

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

Cape Town, 11 May 2009

Background

We, the 40 representatives of African civil society organisations (including the media), the legal profession, other relevant organisations, and concerned individuals and academics (see the list below), participated in a meeting in Cape Town on 11 May 2009 to consider the implications of the African Union's recent decisions on universal jurisdiction and the International Criminal Court (ICC) in Africa. The meeting was convened by the Institute for Security Studies (ISS) and produced this statement that expresses the views of a segment of African civil society directly involved in human rights and justice work on the continent. The statement has been prepared and issued ahead of the gathering of African States Parties to the Rome Statute of the ICC convened by the African Union (AU) Commission and currently scheduled to take place from 8 – 9 June 2009 in Addis Ababa, Ethiopia.

Workshop conclusions

Considering that the rule of law and human rights form the foundation of sustainable peace in Africa, and that impunity for perpetrators of serious international crimes (genocide, crimes against humanity, and war crimes) undermines these goals, we are convinced that international criminal justice is an essential component of any democracy.

African governments also recognise the importance of ending impunity on the continent. Articles 3(h), 4(h), 4(m) and 4(o) of the AU's Constitutive Act and the objectives outlined in the AU's Protocol Relating to the Establishment of the Peace and Security Council, commit Member States to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity. Article 4(h) of the Act states that "it is the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity". This commitment to protecting vulnerable populations during conflict and ensuring accountability for international crimes has been further demonstrated by the 30 African countries – the largest number from any continent – that have ratified the Rome Statute of the International Criminal Court which established the ICC. The support of the 13 additional African states that signed the Rome Statute at its adoption, thereby signaling their support for as well as intent to become parties to the treaty, also needs to be recognised.

It is therefore of concern that many serious international crimes are still being committed across the continent, and that the planners and perpetrators of these atrocities are seldom brought to justice.

Civil society must assist in reversing this trend. Civil society organisations have in the past played an important role in promoting international criminal justice in Africa, including the establishment of regional courts (the tribunals for Rwanda and Sierra Leone), and the development of the ICC. At the national level, members of civil society often take the lead in holding their governments to

account for human rights violations.

We are determined to continue fulfilling our responsibility to promote accountability and to meaningfully contribute towards ending impunity by: i) keeping international criminal justice on the domestic and regional agendas in Africa, ii) reminding political leaders of the relevance of international justice and of their commitments and obligations under international and domestic law, and iii) assisting government officials, lawyers, the media, and victims to participate in the delivery of international justice on a practical level. In doing so, we will explore a range of approaches for delivering international criminal justice in Africa, including but not limited to, the ICC. We will not, however, deviate from the principles underpinning the Court's work, namely that individuals responsible for war crimes, crimes against humanity and genocide – including even the most senior government officials – be brought to justice, and that the interests of victims be given priority through, among others, the award of compensation and reparations.

We are concerned that recent developments indicate a growing resistance on the part of African leaders to international criminal justice in general and the role of the ICC in particular as exemplified by the two decisions taken by the AU at its February 2009 summit which could be decisive for the future of international criminal law on the continent. The AU resolved to i) examine the implications of the African Court on Human and Peoples' Rights trying international crimes (genocide, war crimes and crimes against humanity), and ii) urgently convene a meeting of the 30 African countries that have ratified the ICC's Rome Statute to discuss the Court's work in Africa.

Despite Africa's leading role in the development of the ICC and international criminal justice, including the initiation (by self-referral) of three of the Court's four current investigations, the ICC is now largely portrayed as an 'imperialist' imposition by powerful Western nations. We believe that this is a misleading and unproductive approach to the Court, and one which illustrates the urgent need to raise awareness about international criminal justice and how the ICC works throughout Africa.

We acknowledge the concerns expressed by various African leaders that Africa appears not to be treated as an equal participant in the application of international criminal justice. This is a growing perception not only in relation to the work of the ICC, but also the principle of universal jurisdiction and the notion that it is being used and abused by some Western courts at the expense of African states' sovereignty, as well as the role of the United Nations Security Council in implementing international criminal justice through its referral of the Sudan situation to the ICC Prosecutor for investigation and possible prosecution under Article 13(b) of the Rome Statute (which subsequently resulted in the ICC issuing an arrest warrant for President al-Bashir of Sudan for crimes against humanity, and war crimes).

These developments reinforce the importance of regional and domestic (African) responses to international crimes. Consistent with the doctrine of complementarity in the Rome Statute, national courts must bear the greatest responsibility for ensuring accountability for serious international crimes. To achieve this, the day-to-day capacity of such courts, and the independence of the judiciary, must be enhanced.

At the same time, the specialisation and funds required to investigate, prosecute and adjudicate serious international crime cases will also need to be developed. We are aware that the challenges in this regard are immense anywhere in the world. They are particularly acute on our continent where resources and capacity are scarce. In addition, very few African States Parties have domesticated the Rome Statute and other relevant instruments of international criminal and humanitarian law. Passing these laws at the national level would not only facilitate the prosecution of international crimes by individual states, but would also demonstrate political commitment to protecting human rights and ending impunity. This raises a more serious challenge than capacity and resources – the apparent lack of political will at national and regional level to act against alleged perpetrators or to comply with obligations under international law.

These issues have a direct bearing on the AU's decision to examine the implications of the adjudication of international crimes by the African Court on Human and Peoples' Rights. The African Court is an important continental mechanism to promote the ideals of justice, accountability and human rights. However, we recognise that the Court is currently limited in its mandate (its focus is on human rights violations of the African Charter), its judges are not specialists in international criminal law, and it has no prosecutorial or investigative powers or institutional capacity to take on the extra burden of bringing to justice perpetrators of international crimes. There is the further danger that loading this responsibility on the African Court will undermine its early progress towards acting as a dedicated regional human rights mechanism.

It is under these circumstances that an international institution like the ICC has the most to offer international criminal justice in Africa. We believe therefore that a parallel approach should be pursued: one that emphasises both national and international efforts rather than prioritising one over another. Commitment at the national and international level is essential when dealing with crimes as complex and politically charged as international crimes are.

We accept that such a parallel approach can only succeed in Africa if international criminal justice mechanisms are perceived to be legitimate. In this regard, and in the best interests of international criminal justice, we urge the 30 African States Parties to use their powerful position on the ICC's Assembly of States Parties to constructively address the concerns about the Court.

Civil society organisations in these 30 countries must contribute towards this effort by lobbying and supporting their respective governments and relevant regional institutions to take up African concerns about international criminal justice and the ICC, to domesticate the Rome Statute, and to use national laws where they exist.

We call on African States Parties as well as the signatories to the Rome Statute to:

1. Reaffirm your commitment to end impunity for serious international crimes and uphold the values of accountability, protection of human rights and the rule of law, as espoused in the AU's Constitutive Act, relevant African and international human rights instruments, and relevant obligations under your national legal and constitutional frameworks.
2. Reaffirm your commitment to uphold your international and domestic obligations stemming from your decision to ratify the Rome Statute of the ICC. States Parties that have not domesticated the provisions of the Rome Statute should pass implementing legislation as a matter of urgency.

3. Encourage African non-states parties to accede to the Rome Statute, thereby achieving universality of its application on the continent and in the world.
4. Proactively work with other African countries, regional and sub-regional organisations and civil society (including the media), to develop a stronger African voice in the global discourse on international criminal justice and the work of the ICC. In this regard, the dialogue between the AU, States Parties and the ICC should be expanded to develop common approaches to deal with concerns related to the Court's work in Africa.
5. Ensure that, with regard to the AU's call to consider the expansion of the African Court's jurisdiction to include criminal matters, any such initiative be in line with international legal and human rights standards and obligations, and recognise that substantial resources and expertise would be required.
6. Support the concurrent development of domestic, regional and international criminal justice mechanisms and capacity to respond to international crimes.
7. Use the platforms of the ICC Assembly of States Parties (ASP) and the 2010 ICC Review Conference in Uganda to make constructive recommendations to assist the ICC's work in Africa.

We call on African civil society to:

1. Undertake targeted activities to support the work of the ICC in Africa, including through constructive engagement with your respective governments, lobbying, awareness raising and capacity building. Where appropriate, these activities should be conducted with the support of other civil society organisations and groupings working on these issues.
2. Engage with relevant government officials and ICC representatives to create a platform for dialogue between governments and the Court.
3. Work with African media to ensure informed reporting on international criminal justice and the ICC as part of civil society's role in promoting accountability, preventing conflicts, and rejecting impunity on the continent. In this vein, we urge the media to assist in the wide dissemination of this statement in your respective countries and regions.
4. Ensure that victims are given a voice in the debate about international criminal justice in Africa, especially in the context of political agreements which risk undermining justice and the rights of victims, including to compensation and reparations.
5. Consider developing public responses to the meeting of African States Parties to be convened by the AU in Addis Ababa in June that demonstrate broad civil society support for ending impunity and promoting accountability for serious international crimes in Africa.

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List of participants: Cape Town, 11 May 2009

Organisations

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4. Zohra Dawood, Open Society Foundation–South Africa
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6. Max du Plessis, Institute for Security Studies & University of KwaZulu Natal
7. Malebakeng Forere, Law Society of Lesotho
8. Nicole Fritz, Southern African Litigation Centre
9. Vincent Gatera Gashabana, Rwanda Bar Association
10. Mabvuto Hara, SADC Lawyers Association
11. Charles Chernor Jalloh, Africa Law Institute
12. George Kapiamba, Association Africaine de Defense des Droits de l'Homme (ASADHO), DRC
13. Kwame Karikari, Media Foundation for West Africa
14. Tiseke Kasambala, Human Rights Watch
15. Stephen Arthur Lamony, Coalition for the International Criminal Court
16. Antoinette Louw, Institute for Security Studies
17. Meredith Lwanga, East Africa Law Society
18. Patric Mtshaulana, General Council of the Bar of South Africa
19. Godfrey Musila, Institute for Security Studies
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32. Lina Zedriga, Advocates for Public International Law, Uganda
33. Legal Assistance Centre, Namibia
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Individuals

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39. Benson Olugbuo, formerly with the Coalition for the International Criminal Court
40. Yitiha Simbeye, Open University of Tanzania