

Memorandum to African States Parties of the International Criminal Court for the Assembly of States Parties 14th Session

In 2015 important developments took place in investigations and examinations by the International Criminal Court (ICC) in Africa and outside Africa, and with Africa's relationship with the ICC. As the Assembly of States Parties (ASP) begins its fourteenth session on November 18, the undersigned African civil society organisations and international organisations with a presence in Africa offer analysis of these developments, and offer recommendations to African ICC States Parties for the session to ensure that those responsible for war crimes, genocide, and crimes against humanity face justice for serious crimes in violation of international law.

Progress in ICC investigations and examinations in and beyond Africa

Despite criticism from some African leaders that the ICC targets Africa, the below developments reinforce the role the court is playing to deliver justice to victims in Africa at the request of African states.

Following a referral of the situation in Mali by the country's government in 2012 and the subsequent opening of an ICC investigation, Niger surrendered the first suspect to the court on 26 September 2015. The suspect, Ahmad Al Faqi Al Mahdi, faces charges of war crimes for allegedly directing attacks in Timbuktu, Mali against buildings dedicated to religion and historical monuments. The case is set to be the first ICC case involving such crimes.

In September, the trial of Congolese commander Bosco Ntaganda opened. Ntaganda faces charges of war crimes and crimes against humanity, including murder, rape, and sexual slavery, committed in the Ituri district of the Democratic Republic of Congo in 2002 and 2003.

In January, Lord's Resistance Army (LRA) leader Dominic Ongwen was surrendered to the ICC, as a result of efforts by Uganda, the Central African Republic, the United States, and the African Union. Ongwen had been an ICC fugitive since 2005, after Uganda referred the situation in northern Uganda to the ICC in 2003. Uganda President Yoweri Museveni pledged his government's support to the ICC in the case, including handing over evidence.

The ICC Prosecutor also took steps to investigate crimes committed outside of Africa. On 13 October, the ICC Prosecutor requested that the ICC judges approve the opening of an investigation into alleged crimes committed in Georgia. If approved, this will be the first ICC investigation that is not in Africa. The Office of the Prosecutor continued preliminary examinations in other situations, including Afghanistan, Colombia, Iraq, Palestine, and Ukraine.

The ICC's relationship with Africa

There has been notable progress in efforts to improve the ICC's relationship with Africa. With his election as President of the Assembly of States Parties in 2014, Senegalese Justice Minister Sidiki Kaba made improving the AU-ICC relationship a key pillar of his work. In August, he visited Kenya and met with President Uhuru Kenyatta, who reiterated Kenya's support for the ICC. He also met AU Commission Chair Nkosazana Dlamini-Zuma in August, and in September met with Nigeria's Foreign Minister at the United Nations General Assembly. In September Minister Kaba travelled to Guinea where he met President Alpha Condé, and he convened celebrations for International Justice Day in Dakar in July.

In October the ICC also held its fourth AU-ICC technical seminar in Addis Ababa to promote greater understanding between the two institutions. The same month, the ICC held a high-level seminar in Botswana on cooperation with the ICC, with representation from Angola, Botswana, Comoros, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, and Zambia.

In addition, some African states publicly renewed their commitment to the ICC. In the lead-up to the June AU summit and speculation over possible discussion of ICC withdrawal, Malawi's Minister of Justice and Constitutional Affairs and the spokesperson of the Ministry of Foreign Affairs and International Cooperation stated that Malawi was firmly committed to the Rome Statute, which it ratified in 2002. In November, Botswana, Madagascar, Nigeria, and Senegal delivered statements offering strong support to the ICC following the delivery of the court's annual report to the UN General Assembly.

Despite this progress, the ICC continues to face difficulties at the AU and with some African states, which is a scenario that poses deep challenges for the court's delivery of justice for victims.

The government of South Africa has traditionally been a strong proponent of the ICC. Yet questions over its cooperation with the ICC arose following its June 2015 hosting without arrest of Sudan's President Omar-al Bashir—who faces two ICC arrest warrants on charges of genocide, war crimes, and crimes against humanity committed in Darfur. Litigation is pending at the ICC and before South Africa's domestic courts on its cooperation with the ICC. South Africa's ruling party, the African National Congress, however, called on South Africa to take steps toward withdrawal from the Rome Statute at its annual meeting in October.

In January, AU Chair President Robert Mugabe of Zimbabwe threatened to push for ICC withdrawal by African states. In September, the AU established an Open Ended Committee of Ministers on the ICC to pursue AU calls for the cases against President al-Bashir and Deputy President William Ruto to be dropped. The Committee is also expected to pursue amendments to the Rome Statute, including one that would undermine the core principle of the irrelevance of official capacity before the ICC. This principle ensures that no one is exempt from criminal responsibility for genocide, war crimes, and crimes against humanity.

Recommendations for the Assembly of States Parties

The ICC is not a perfect institution and it continues to have much work to do to strengthen its delivery of justice. Yet, as discussed above, it continues to make important progress and remains the crucial court of last resort for victims of many of the gravest crimes. As we have seen from the multiple requests by African governments to the ICC to open investigations in situations on their own territories, national courts continue to struggle to effectively ensure accountability for many of the gravest crimes.

In this context, we urge your government to continue to express firm support for the ICC in the ASP session's General Debate, and to use the upcoming ASP to work to strengthen the court. Below are several specific recommendations for action regarding the court's budget, agenda items, cooperation, and complementarity.

Ensure the ICC has adequate resources

The ICC's ability to meet the ever-increasing demands placed upon it is inextricably linked to its being granted necessary resources. For 2016, the ICC requested a total budget of €153.27 million, which includes an increase of €6.5 million by the Office of the Prosecutor. However, the Assembly's expert budgetary body (the Committee on Budget and Finance) recommended reducing the Court's proposed

budget to €139.96 million and the Office of the Prosecutor's request by €2.0 million. At the same time, some of the largest contributors to the ICC budget are calling for further reductions.

We are deeply concerned that unless the ICC is able to expand its capacity, the Court will fall behind in conducting effective investigations and prosecutions in situations under investigation, and be unable to open new investigations. **We urge African ICC States Parties to insist that the ICC has sufficient resources to properly handle current and future investigations.**

Support complementarity and commit to adopting ICC implementing legislation

Complementarity—which regulates the relationship between the ICC and national systems—is a fundamental principle of the ICC. The ICC is not intended to supersede the exercise of jurisdiction by national courts, and only acts when national courts are unable or unwilling to act.

One essential element of complementarity is that domestic justice systems have laws that allow them to ably prosecute crimes committed in violation of international law. While 34 African countries have become parties to the Rome Statute, fewer than 10 African ICC States Parties—South Africa, Uganda, Kenya, Burkina Faso, and Central African Republic, among them—have to our knowledge incorporated the Rome Statute into their national laws.

We urge African ICC States Parties to use the General Debate at the ASP session to commit to advancing ICC implementing legislation in their countries in the next year if not yet adopted. We also urge African ICC States Parties to commit to develop or strengthen their legal capacity to prosecute serious crimes committed in violation of international law.

Protect the ICC's independence

The government of Kenya has made two proposals for agenda items at this ASP session. The first is on Rule 68 of the ICC Rules of Procedure and Evidence, which derives from how the trial chamber in the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* case interpreted and applied Rule 68 to allow the use of pre-recorded evidence. This decision has since been appealed and is pending before the Appeals Chamber. The request thus raises fundamental concerns for the ICC's independence. **We urge that States Parties resist the ASP becoming a platform where pending judicial matters are discussed.** Kenya should be encouraged to wait for the conclusion of the appeal.

Kenya's second proposal is to have a discussion on a petition by Kenyan legislators requesting an independent audit on the identification and recruitment of witnesses by the ICC Prosecutor. The ASP should not, however, interfere with the operations of the Office of the Prosecutor.

South Africa has also requested an agenda item on Articles 97 and 98 of the Rome Statute, which relates to the hosting of President al-Bashir by South Africa in June 2015 without arrest. The Court is currently considering the question of South Africa's cooperation or lack thereof in hosting al-Bashir, which will cover the interpretation and implementation of Articles 97 and 98. **We are deeply concerned that South Africa's proposal risks interference with ongoing judicial processes, and its concerns should instead be expressed through the pending litigation.**

Support effective cooperation with the ICC

Cooperation is indispensable where the ICC is concerned. The ICC does not have a police force to arrest suspects, and the court relies on States Parties to bring suspects into custody and to obtain essential information and evidence, as provided under Part 9 of the Rome Statute. State cooperation is the only way

that perpetrators of the most serious crimes “which are of concern to the international community,” will be brought to justice.

During this ASP session’s Plenary Discussion on Cooperation, we urge African ICC States Parties to commit to cooperating with the ICC and to complying with requests of the ICC. We also urge African ICC States Parties to commit to not welcoming ICC fugitives to its territory, unless for the purpose of obtaining their surrender to the ICC. Botswana, Central African Republic, Kenya, Malawi, Uganda, and Zambia have all previously avoided such visits by indicating ICC suspects are not welcome, cancelling or relocating meetings to which suspects may be invited, and inviting countries to send representatives who are not ICC suspects.

We thank you for your consideration of these issues and wish you a productive ASP session.

Affirmative Action for Women Initiative (Nigeria)
Center for Human Rights and Rehabilitation (Malawi)
Centre for Accountability and Rule of Law (Sierra Leone)
Children Education Society (Tanzania)
Civil Liberties Organisation (Nigeria)
Civil Resource Development and Documentation Centre
Coalition for Justice and Accountability (Sierra Leone)
Coalition for the International Criminal Court
Coalition of Eastern NGOs (Nigeria)
Ditshwanelo: Botswana Centre for Human Rights
Espace Vital ASBL (Democratic Republic of the Congo)
Fédération Internationale des Droits de l’Homme
Foundation for Human Rights Initiative (Uganda)
Groupe Lotus (Democratic Republic of the Congo)
Human Rights Watch
International Commission of Jurists-Kenya
International Commission of Jurists
ITEKA – Ligue Burundaise de Défense des Droits de l’Homme
Kenya Human Rights Commission
Kenyans for Peace with Truth and Justice
Ligue des Electeurs (Democratic Republic of the Congo)
Ligue Djiboutienne des Droits de l’Homme
Ligue Ivoirienne des Droits de l’Homme
Maison des Droits de l’Homme du Cameroun
Mouvement Ivoirien des Droits Humains
NamRights (Namibia)
Nigerian Coalition for the ICC
Observatoire Congolais des Droits de l’Homme (Republic of the Congo)
Regional Watch for Human Rights
West African Bar Association (Nigeria)

This document was jointly drafted by four African civil society organisations and one international organisation with a presence in Africa, with editorial input from several other organisations. The signatories are among organisations that have been the most active in cross-continental efforts to promote support by African governments for justice for grave crimes.