



AN EXPERT CONSULTATION IN ADVANCE OF THE PREPARATORY MEETING OF AFRICAN STATE PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT FOR THE ROME STATUTE REVIEW CONFERENCE

Conclusions and Recommendations

On 31st October and 1st November 2009 a group of twenty three experts in international and transitional justice and human rights met in Nairobi, Kenya to review the agenda of the Preparatory Meeting of African State Parties to the Rome Statute of the International Criminal Court (Rome Statute) Review Conference and prepare submissions which might assist with those deliberations. The meeting built on a previous consultation also held in Nairobi in June 2009 which prepared contributions to the previous meeting of African State parties on the Rome Statute of July 2009. *The participants were invited and conducted the deliberations in their individual capacities.* At the end of their reflections, the participating experts adopted the following conclusions, positions and recommendations for the consideration of the African States Parties to the ICC and the African Union.

1 General observations

- a) All actors should be conscious of the fact that international justice takes place within a political, socio-economic, and ideological context. The effective deployment of international justice requires supportive diplomatic, strategic, and political assets.
- b) Respect for the independence of the International Criminal Court (ICC) is essential for its effective operation. In this regard, the Rome Statute of the ICC contains sufficient checks and balances to maintain its integrity and ensure accountability of the organs of the Court, including avenues of judicial and administrative oversight.
- c) Review of the Rome Statute must not conflate the concepts and mechanisms of universal jurisdiction and the institution of the International Criminal Court (ICC) – although different perceptions about the political realities of the global context within which they operate must be acknowledged.
- d) In reviewing the operation of the ICC and the principles and mechanisms of the Rome Statute, African States should identify and promote steps necessary to ensure more effective international justice. Any response to specific instances should not distract from the objective of putting an end to impunity “for the sake of present and future generations”.
- e) The African Union (AU) has consistently affirmed its commitment to the fight against impunity in Africa. Article 4 (h) of the AU Constitutive Act obliges AU member States to ensure the existence of capable, independent and effective national accountability

- institutions. It also enjoins the AU to take steps to complement the operation of mechanisms of accountability and justice such as the ICC and regional courts and tribunals through effective cooperation and compliance. An important opportunity which can be leveraged in terms of the Rome Statute is the fact that African States constitute the largest block within the Assembly of State parties.
- f) Regional mechanisms, including the African Commission and Court on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the Courts of Justice of the regional economic communities, possess both the function and jurisdiction to respond to mass atrocities. They must be fully capacitated both in terms of resources and political commitment. In particular, the culture of non-compliance with judgments must be addressed in order to break the cycle of impunity in Africa. In this regard, the proposal to create an extended criminal jurisdiction for the African Court on Human and Peoples' Rights promotes an African exceptionalism to accountability for mass atrocities and is neither feasible nor necessary at this time.
 - g) Corporate and commercial actors in Africa have been complicit in mass atrocities. AU Member States have a responsibility to promote reform of concepts and mechanisms of accountability for mass atrocities to ensure that such entities are held accountable.

2. Duties to Victims and Victim Communities

All actors engaged in the work of international justice, including States, international institutions, non-State actors and advocates, have obligations to respect and protect the dignity and rights of victims and victim communities, witnesses and intermediaries who are the people most directly affected by mass atrocities, whose respect international justice mechanisms must earn and whose participation and support is necessary for the success of international justice. This obligation includes duties of care, provision of appropriate protection and assistance, accurate and timely information, facilitation of good faith dealings, and diligent discharge of both legal and ethical responsibilities.

3. The Addis agenda

- A. *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).*
 - i. It is vital for the credibility of international justice and the appropriate exercise of their responsibilities that all permanent members of the UN Security Council (UNSC) ratify the Rome Statute. No viable alternative has been demonstrated to the current channels for ICC referral and deferral of investigations.
 - ii. Where a regional peace and security institution has responsibilities within the framework of Chapter VIII of the UN Charter complementary to those of the UNSC with respect to decision-making concerning threats to or breaches of international peace and security under Chapter VII in the context of Articles 13 or 16 of the Rome Statute, a mechanism of sustained consultation with that regional institution should be created.
 - iii. Any request under Article 16 of the Rome Statute to the UNSC must be based on clearly articulated criteria with the onus of proof on the originator of the request. Article 16 should

- be deployed only in cases of exceptional necessity and further to a determination that on the balance of probabilities the continuation of the investigation is a greater threat to international peace and security than its suspension. In appropriate circumstances, such decisions should be narrowly restricted or targeted to a specific case rather than to a situation investigation as a whole.
- B. *Regional input in evaluating evidence and decisions to proceed with ICC prosecutions, especially in cases against senior officials;*
- i. The independence of the ICC and all its organs is paramount. Any proposal or request for input into prosecutorial decision-making by states whose officials are under investigation clearly undermines the essential independence of the court and reinforces the politicisation of the Court, the very trend the AU desires to counter. The role of the Prosecutor requires significant exercise of necessary and desirable discretion, subject to judicial oversight as provided for by the Rome Statute. Notwithstanding this, there is a need for greater clarity on how the gravity test is understood and applied.
 - ii. Regional human rights commissions, courts and tribunals are designed to address state responsibility for grave violations and mass atrocities, not individual criminal responsibility. Regional mechanisms, including the African Commission and Court on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the Courts of Justice of the regional economic communities, can support international justice through investigating and determining state responsibility for serious human rights violations and mass atrocities, and contributing to ensuring the protection of prosecutorial assets.
 - iii. Notwithstanding the acknowledged capacity of regional institutions broadly to contribute to international justice, the proposal to extend the jurisdiction of the African Court on Human and Peoples' Rights to encompass international crimes confronts insurmountable legal and practical obstacles, including an expensive re-design of the instruments and institutions of Africa's regional human rights system, the establishment of a regional system of co-operation and compliance for regional criminal prosecutions, enforcement and sentencing; and a massive commitment of regional financial and diplomatic resources on a scale that African States have so far been unwilling (and seem unable) to make to regional human rights institutions.
 - iv. If, notwithstanding the above, AU member States choose to proceed with extending the jurisdiction of the African Court on Human and Peoples' Rights, any such review should fulfil at least three clear criteria:
 - a. It must not compromise the goal and obligation of ensuring accountability for grave crimes of mass atrocity;
 - b. It must be compatible with the objects and purposes of the UN Charter and of the Constitutive Act of the African Union with respect to the obligation to ensure an end to impunity for crimes of mass atrocity; and
 - c. It has to avoid the perception or reality of creating an African exceptionalism to the universal regime of international accountability for crimes of mass atrocity.

- v. African States are for the moment best served by improving the capacities and resources of the regional human rights and judicial institutions, establishing a culture of compliance with decisions of these institutions, and enhancing the overall effectiveness and credibility of the continent's human rights system.
- C. *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.*
- i. Article 27 of the Rome Statute confirms the evolution of international law and provides that there can be no immunity from jurisdiction for international crimes for any person. A sitting Head of State can therefore be investigated, identified as criminally responsible and made the subject of an arrest warrant by an international tribunal.
 - ii. Article 98 of the Rome Statute, however, raises a potential – but timebound -- conflict, between the identification and pursuit of criminal responsibility in respect of a sitting Head of State under the Rome Statute and the law of diplomatic relations with respect to the immunities from process of a sitting Head of State. The law of diplomatic relations precludes a country from arresting a Head of State of a country whose government it recognises. This temporary conflict can be resolved, *inter alia*, by:
 - a. Waiver or removal of immunity by the institutions of the relevant State;
 - b. Creation of an explicit doctrinal exception by State Parties to the Rome Statute with respect to the immunity from process of a sitting Head of State;
 - c. Undertaking a process of de-recognition or non-recognition of the government of a sitting Head of State who is subject to an ICC arrest warrant. Immunities from process will thus no longer apply; and
 - d. Support for the exercise of popular sovereignty including, for example, through parliamentary decision or other constitutional means of removing immunity from the Head of State, and free, fair and democratic elections.
 - iii. Democratic and socio-economic justice are complements to the deployment of international justice. In this regard, support for the ratification of the African Charter on Democracy, Elections and Good Governance by African States must be stepped up and African Union and the standards of the regional economic communities (RECs) on elections upheld.
- D. *Guidelines and a code of conduct for the ICC prosecutor, particularly in his authority to commence investigations on his own initiative;*
- i. The role of the Prosecutor requires significant exercise of necessary and desirable discretion, subject to judicial oversight as provided for by the Rome Statute. The Office of the Prosecutor must remain depoliticised for the credibility of the ICC and of international justice. Mechanisms exist within the Rome Statute for ensuring accountability including professional, administrative, and judicial channels. Chambers have in several decisions demonstrated that the judicial organs of the ICC are conscientious in supervising Prosecutorial conduct.

- ii. It is important that the AU and the ICC maintain channels of communication and exchange even during times of difficult relations. In this regard, the AU ICC Cooperation Agreement and arrangements for the establishment of the ICC's AU Liaison office, should be concluded swiftly.

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