases or budget allocations.

Support effective cooperation with the ICC

The ICC's ability to operate effectively depends on its ability to secure effective cooperation. We believe the Assembly needs to strengthen its capacity to address judicial findings of non-cooperation in ICC cases to ensure adequate cooperation.

In accordance with article 87 of the Rome Statute, the judges may refer findings of non-cooperation to the ASP, and in recent years, the Court has made several findings of non-cooperation with respect to cases related to crimes committed in Darfur. The ASP in 2011 adopted procedures with respect to non-cooperation that focus on engagement with a state subject to a finding of non-cooperation.³

However, securing effective cooperation remains a significant challenge for the court, and the ASP needs to enhance its capacity to take more effective steps to ensure cooperation in the event of findings of non-cooperation. This is heightened currently, in particular given concerns between the ICC Office of the Prosecutor and Kenya as to whether the Kenyan government has met its cooperation obligations, and it has become the subject of a pending decision in *The Prosecutor v Uhuru Kenyatta*. One particular issue of concern in the event of a finding of non-cooperation is that even though the Assembly meets at least once a year and can also hold special sessions, in practice its meetings often take place only once every year. As such, this could lead to significant delays in the management of trials related to findings of non-cooperation. Given developments to date, it is also not unlikely that a finding of non-cooperation could be politicized, underscoring the importance of effective handling by the ASP.

Reject immunity of officials before the ICC

The government of Kenya has proposed, with AU backing, amending the ICC Statute to allow immunity for sitting officials at the ICC.⁴ Consultations of the ASP Working Group on Amendments indicate that this proposal (and any other proposed amendments to the statute) will not be formally considered at this ASP session. We believe it nevertheless remains important for your government to distance itself wherever possible from allowing immunity for sitting officials and all other persons before the ICC for serious crimes. The irrelevance of official capacity is at the core of the ICC's mission to ensure those responsible for grave crimes are held to account and ensure access to justice by victims. It has been a cornerstone of international law since the post-World War II trials at Nuremberg, and is included in the statutes of the International

³ Assembly of States Parties, Assembly procedures relating to non-cooperation, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Non-coop/ICC-ASP-10-Res.5-extract-annex-ENG.pdf, 2011.

⁴ Kenya's proposal is available at: <https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>.

Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary African Chambers of Senegal. The recent inclusion of immunity of some senior sitting officials in the protocol expanding the jurisdiction of the African Court on Justice and Human Rights represents a substantial retreat from international practice.

African ICC states parties should commit to increase their capacity to prosecute serious crimes

The backlash against the ICC by some African leaders in recent years calls for a deeper understanding and appreciation of the principle of complementarity, which dictates that the ICC is a court of last resort.

Domestic courts have primary jurisdiction and the ICC's Rome Statute reflects the vision of domestic courts that should be willing and able to ensure justice. However, national jurisdictions must be equipped with the tools that will allow them to act. The domestication of Rome Statute is central to empowering African courts to handle egregious crimes perpetrated in their territories. Yet, only a handful of African states have adopted legislation that domesticates ICC crimes—as of last count, these were Burkina Faso, the Central African Republic, Kenya, Mauritius, Senegal, South Africa, and Uganda. We call upon all African states to domesticate the Rome Statute and develop capacity for dealing with international crimes at the national level.

Universal jurisdiction in an African context is also proving to be a useful tool, as reflected by the important work of the Extraordinary African Chambers and the recent decision of South Africa's Constitutional Court on domestic authorities pursuing cases involving serious crimes committed outside South Africa. Legislation domesticating the Rome Statute can be tailored to suit each national jurisdiction and to include a reasonable form of universal jurisdiction.

African ICC states parties should commit to incorporating the needs of victims into domestic efforts to ensure justice for serious crimes

The Rome Statute has advanced the rights of victims of international crimes to participate in legal proceedings at the ICC as provided under article 68 of the Rome Statute. However, victim participation in national criminal justice mechanisms has received little attention so far. States should reflect on providing victims an opportunity to participate in domestic legal proceedings that relate to international crimes. This is supported by the spirit behind the domestication process of the Rome Statute, which aims at strengthening national criminal justice systems.

Within the ICC system, victims of international crimes also have the right to reparations as provided under article 75 of the Rome Statute. In order for the Rome Statute to be truly complementary to national criminal justice systems, there should be an extension of the understanding of complementarity to include the possibility for victims of international crimes to participate in proceedings before national criminal justice systems and to have access to reparations from the state.

National legislation providing for reparations to victims of international crimes potentially supports the complementary relationship between the ICC and national criminal jurisdictions, while also providing for an effective enforcement mechanism of ICC ordered reparations. Reparative complementarity advocates for the principles on reparations established by the ICC to

be implemented at and by national legal systems. National legal systems should also include ways in which victims would meaningfully participate in a reparations process while simultaneously keeping with established principles recognized under international law on victims' redress.

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This document was jointly drafted by four African civil society organisations and two international organisations with a presence in Africa. Its contents are supported by the following organisations that are active in an informal network that promotes support for justice for the most serious crimes: Affirmative Action Initiative for Women of Nigeria, African Legal Aid, Centre for Accountability and Rule of Law of Sierra Leone, Children's Education Society of Tanzania, Civil Resource Development and Documentation Centre of Nigeria, East and Horn of Africa Human Rights Defenders Project, Foundation for Human Rights Initiative of Uganda, Human Rights Network-Uganda, Human Rights Watch, International Crime in Africa Program of the Institute for Security Studies, International Commission of Jurists–Kenya, International Federation for Human Rights, Kenya Human Rights Commission, Kenyans for Peace with Truth and Justice, Malawi Centre for Human Rights and Rehabilitation, Nigerian Coalition on the ICC, Pan African Human Rights Defenders Network, Southern African Litigation Centre, TrustAfrica, Ugandan Coalition for the ICC, and the global Coalition for the ICC.