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Open letter to the African Union Peace and Security Council

Your Excellency,

Further to our letter to President Jakaya Kikwete on 11 August in his capacity as the Chairperson of the African Union (AU), I am writing on behalf of Amnesty International, in advance of the African Union Peace and Security Council (AU PSC) meeting in September in New York, to urge you to use your position and leadership of the Peace and Security Council to firmly oppose calls for the United Nations Security Council (UN SC) to defer any aspect of the International Criminal Court's (ICC) work to end impunity for the horrific human rights violations that have been and continue to be committed in the Darfur region of Sudan.

Amnesty International remains gravely concerned about the content of the AU PSC's Communique of its 142nd meeting transmitted to the UN SC on 21 July which requests:

“The United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC, taking into account the need to ensure that the ongoing peace efforts are not jeopardized, as well as the fact that, in the current circumstances, a prosecution may not be in the interests of victims and justice.”

It is not clear from the text whether the request is for a deferral of any legal action against President Omar al Bashir or whether the deferral requested would extend to other cases of crimes in Darfur being prosecuted by the ICC or whether it relates to all ICC activities in Darfur.

Amnesty International is opposed to the implementation of Article 16 in all situations on the basis that any Security Council decision to defer the ICC's investigation and/or prosecution of any cases in Darfur would constitute political interference with the justice process and could result in impunity. It would also undermine any deterrent impact that the Court may have against future crimes. Below, our organization sets out a number of specific concerns with the AU PSC's request.

Firstly, we are concerned that the request was issued as a political response to the Prosecutor's announcement on 14 July that he has applied to the Pre-Trial Chamber to issue an arrest warrant for Sudanese President Omar El Bashir on charges of genocide, crimes against humanity and war crimes. The request was issued despite the fact that the Pre-Trial Chamber has yet to take any decision on the Prosecutor's application. By reiterating in paragraph 3 of the Communique the “AU's concern with the misuse of indictments against African leaders,” the AU PSC is acting contrary to its longstanding support for the ICC. Most African governments rejected immunity for heads of state when they participated in the drafting of the Rome Statute (including Article 27, which expressly rejects such immunities) and when

most governments in the continent ratified the Rome Statute. It is disturbing that the AU PSC would make any such reference implying “misuse of indictments” when no arrest warrant has been issued. Strict safeguards have been incorporated into the Rome Statute to ensure that there can be no politically motivated prosecutions, including Article 58 (1) (a) of the Rome Statute which provides that the Pre-Trial Chamber will only issue a warrant of arrest “if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) [t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; [...].”

Secondly, the AU PSC request is silent on the duration of any deferral which demonstrates that it has no exit strategy for the proposed deferral process (as a deferral can only last for 12 months) and implies that the AU PSC may support annual renewals of the deferral, which would result in impunity. In fact, there can be no effective exit strategy to a deferral, as once the initial deferral is made, the Security Council would be open to permanent blackmail by the government of Sudan – which based on the initial deferral - could attempt to expel UNAMID and resume hostilities if the Security Council indicated that it would not issue a renewal.

Thirdly, we are concerned about the justification of the request that the ICC’s work would jeopardize ongoing peace efforts and would not be in the interests of victims. The conclusion ignores recent examples of peace negotiations which have been concluded in situations where international and internationalized criminal courts have been investigating and prosecuting cases. The Dayton Peace Agreement was reached despite the activities of the International Criminal Tribunal for the former Yugoslavia. A solution to the Liberian conflict was reached despite an arrest warrant against Charles Taylor by the Special Court for Sierra Leone. Political negotiations continue in Uganda and the International Criminal Court’s arrest warrants against senior LRA leaders is playing a vital role in ensuring that impunity is not an option.

The assumption that the ICC’s work to ensure justice in Darfur will undermine peace is flawed. Peace of course requires more than negotiating an agreement. Meaningful peace and reconciliation also require that horrific human rights violations are addressed, that victims receive justice, truth and reparations and that effective measures are implemented to ensure that the crimes will not be repeated. In Darfur there is currently no justice, crimes continue to be committed by all sides with no deterrent and the suffering of victims is ignored. The ICC can play a vital role to address the failings of the national authorities and to act as a catalyst for national reform. In doing so, it complements rather than conflicts with peace. While there may be efforts by the national government to threaten peace and security, as President Bashir has done by threatening to require UNAMID to leave Darfur if an arrest warrant is issued against him, it is the responsibility of the international community, and in particular the governments closely linked to them to send a strong message that such threats will not be tolerated.

Fourthly, the request is not consistent with the AU’s commitments to oppose impunity and goes against many years of supporting the ICC. Among the objectives of the AU, which are enshrined in Article 3 of the Constitutive Act, is to “promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law.” The Constitutive Act also makes respect for the sanctity of human life and condemnation and rejection of impunity two of its operational principles. In its Communique to the UN SC, the AU PSC recognizes and reiterates the AU’s “unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with its Constitutive Act, and, in this respect,” and it condemned “once again the gross violations of human rights in Darfur.” This position is consistent with one of the PSC’s objectives articulated in its establishing Protocol, which is to “promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts”.

African countries supported the establishment of the ICC, the majority of AU member states have ratified the Rome Statute, and the AU's own institution, the African Commission on Human and Peoples' Rights has called on the AU and its members to fully support the work of the ICC. At its 24th Ordinary Session in 1998 in Banjul, The Gambia, the African Commission among others asked AU member states "to ratify the Rome Statute and to take all necessary legislative and administrative steps to bring national laws and policies into conformity with the statute." Furthermore, the three state referrals of situations to the ICC Prosecutor and the one declaration under article 12(3) have all been by African States.

Amnesty International believes that the AU's failure to fully support the ICC's initiative on Darfur is sending a message that the organization cannot enforce its own principles and commitments, including those contained in the AU Constitutive Act and the African Charter on Human and Peoples' Rights, and the Protocol Relating to the Establishment of the Peace and Security Council.

Amnesty International, therefore, urges the AU PSC to reconsider its call for a deferral in the Darfur situation and to show political will and back up its oft-expressed commitment to fight impunity for genocide, crimes against humanity, war crimes by actively supporting and facilitating the ICC's work in Darfur. We are also urging the AU PSC to put ending impunity for the worst possible human rights violations in Darfur at the heart of its mandates to bring to an end the serious human rights violations being committed in the region.

Amnesty International believes that the ICC's work presents the AU Peace and Security Council with a unique opportunity to demonstrate its commitment to addressing impunity for serious crimes under international law, and to rebuild confidence in the credibility of the AU as an organization committed to the protection of human rights. It is only by effectively and decisively tackling impunity for Darfur that African governments can show that the AU can make a real difference for the human rights of African children, men and women.

I look forward to a strong and decisive message and consistent actions by the PSC making it clear that the AU will not tolerate or allow impunity for the serious human rights violations committed in Darfur.

Yours sincerely,

Irene Khan
Secretary General