

# Managing Setbacks for the International Criminal Court in Africa

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## Abstract

The International Criminal Court (ICC) suffered two notable setbacks in Africa in 2010: the African Union's (AU) renewed call for members not to cooperate in executing ICC arrest warrants for Sudanese President al-Bashir; and the president's first visits to the territory of ICC states parties since warrants were issued in 2009 and 2010. Factors surrounding these developments suggest they do not represent the predominant view or approach to the court in Africa, where there is considerable backing for the ICC among African government officials and civil society. African ICC states parties and civil society should enhance initiatives to demonstrate the support that exists for the court, and to ensure that attacks on it are understood as limited efforts that emanate more from criticisms of the UN Security Council than of the court. Developments in 2011 reinforce these assessments.

## INTRODUCTION<sup>1</sup>

In 2010, Africa experienced two setbacks regarding ensuring justice for victims of genocide, war crimes and crimes against humanity: the African Union's

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1 This article draws heavily from a non-public briefing paper on challenges in Africa regarding the ICC drafted by the author (on file with Human Rights Watch) and portions of Human Rights Watch "Human Rights Watch memorandum for the ninth session of the International Criminal Court Assembly of States Parties" (November 2010), available at: <<http://www.hrw.org/news/2010/11/16/human-rights-watch-memorandum-ninth-session-international-criminal-court-assembly-st>> (last accessed 30 September 2011).

(AU) July summit decision that renewed a call for its members not to cooperate with the International Criminal Court (ICC) in arresting Sudanese President Omar al-Bashir, for whom the court had issued two arrest warrants; and the first visits by President al-Bashir, without arrest, to the territory of ICC states parties (Chad and Kenya) since he became subject to an ICC warrant.<sup>2</sup> These developments pose unprecedented challenges to ensuring that accountability for international crimes is not undermined in Africa, although the circumstances that surround them suggest their importance should not be overstated.

This article analyses the 2010 setbacks and offers reflections on the road ahead. It discusses key concerns with the July 2010 AU decision on the ICC and visits by President al-Bashir to the territory of ICC states parties, and assesses the significance of these setbacks given the broader landscape in which they occurred. It continues with a discussion of three areas that may merit consideration in managing setbacks for the ICC in Africa. The conclusion includes some discussion of relevant developments in 2011.

## **CONCERNS WITH THE JULY 2010 AU DECISION AND VISITS BY AL-BASHIR TO CHAD AND KENYA**

The decision that the AU adopted on the ICC at its July 2010 summit in Kampala, Uganda, raises serious concerns. Most significantly it: calls for AU member states not to cooperate in arresting President al-Bashir; rejects “for now” opening an ICC liaison office in the Ethiopian capital, Addis Ababa; and criticizes the ICC prosecutor’s conduct on the grounds he “has been making egregiously unacceptable, rude and condescending statement[s]” in the case against President al-Bashir and “other situations in Africa”.<sup>3</sup>

The call for non-cooperation in President al-Bashir’s arrest is contrary to ICC states parties’ obligations to cooperate with the ICC under the Rome Statute,

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2 The ICC opened an investigation into crimes committed in Darfur in June 2005, following a UN Security Council referral of the situation in Darfur to the court in March 2005: UN Security Council res 1593 (2005), S/RES/1593 (2005). The ICC issued its first arrest warrant for President al-Bashir in March 2009 on charges of war crimes and crimes against humanity committed in Darfur. A second warrant was issued in July 2010, adding genocide charges. For information on the ICC’s cases involving crimes committed in Darfur, see ICC “Darfur, Sudan”, available at: <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/>> (last accessed 30 September 2011).

3 The AU’s decision does not provide specific examples of statements made by the prosecutor that it viewed as problematic. See AU Assembly “Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270 (XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC): Doc.Assembly/AU/10 (XV)” in *Decisions, Declarations, Resolution* of the 15th ordinary session of the AU Assembly: Assembly/AU/Dec.296 (XV) (Kampala, July 2010) 24 at paras 5, 8 and 9, available at: <[http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_25\\_27\\_July\\_2010\\_BCP\\_ASSEMBLY\\_OF\\_THE\\_AFRICAN\\_UNION\\_Fifteenth\\_Ordinary\\_Session.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_25_27_July_2010_BCP_ASSEMBLY_OF_THE_AFRICAN_UNION_Fifteenth_Ordinary_Session.pdf)> (last accessed 30 September 2011).

the treaty that established the court.<sup>4</sup> While the substance of the call is not new (it restates a decision requesting non-cooperation that the AU Assembly made one year earlier), the reiteration of the earlier decision indicates the initial call was not an isolated event and gives it added emphasis.<sup>5</sup> Meanwhile, the rejection of a liaison office is a missed opportunity to facilitate enhanced communication between the AU and ICC, which could enable better information exchange and understanding between the two entities. Finally, comments about the prosecutor suggest a degree of disrespect for his office, if not disregard for his independence.<sup>6</sup>

In addition, President al-Bashir visited the territories of two ICC states parties. On 22 July 2010, he travelled to Chad to attend a summit of the Community of Sahel-Saharan States.<sup>7</sup> On 27 August, he travelled to Kenya to attend celebrations for the country's new constitution.<sup>8</sup> Some African officials justified the visits by citing special circumstances including, for the visit to Chad, the normalization of relations between Sudan and Chad after years of proxy war and, for the visit to Kenya, intense anxiety over stability in the region in the lead-up to the referendum on Southern Sudan's secession in January 2011.<sup>9</sup> However, the visits ran counter to Chad and Kenya's binding international treaty obligations under the Rome Statute. They have also made it more difficult to ensure that al-Bashir is held to account for his alleged role in crimes committed in Darfur, and damaged Chad and Kenya's credibility when it comes to justice issues.

## HAS AFRICA TURNED AGAINST THE ICC?

The July 2010 AU decision on the ICC, and President al-Bashir's visits to Kenya and Chad around the same time, might easily be interpreted as suggesting

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- 4 Rome Statute of the International Criminal Court (Rome Statute): UN doc A/CONF.183/9 (17 July 1998, entered into force 1 July 2002) at part 9, available at: <[http://untreaty.un.org/cod/icc/statute/english/rome\\_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf)> (last accessed 30 September 2011).
  - 5 AU Assembly "Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC) – Doc.Assembly/AU/13(XIII)" in *Decisions and Declarations* of the 13th ordinary session of the AU Assembly: Assembly/AU/Dec.245 (XIII) (Sirte, July 2009) 7 at para 10, available at: <[http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_1\\_3\\_JULY\\_2009\\_AUC\\_THIRTEENTH\\_ORDINARY\\_SESSION\\_DECISIONS\\_DECLARATIONS\\_%20MESSAGE\\_CONGRATULATIONS\\_MOTION\\_0.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf)> (last accessed 30 September 2011).
  - 6 This is not the first time the AU has raised concerns over the prosecutor's conduct, but the language is more provocative than previously. See, for example, id at para 11.
  - 7 See *The Prosecutor v Omar Hassan Ahmad Al Bashir* ICC case no ICC-02/05-01/09, "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad" (27 August 2010), available at: <<http://www.icc-cpi.int/iccdocs/doc/doc931075.pdf>> (last accessed 30 September 2011).
  - 8 Ibid.
  - 9 See, for example, "Bashir defies warrant on Chad trip" (22 July 2010) *Aljazeera*, available at: <<http://english.aljazeera.net/news/africa/2010/07/201072183438656172.html>> (last accessed 8 August 2011).

that Africa is turning, or has already turned, against the ICC, a process ignited when the ICC prosecutor first requested an arrest warrant for the Sudanese president in 2008.<sup>10</sup> Nevertheless, such an assessment would overlook several key factors, including: a false appearance of unanimity in states criticizing or disregarding the ICC; focused efforts by some African leaders to leverage the uneven application of international justice to date in order to stir opposition to the ICC; and strong, continued support for the ICC in Africa.

### **A false appearance of unanimity in states criticizing or disregarding the ICC**

The context in which the AU decision was reached suggests that its substance does not reflect the range of positions that African governments have regarding the ICC. For example, at the July 2010 AU summit's Executive Council meeting, which is attended by foreign ministers, several African ICC states parties actively sought a far more favourable text that excluded the call for non-cooperation and criticism of the prosecutor's conduct.<sup>11</sup> In addition, based on discussion among AU member heads of states, ICC states parties understood that some of the most inflammatory language concerning the prosecutor's conduct would be removed from the final version of the decision. However, the AU Commission, which prepares the final text, did not remove the language.<sup>12</sup> The commission also pressed for a provision threatening sanctions on ICC states parties that fail to heed the AU's call not to cooperate in arresting President al-Bashir.<sup>13</sup> ICC states parties fought against such language, which was ultimately not included.<sup>14</sup> In addition, some ICC states parties

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10 For a detailed discussion of backlash against the ICC in Africa following the prosecutor's request for the warrant, see C Jalloh "Regionalizing International Criminal Law?" (2009 University of Pittsburgh legal studies research paper no 2009-20, 1 July 2009) 9 *International Criminal Law Review* 445.

11 Civil society telephone, email and in-person exchanges with diplomats (July and August 2010) (details on file with the author). See also B Malone "African nations divided over Bashir genocide charge" (25 July 2010) *Reuters*, available at: <[http://uk.reuters.com/article/2010/07/25/idUKLDE6600CF\\_CH\\_2420](http://uk.reuters.com/article/2010/07/25/idUKLDE6600CF_CH_2420)> (last accessed 16 September 2010).

12 In addition, positive exchanges at the summit between ICC states parties and non-states parties are not well-reflected in the final text of the decision. See civil society telephone, email, and in-person exchanges, *ibid*.

13 Art 23 of the Constitutive Act of the AU discusses sanctions: "The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments, therefrom ... Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly": OAU doc CAB/LEG/23.15 (11 July 2000, entered into force 26 May 2001), available at <[http://www.africa-union.org/root/au/AboutAu/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm)> (last accessed 30 September 2011).

14 Civil society telephone, email, and in-person exchanges, above at note 11.

registered strong public opposition to the decision after its adoption. For example, Botswana's government stated that Botswana "cannot associate herself with any decision which calls upon her to disregard her obligations to the International Criminal Court".<sup>15</sup> Meanwhile South Africa's ruling African National Congress reaffirmed the government's position, conveyed publicly the previous year, that it would cooperate with the ICC in executing the arrest warrant for President al-Bashir.<sup>16</sup>

With regard to President al-Bashir's visits to Chad and Kenya, it is notable that support within the Kenyan government for his trip was far from uniform. Key Kenyan government officials, including the prime minister, indicated they had not been consulted about the visit, which the prime minister characterized as "wrong" and which had been arranged with considerable secrecy.<sup>17</sup> Parliamentarians also criticized the decision and raised the matter in Parliament,<sup>18</sup> while the visit triggered outrage and disappointment among Kenyan civil society, media and the general public.<sup>19</sup> Even more significantly, following a media storm, the Kenyan government postponed an October 2010

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- 15 Botswana Press Agency "Botswana stands by the International Criminal Court" (28 July 2010), available at: <<http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court/>> (last accessed 22 September 2010).
- 16 S Kwinika "Sudan President Bashir, accused of war crimes, would be arrested in South Africa, says ANC" (28 July 2010) *The Christian Science Monitor*, available at: <<http://www.csmonitor.com/World/Africa/Africa-Monitor/2010/0728/Sudan-President-Bashir-accused-of-war-crimes-would-be-arrested-in-South-Africa-says-ANC>> (last accessed 16 September 2010); South African Government Information "Notes following the briefing of Department of International Relations and Co-operation's Director-General, Ayanda Ntsaluba" (31 July 2009), available at: <<http://www.info.gov.za/speeches/2009/09073110451001.htm>> (last accessed 23 September 2010).
- 17 P Opiyo "Raila slams Bashir invitation" (30 August 2010) *The Standard*, available at: <<http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000017133&cid=4>> (last accessed 16 September 2010); S Otieno and I Lucheli "How Bashir was sneaked into Kenya" (28 August 2010) *The Standard*, available at: <<http://www.standardmedia.co.ke/archives/news/InsidePage.php?id=2000017088&cid=4&>> (last accessed 2 September 2010).
- 18 P Clotey "Kenyan lawmaker to demand answers about Sudan leader's visit" (30 August 2010) *Voice of America*, available at: <<http://www.voanews.com/english/news/africa/Kenyan-Lawmaker-to-Demand-Answers-about-Sudan-Leaders-Visit-101842203.html>> (last accessed 16 September 2010); See P Leftie and K Kelly "Storm over al-Bashir's surprise visit" (28 August 2010) *Daily Nation*, available at: <<http://www.nation.co.ke/Kenya%20Referendum/Storm%20over%20al%20Bashir%20/-/926046/998960/-/69nwjj/-/index.html>> (last accessed 23 September 2010).
- 19 See, for example, C Muthoga "Bashir's furtive visit to Kenya was a display of incompetent foreign policy" (September 2010) *The East African* (on file with the author); Kenyans for Peace Truth and Justice "President Bashir's presence at promulgation ceremony a show of impunity by the executive" (27 August 2010), available at: <[http://www.iccnw.org/documents/KPTJ\\_statement\\_on\\_bashir1.pdf](http://www.iccnw.org/documents/KPTJ_statement_on_bashir1.pdf)> (last accessed 30 September 2011); "Government erred in inviting Al-Bashir" (29 August 2010) *Daily Nation*, available at: <<http://www.nation.co.ke/oped/Editorial/Government%20erred%20in%20inviting%20Al%20Bashir%20/-/440804/999272/-/112tqj/-/index.html>> (last accessed 7 October 2010); comments posted to W Menya "Bashir surprise guest in Kenya" (27 August 2010) *Daily Nation*, available at: <<http://www.nation.co.ke/News/Bashir%20surprise%20>>

meeting of the Intergovernmental Authority on Development, for which President al-Bashir had planned to return to Kenya; the meeting was ultimately moved to Ethiopia, which is not a party to the ICC.<sup>20</sup> Civil society groups based in Kenya and several other African states, including Uganda, South Africa and the Democratic Republic of Congo, had pressed key Kenyan officials to ensure that President al-Bashir would be arrested if he re-entered the country.<sup>21</sup>

### **Targeted efforts by some African leaders to paint the ICC as an anti-African institution**

A small group of African leaders, primarily from north African states that are not ICC states parties, have meanwhile actively sought to exploit unevenness in the application of international justice to present the ICC as a new form of imperialism that should be opposed.<sup>22</sup> AU officials have played a prominent role in this effort, likely reflecting, at least in part, the disproportionate influence within the AU of north African states that are not ICC states parties, including Libya and Algeria.

The characterization of the ICC as unfairly targeting Africans is not supported by the facts. While all situations under ICC investigation to date are in Africa, the majority of these came about as a result of voluntary referrals by the governments of states where the crimes were committed (Democratic Republic of Congo, northern Uganda and Central African Republic). Two

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20guest%20in%20Kenya/-/1056/998008/-/w03i5sz/-/index.html> (last accessed 7 October 2010).

- 20 T-A Tekle "Sudan's Bashir arrives in Ethiopia for IGAD summit" (23 November 2010) *Sudan Tribune*, available at: <<http://www.sudantribune.com/Sudan-s-Bashir-arrives-in-Ethiopia,37022>> (last accessed 5 August 2011).
- 21 See "Arrest Bashir, rights group tells Kenya" (22 October 2010) *The East African*, available at: <<http://www.theeastafrican.co.ke/news/-/2558/1038056/-/ongh16z/-/>> (last accessed 8 November 2010); A Ryu "Human rights groups to Kenya: Arrest al-Bashir" (22 October 2010) *Voice of America News*, available at: <<http://www.voanews.com/english/news/africa/east/Human-Rights-Groups-to-Kenya-Arrest-al-Bashir-105533033.html>> (last accessed 8 November 2010); Human Rights Watch "Civil society concerned over possible return visit by President Omar al-Bashir" (letter to President Mwai Kibaki, Kenya, 20 October 2010), available at: <<http://www.hrw.org/node/93796>> (last accessed 30 September 2011); letter to President Mwai Kibaki signed by the Kenyan Section of the International Commission of Jurists (19 October 2010), available at: <<http://www.icj-kenya.org/dmdocuments/letters/Letter%20to%20President%20Kibaki%20final.pdf>> (last accessed 30 September 2011).
- 22 See, for example: "AU chief chides ICC prosecutor" (23 July 2010) *News24.com*, available at: <<http://www.news24.com/Africa/News/AU-chief-chides-ICC-prosecutor-20100723>> (last accessed 28 September 2010); F Rabkin "Africa: World court faces charge of 'judicial imperialism'" (23 July 2010) *AllAfrica.com*, available at: <<http://allafrica.com/stories/201007230728.html>> (last accessed 28 September 2010); "Gaddafi elected AU head, union backs Sudan in critique of ICC" (2 February 2009) *Radio France Internationale*, available at: <[http://www.rfi.fr/actuen/articles/110/article\\_2786.asp](http://www.rfi.fr/actuen/articles/110/article_2786.asp)> (last accessed 28 September 2010).

other situations were referred to the ICC by the UN Security Council (Darfur and Libya). The prosecutor has acted on his own initiative to open an investigation in only two situations (Kenya and Côte d'Ivoire).<sup>23</sup> Nevertheless, the claim has resonated strongly among some African officials and in public debate. This reaction is perhaps unsurprising, as it draws from genuine historical geopolitical power imbalances and the legacy of injustices committed during the colonial period for which there was no accountability.

It is important to acknowledge that, to date, international justice has not been evenly applied, with international courts less likely to prosecute leaders of powerful states, and those they protect, than their counterparts from less powerful states when they are associated with serious crimes.<sup>24</sup> This is a major issue that should be addressed, but in a manner that extends, rather than curtails, accountability, so that victims have recourse to justice, no matter where atrocities are committed.<sup>25</sup>

### **Strong, continued support for the ICC in Africa**

Despite intensified attacks on the ICC in Africa, the court nevertheless continues to enjoy strong support across the continent. It is well known that African governments were actively involved in establishing the ICC.<sup>26</sup> More significantly, most African states are parties to the court and African states are continuing to ratify the treaty. In June 2011, Tunisia acceded to the treaty, bringing the number of African states that have joined the court to 32 out of 54 states in Africa.

In addition, at the ICC's first review conference in May and June 2010 in Kampala, Uganda, African governments were clear that they continue to

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23 See Human Rights Watch "ICC: Prosecutor to open an investigation in Libya" (questions and answers document, 3 March 2011) at Q 10, available at: <<http://www.hrw.org/news/2011/03/03/icc-prosecutor-open-investigation-libya>> (last accessed 30 September 2011); Coalition for the ICC "Africa and the International Criminal Court" (fact sheet), available at: <[http://www.iccnw.org/documents/Africa\\_and\\_the\\_ICC.pdf](http://www.iccnw.org/documents/Africa_and_the_ICC.pdf)> (last accessed 7 October 2010); International Center for Transitional Justice "Protecting the mission and mandate of the International Criminal Court" (briefing paper, 3–6 November 2009), available at: <[http://www.coalitionfortheicc.org/documents/Briefing\\_AU\\_ICC\\_Review.pdf](http://www.coalitionfortheicc.org/documents/Briefing_AU_ICC_Review.pdf)> (last accessed 30 September 2011). A decision by the ICC's judges on the prosecutor's request regarding Côte d'Ivoire was pending at the time of writing.

24 Much of the problem relates to the UN Security Council's role in establishing international war crimes tribunals, and the ability of its permanent members to quash accountability efforts they do not support. The ICC was created by a multilateral treaty rather than a Security Council resolution, but there are other limits to its jurisdiction. Some of the worst crimes perpetrated since 2002 have been committed in states that are not parties to the court and are thus outside the court's jurisdiction, including Sri Lanka, Burma and Iraq.

25 Efforts should include pressing for the investigation of relevant crimes wherever they are committed, and broader ratification of the Rome Statute.

26 See Coalition for the ICC "Africa and the International Criminal Court", above at note 23.

support the court's work.<sup>27</sup> African ICC states parties, which actively participated and were represented by high-level officials, made many positive statements regarding the ICC and the need to cooperate with the court.<sup>28</sup> African states also submitted concrete pledges of targeted assistance to support the court.<sup>29</sup> Furthermore, African ICC states parties continued to work for an ICC liaison office in Addis Ababa, despite AU resistance.<sup>30</sup>

Meanwhile, African civil society has firmly and consistently raised its voice in response to attacks on the court. More than 160 organizations based in more than 30 African countries have spoken out about the ICC's importance for Africa, and the need for the court to receive adequate cooperation from states in response to the AU call for non-cooperation. Civil society organizations have repeatedly collaborated on letters, analyses and meetings with officials of African ICC states parties to convey the need for strong African government support for the ICC.<sup>31</sup>

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27 This conference was organized for the ICC states parties to consider amendments to the statute. See Rome Statute, art 123.

28 For example, the Tanzanian president said, "[i]t is imperative that States Parties ... fully support the Court to bring justice to ... victims", and the Central African Republic justice minister indicated his government, "seizes the opportunity ... to reiterate ... support for the International Criminal Court and faith in its mission". The Nigerian attorney general and justice minister pledged that Nigeria would "do everything possible to ensure full implementation of the Statute in Nigeria", and the Namibian justice minister indicated that Namibia "fully supports the Court's work in promoting cooperation with the ICC". In each case, see ICC "General debate: Review conference 31 May – 1 June 2010", translation from French of Central African Republic statement by Human Rights Watch, available at: <[http://www.icc-cpi.int/Menu/ASP/ReviewConference/GENERAL+DEBATE+\\_+Review+Conference.htm](http://www.icc-cpi.int/Menu/ASP/ReviewConference/GENERAL+DEBATE+_+Review+Conference.htm)> (last accessed 10 October 2011).

29 See ICC "Review conference of the Rome Statute: Kampala, 31 May – 11 June 2010": RC-9-ENG-15072010 (15 July 2010), available at: <<http://www.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFE-BE56-903F2062B797/0/RC9ENGFRASPA.pdf>> (last accessed 30 September 2011). In addition, several African states appear to be involved in current efforts to develop domestic legislation to implement the Rome Statute.

30 AU "Report of the meeting of African states parties to the Rome Statute of the International Criminal Court" (Addis Ababa, 8–9 June 2009): MinICC/Rpt at para 15(v) (on file with the author); letter from the Kenyan attorney general to the AU Commission chairperson (3 June 2010), available at: <[http://www.coalitionfortheicc.org/documents/AULO-African\\_SPs\\_Letter.pdf](http://www.coalitionfortheicc.org/documents/AULO-African_SPs_Letter.pdf)> (last accessed 30 September 2011).

31 See, for example, Kenyan section of the International Commission of Jurists "African civil society urges African states parties to the Rome Statute to reaffirm their commitment" (30 July 2009), available at: <[http://www.icj-kenya.org/index.php?option=com\\_content&view=article&id=267:african-civil-society-urges-african-states-parties-to-the-rome-statute-to-reaffirm-their-comm](http://www.icj-kenya.org/index.php?option=com_content&view=article&id=267:african-civil-society-urges-african-states-parties-to-the-rome-statute-to-reaffirm-their-comm)> (last accessed 10 October 2011); Human Rights Watch "Civil society declaration on Africa and the review conference of the Rome Statute of the International Criminal Court" (news release, 24 May 2010), available at: <<http://www.hrw.org/node/90620>> (last accessed 30 September 2011); International Center for Transitional Justice "Protecting the mission and mandate of the ICC", above at note 23.



## CHARTING A COURSE FORWARD AMID INTENSIFIED CHALLENGES

The July 2010 AU summit decision and President al-Bashir's visits to Chad and Kenya intensified existing challenges to advancing justice for serious crimes that violate international law. There are no easy solutions to these obstacles, but three areas merit special consideration: providing greater attention to the role of the UN Security Council in concerns that the AU has regarding the ICC; ensuring states parties have more accurate information concerning their obligations to arrest ICC suspects in their territories; and promoting continued and intensified shows of support to the ICC by states parties and civil society.

### Greater attention to the role of the Security Council in AU concerns regarding the ICC

The AU premised its call for its member states not to cooperate in the arrest of President al-Bashir on the grounds that the UN Security Council ignored its July 2008 request to defer the case against him.<sup>32</sup> Even among officials who strongly support the ICC, concern has mounted that the Security Council showed disrespect for the AU by failing to respond either positively or negatively to its deferral request.<sup>33</sup>

More attention to the reasoning underlying the AU call for non-cooperation with the ICC could be valuable in promoting a more accurate portrayal of African views on the ICC. First, such attention would underscore that much of the AU's expressed concern vis-à-vis the ICC relates to Security Council inaction, and not the court itself. Secondly, it could help show that the Security Council has not in fact ignored the AU's deferral request, although it has not formally granted or rejected it. Specifically, ten days after the AU Peace and Security Council (PSC) first called for a deferral, the UN Security Council acknowledged the request in Security Council resolution 1828, adopted on 31 July 2008.<sup>34</sup> The request was also discussed in a public meeting of the

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32 Specifically, the July 2009 AU decision on the ICC states that the AU “[d]eeply regrets that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir ... has neither been heard nor acted upon ... *Decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan*”: AU Assembly “Decision on the meeting of African States Parties to the Rome Statute”, above at note 5 (emphasis added). See also AU Assembly “Decision on the progress report of the Commission”, above at note 3 at paras 4 and 5; AU Peace and Security Council “Communiqué of the 142nd meeting of the Peace and Security Council”: PSC/MIN/Comm (CXLII) (Addis Ababa, 21 July 2008), available at: <<http://www.africa-union.org/root/ua/actualites/2008/juillet/psc/142-communique-eng.pdf>> (last accessed 30 September 2011).

33 AU “Report of the meeting of African states parties”, above at note 30, at para 18 (R6).

34 UN Security Council res 1828 (2008): S/RES/1828 (2008) at preambular para: “*Taking note of the African Union (AU) communiqué of the 142nd Peace and Security Council (PSC)*

Security Council on the resolution, during which a number of Security Council members expressed views on a deferral and the fact that the council had not granted a deferral.<sup>35</sup> The comments that states expressed in the July 31 meeting make clear the request was also considered in other council discussions.<sup>36</sup>

Finally, the council's lack of formal response does not support the conclusion that it has ignored the issue: council members are unlikely to issue a formal response if there is no consensus between them. The members are usually unwilling to table a resolution that is likely to be vetoed, or that cannot garner enough support to be adopted. Meanwhile, other paths for council action, such as presidential or press statements, require consensus. Council members also tend to avoid drawing attention to issues where consensus is lacking as it highlights Security Council impotence to act.

### **Ensuring states parties uphold their obligations to arrest ICC suspects in their territories**

In the face of possible further attempts by President al-Bashir to visit ICC states parties' territories, states parties should arrest the president if he enters their territory or otherwise avoid disregarding their obligations under the Rome Statute, notably by barring him entry. ICC states parties have clear obligations under the Rome Statute to cooperate with the ICC in executing warrants, and arrests are critical to the ICC's ability to function, since suspects must be in ICC custody to be prosecuted.

In this regard, two justifications relating to visits by President al-Bashir to the territories of ICC states parties merit scrutiny. The first is the suggestion, which has gained traction since the July 2010 AU summit, that AU calls for non-cooperation in arresting President al-Bashir may take precedence over ICC treaty obligations to cooperate with the court in executing his arrest warrants.<sup>37</sup> Various legal arguments involving further analysis could be developed

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Meeting dated 21 July (S/2008/481, annex), *having in mind* concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and *taking note* of their intention to consider these matters further" (emphasis original).

35 In particular, the Russian government indicated that a deferral was not possible at the time "as a result of resistance by a number of Security Council members". The Libyan government similarly stated, "[d]espite all the reasons that we put forward to justify our proposed amendments to the draft resolution [in favour of deferral], we did not receive the hoped-for response from certain Council members": UN Security Council 5947th meeting, S/PV.5947 (31 July 2008).

36 There are indications that the council discussed the deferral request informally on other occasions, including in a meeting with AU officials during a Security Council visit to Addis Ababa in May 2009: Human Rights Watch email exchanges with Security Council report analyst (16 September and 7 October 2010) (on file with the author).

37 See Kenyan Ministry of Foreign Affairs "Kenya's response to the decision of the pre-trial chamber informing the UN Security Council and the Assembly of States Parties to the

to support the opposite conclusion.<sup>38</sup> At the most basic level, however, the Rome Statute is a multilateral treaty that contains binding international obligations, including cooperation in arrest of suspects, which states assume when they become parties. Thus, irrespective of any legal conclusion as to the weight of the AU decision, a visit by President al-Bashir raises the prospect that ICC states parties will breach their obligations as parties to the court. Given their obligations under the Rome Statute, states parties should arrest the president if he enters their territory, but at a minimum should prevent his visits. Notably, this is consistent with the July 2010 AU decision, which requests that states balance their ICC and AU obligations.<sup>39</sup>

Second is the argument of governments that it is necessary for states to allow President al-Bashir to visit in order to promote stability.<sup>40</sup> It is understandable that neighbouring states have concerns about regional stability. But it remains incumbent upon states dedicated to justice for genocide, war crimes, and crimes against humanity to address these concerns in ways that do not undermine accountability.<sup>41</sup> Aside from the obligations that ICC states parties have under international law, and the inherent value of holding perpetrators of crimes to account, it is widely recognized that justice is critical to long-term stability. Disregard for ICC warrants risks undermining the court's

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Rome Statute about the presence of President Omar Hassan al-Bashir of the Sudan in the territory of the republic of Kenya" (aide memoire attached to letter from Thuita Mwangi, permanent secretary in the Kenyan government, to all heads of mission and heads of division concerning government statement on the presence of President Omar al-Bashir, 29 August 2010) at para 4 (on file with the author); AU "Press release on the decision of the pre-trial chamber of the ICC informing the UN Security Council and the Assembly of the States Parties to the Rome Statute about the presence of President Omar Hassan al-Bashir of the Sudan in the territories of the Republic of Chad and the Republic of Kenya" (press release, 29 August 2010), available at: <<http://appablog.wordpress.com/2010/08/29/african-union-commission-press-release-on-the-decision-of-the-pre-trial-chamber-of-the-icc-informing-the-un-security-council-and-the-assembly-of-the-state-parties-to-the-rome-statute-about-the-prese/>> (last accessed 2 June 2011).

- 38 These arguments include that obligations related to a decision of a regional organization do not trump those that flow from a multilateral treaty, and that concern on the part of ICC states parties over implementing their obligation to cooperate with the court is not a basis for disregarding arrest warrants, but may be raised directly with the ICC consistent with art 97 of the court's statute.
- 39 AU Assembly "Decision on the progress report of the Commission", above at note 3 at para 6.
- 40 See Kenyan Ministry of Foreign Affairs "Kenya's response to the decision of the pre-trial chamber", above at note 37; "Kenya: Bashir visit 'in our interest'" (29 August 2010) *News24.com*, available at: <<http://www.news24.com/Africa/News/Kenya-Bashir-visit-in-our-interest-20100829>> (last accessed 23 September 2010); "Kenya should 'clarify ICC position'" (29 August 2010) *News24.com*, available at: <<http://www.news24.com/Africa/News/Kenya-should-clarify-ICC-position-20100829>> (last accessed 15 October 2010).
- 41 See Human Rights Watch "Selling justice short: Why accountability matters for peace" (July 2009), available at: <<http://www.hrw.org/node/84264/>> (last accessed 30 September 2011).

ability to function effectively in ensuring that perpetrators are held to account in the future. Moreover, experience shows that anticipated negative consequences of insisting that alleged perpetrators face justice often do not materialize.<sup>42</sup> For both of these reasons, disregarding the warrants is contrary to both international legal obligations and sound policy.

### **Continued efforts by states parties and civil society to support the ICC**

ICC states parties have undertaken important efforts to support the ICC at AU meetings, and made clear that suspected war criminals are not welcome in their territories. These efforts, along with clear, regular affirmations of support in domestic, regional and international fora, are all the more important in the wake of the July 2010 AU decision and the visits by President al-Bashir to Chad and Kenya.<sup>43</sup>

In addition, more domestic legislation is needed in Africa to implement the Rome Statute, which makes genocide, war crimes and crimes against humanity criminal offences under domestic law, and provides for cooperation with the ICC. While ICC states parties must uphold their Rome Statute obligations regardless of implementing legislation, such legislation can enhance the capacity of states to do so.<sup>44</sup> Available information suggests that only six states in Africa (Burkina Faso, Central African Republic, Kenya, Senegal, South Africa and Uganda) have enacted comprehensive ICC implementing legislation to date.<sup>45</sup>

More active participation by African ICC states parties in sessions of the ICC Assembly of States Parties (ASP) is also important. The ASP provides management oversight of the court's administration and comprises representatives

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42 Arrest warrants issued for leaders in the former Yugoslavia, for example, did not impede the attainment of a peace agreement to end conflict in the Balkans. Similarly, an arrest warrant issued for former Liberian president, Charles Taylor, for crimes committed in Sierra Leone did not obstruct a peace agreement to end conflict in Liberia. In both situations, the marginalization of the suspects actually seemed to prove helpful in advancing negotiations. In another example, a feared "climate of instability", that would lead to the unravelling of the democratic transition in Chile due to proceedings initiated against Augusto Pinochet, did not occur. See *id* at 3–4, 18–27 and 109–12.

43 Principled criticism, such as regarding the need for a more equitable application of international justice, is also valuable, especially when it is framed by an overarching dedication to the ICC's mission and cooperation with the court.

44 Notably, South Africa relied heavily on such domestic implementing legislation when it explained that President al-Bashir would be arrested should he enter the country, despite the AU's call for non-cooperation in his arrest. See South African Government Information "Notes following the briefing", above at note 16.

45 Other states have passed legislation implementing some aspects of the Rome Statute, and draft implementing legislation is pending in others. For greater (though not necessarily fully updated) information on the extent of implementing legislation in ICC states parties, see Coalition for the ICC "Full chart on the status of ratification and implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)", available at: <<http://www.coalitionfortheicc.org/?mod=download&doc=12199>> (last accessed 8 November 2010).

of each state party.<sup>46</sup> As such, it is an important forum for states parties to engage on the ICC, and can contribute critically to ensuring that the ICC effectively advances its mission through principled scrutiny of the court's work. However, it can only do so if it operates in an active, engaged way. To date, African ICC state party attendance and participation at ASP sessions has been variable.

Finally, African civil society can provide relevant input for African ICC states parties in addressing unjust criticism of the ICC in Africa and show ongoing support for the court. Interaction between civil society and states parties should be encouraged, and further coordination between civil society groups based in various states across Africa could help to promote common views on the need for African ICC states parties to continue supporting the ICC and cooperate with the court.

## CONCLUSION

The July 2010 AU decision on the ICC, and President al-Bashir's first visits to ICC states parties in July and August 2010, created a new level of strain in the ICC's relationship with Africa. However, the circumstances in which they occurred suggest they should not obscure that strong backing for the court exists within the continent.

These dynamics continued in 2011. The AU summits in January and June/July 2011 resulted in decisions that again called for non-cooperation with the court.<sup>47</sup> In addition, in April 2011, Omar al-Bashir travelled to the territory of a third ICC state party, Djibouti.<sup>48</sup> At the same time, sentiment in Africa regarding the ICC remained diverse, and governments and civil society across the continent continued to demonstrate strong support for the court.<sup>49</sup>

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46 For more detailed discussion of the role of the ASP, see: Rome Statute, art 112; Human Rights Watch "Courting history: The landmark International Criminal Court's first years" (July 2008) at 211 – 14, available at: <<http://www.hrw.org/reports/2008/icc0708>> (last accessed 30 September 2011).

47 AU Assembly "Decision on the implementation of the decisions on the International Criminal Court (ICC)": Assembly/AU/Dec.334 (XVI) (Addis Ababa, 31 January 2011), available at: <[http://au.int/en/sites/default/files/ASSEMBLY\\_EN\\_30\\_31\\_JANUARY\\_2011\\_AUC\\_ASSEMBLY\\_AFRICA.pdf](http://au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf)> at 2 (last accessed 10 October 2011); AU Assembly "Decision on the implementation of the Assembly decisions on the International Criminal Court - Doc. EX.CL/670(XIX)" in *Decisions, Declarations and Resolution of the 17th ordinary session of the AU Assembly*: Assembly/AU/Dec.366 (XVII) (Malabo, July 2011) 9, available at: <[http://www.au.int/en/sites/default/files/Assembly\\_AU\\_Dec\\_363-390\\_\(XVII\)\\_E.pdf](http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_(XVII)_E.pdf)> (last accessed 30 September 2011).

48 "Djibouti will not honor its Rome Statute obligations, invites Sudan's Bashir" (5 April 2009) *Sudan Tribune*, available at: <<http://www.sudantribune.com/Djibouti-will-not-honor-its-Rome,30777>> (last accessed 10 October 2011).

49 See, for example, Lawyers for Human Rights "Observations and recommendations on the International Criminal Court and the African Union in advance of the 17th African Union Summit (30 June – 1 July)" (press release, 21 June 2011), available at: <<http://www.lhr.org.za/news/2011/observations-and-recommendations-international-criminal-court-and>

States and civil society can play a vital role in ensuring setbacks for the ICC in Africa are not perceived as Africa having turned against the court. They also can work to ensure the court is able to function as effectively as possible to promote accountability for the world's worst crimes, such as by adopting legislation to implement the Rome Statute domestically. These efforts are crucial, particularly since attacks on the court from some quarters in Africa seem unlikely to dissipate in the near term.

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african-union-advance-17> (last accessed 30 September 2011); "Botswana breaks ranks with AU over Kadhafi warrant" (6 July 2011) *The Times* (Johannesburg), available at: <<http://www.timeslive.co.za/africa/2011/07/06/botswana-breaks-ranks-with-au-over-kadhafi-warrant>> (last accessed 29 July 2011).