

# CONFERENCE ON THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA

Convening of stakeholders by the African Network on International Criminal Justice

Date: 27 - 28 November, 2019

Venue: Golden Tulip Hotel,  
Addis Ababa, Ethiopia



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International Criminal  
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Le Réseau Africain  
Sur La Justice Pénale  
Internationale

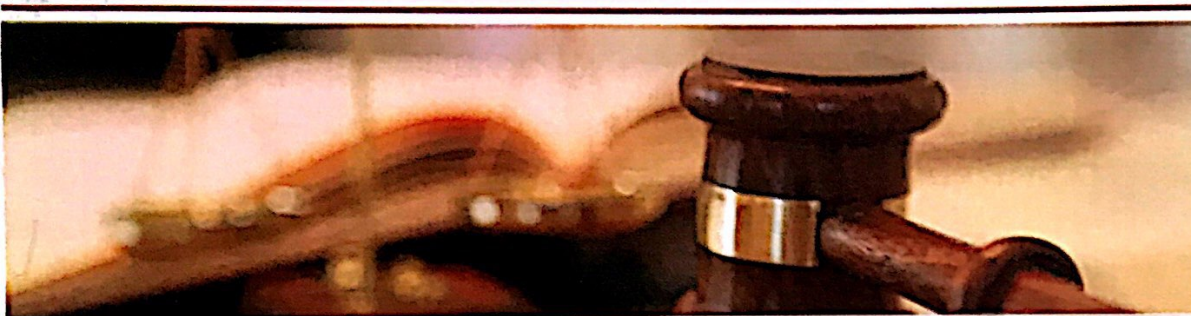


11B, Christ Avenue, Off Admiralty Road,  
Lekki Phase 1, Lagos Nigeria. Tel: +234 1 2914123  
[www.africannetworkforicj.org](http://www.africannetworkforicj.org),  
Email: [info@afriannetworkforicj.org](mailto:info@afriannetworkforicj.org)



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## CONCEPT NOTE

### SUMMARY

In the last few years, the African Union has successfully introduced wide-ranging reforms to improve the framework for justice accountability and reducing impunity gaps in the continent. They include the robust AU Transitional Justice Policy (2019), and the Malabo Protocol (2014), among others.

This proposed conference aims to bring stakeholders together to interact on how to strengthen and improve delivery of justice in Africa, promote desired redress to victims and operationalize all aspects of AU's justice policies and statutes.

### BACKGROUND

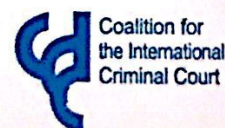
Despite far-reaching democratic reforms in many parts of Africa in the last two decades, and commitments of the African Union and its institutions to drive economic development and the rule of law in the continent, there are still widespread violations of human rights and humanitarian laws, and democratic challenges in many parts of the region.

They range from extrajudicial killings, unconstitutional change of government, electoral violence as a result of recalcitrant electoral losers, arbitrary extension of tenure, massive economic crimes such as corruption by public officials and private business, exploitation of natural resources and



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environmental degradation, contemporary forms of slavery, illegal arms and arrests, enforced disappearance, torture, ill-treatments of detainees, or communal violence, religious conflicts, trafficking of persons, illegal arms and drugs, money laundering, terrorism, ethnic violence, kidnappings, summary executions, sexual and gender-based crimes – including rape, sexual slavery and enforced prostitution, and other international crimes of genocide, war crimes and crimes against humanity.

The African Union has taken proactive steps to improve the continental framework for the rule of law and fight against impunity. In addition to the ambitious Africa Agenda 2063, which envisions a continent in which there is a universal culture of good governance, democratic values, gender equality, respect for human rights, justice and the rule of law, specific programmes (statutory reforms and enhanced institutional capacity) have been initiated to scale up Africa's stable future. Among them is the Judicial, Human Rights & Legal Organs of the AU that have been established to support the implementation of good governance and respect for human rights on the continent. Such statutory innovations as the Africa Transitional Justice Policy, the Malabo Protocol, and institutional reforms to drive the priorities of the Union's Agenda 2063 are commendable innovations. The institutions positioned for these purposes include the African Commission on Human and Peoples' Rights (ACHPR), African Court on Human and Peoples' Rights (AfCHPR), AU Commission on International Law (AUCIL), AU Advisory Board on Corruption (AUABC) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), among others. With renewed focus of the African Union Commission on supporting domestic reforms towards its continental future goals, the AU requires the wide support of Africans in advancing these goals.

#### Expected result of convening

It is expected that the proposed meeting will review progress made, identify possible priorities, elaborate on possible policy strategies for implementation of aspects of the reforms, and mobilize support across Africa civil society and African organizations to promote greater support for the Commission's drive towards building a future Africa in context of Agenda 2063 and its First Ten Years Implementation Plan.

The Malabo Protocol, Transitional Justice Policy and ICJ in Africa



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The adoption on 27 June 2014 at the 23<sup>rd</sup> ordinary session of the Assembly of the African Union of the Protocol on the Amendment to the Statute of the African Court of Justice and Human Rights (Malabo Protocol) raised possibilities of addressing the justice gaps in Africa. The protocol has been considered by many as an African Union alternative to the Statute of the International Criminal Court (ICC), which has been heavily criticized in Africa for focusing unequally on the continent.

But the Malabo Protocol 'consists of extending and strengthening the jurisdiction of the AfCHPR to death with international crimes committed in Africa ... Even if the idea of an African [criminal] court is frequently associated with the AU's dispute with the ICC, discussions on a regional court with criminal jurisdiction go back to the drafting of the African Charter on Human and People's Rights in the 1970s'.

The Malabo Protocol will, when it comes into force (30 days after the 15 ratifications) grant criminal jurisdiction to the existing Africa Court on Human and People's Rights to be known as African Court of Justice and Human Rights, including international crimes of genocide, crimes against humanity and war crimes, and 14 additional crimes such as piracy, unconstitutional change of government and terrorism. As at August 2019, none of the 55 African States have ratified the Protocol, and only 15 have signed it namely: Benin, Chad, Comoros, Congo, Equatorial Guinea, Ghana, Guinea Bissau, Guinea, Kenya, Mozambique, Mauritania, Sierra Leone, Sao Tome & Principe, Togo and Uganda.

Despite the seeming advantages of such regional criminal court, the future of the Malabo Protocol remains uncertain. African civil society and governments have not sustained the momentum of its creation, and wide spread criticism of its inclusion of blanket immunity for heads of state and senior government officials in its Article 46bis, have overshadowed the potentials of the Protocol to address impunity for atrocity crimes in Africa. It has been submitted that the Protocol will not create a court to replace the ICC but rather a court of immediate next resort if national courts fail for one reason or another to prosecute persons responsible for human rights violations. Thus, the ICC would still have jurisdiction to try cases if victims believe that the ACJHR did not give them justice or prosecute their cases properly.

One of the advantages could be allowing trials to be carried out where possible in



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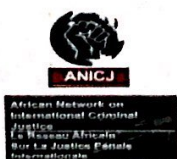
or closer to the places where atrocities were committed. This proximity has clear added advantages for investigations by the prosecution, which should have easier access to evidence and witnesses. More significantly, however, it offers victims and citizens a greater sense of "ownership" of the trial and would probably facilitate greater interest, participation, and reconciliation.

The African Union Transitional Justice Policy provides 'policy parameters on holistic and transformational TJ in Africa, drawing from, amongst others, the AU Constitutive Act, Agenda 2063, the ACHPR and the AU shared-values instruments. The policy offers guidelines, possible benchmarks and practical strategic proposals for the design, implementation, monitoring and evaluation of African TJ processes'. The TJ policy is an important toolkit for progressively achieving sustainable peace, security and justice within the Africa.

### Africa and the ICC

In 1998, the Statute of the International Criminal Court (Rome Statute) led to the establishment of the International Criminal Court (ICC), which became effective in 2002. The purpose of ICC was to deal with four major international crimes; war crimes, genocide, crime against humanity and crime of aggression. It was expected to compliment the national judicial systems and can only exercise jurisdictions when certain conditions are met. Based on the court's record, about 44 individuals have been indicted many of whom are Africans, leading to criticisms about its jurisdiction and operations. Interestingly, the African region has the highest number of state parties with 34 African countries that have signed up to the statute and most of the ICC referrals were made to the court by the governments of the relevant states.

Many of the critics of the Rome Statute particularly African leaders have argued that ICC is biased towards Africans and questions its case selection processes and usually protracted trial procedures. Some have argued about the issue of state immunity in light of the Kenya cases where the President and Vice were indicted by the court as well as the warrant of arrest issued against the then President of Sudan, Omar Al-Bashir. This is exacerbated by the fact that many scholars and jurists contend that the customary international law recognizes immunity for Heads of state or government. Although it has been argued that where a country is bound by a treaty that waives its immunity such as the ICC statute then the



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immunity of its government officials would be waived. The AU has argued that under Article 98(1) of the Rome Statute, only states that have signed up to the ICC statute should be bound by its clauses such as waiver of immunity stipulated in article 27. In this sense, since Sudan was not part of ICC, there was no need issuing arrest warrants against him or persuading state parties to facilitate the arrest of the then President Al-Bashir.

Furthermore, the refusal of China, Russia and the United States who are permanent members of the United Nations Security Council (UNSC) to sign up to the statute as well as the referral and deferral to UNSC, heightens the allegation of bias. Consequently, some African countries withdrew their membership, like South Africa, Burundi and Gambia although the new President of Gambia, Adama Barrow rescinded the withdrawal, likewise South Africa revoked its withdrawal after the pronouncement of a High Court in South Africa as to the illegality of such withdrawals without parliamentary authorization. Nevertheless, there still seem to remain cold relation between the AU and ICC, and its continued impact on closing justice gaps in African is still uncertain, despite Africa holding the largest membership bloc at the Assembly of State Parties of the ICC.

#### Rationale for dialoging on future of ICJ in Africa

The proposed convening is considered a platform for experts and African Union stakeholders to review the state of the international criminal justice architecture in Africa, and deliberate on constructive future in order to advance the dreams of AU agenda 2063. The high level conference promises to bring together state delegates, AU officials, civil society actors, jurists, scholars, and the ICC in order to articulate strategies for the civil society and AU to work together towards a realization of robust justice pathways that meet the justice need of the African people.

Duration: 2 days, 27-28 November 2019

Location: Addis Ababa, Ethiopia.

Chino Obiagwu SAN

Coordinator, African Network for International Criminal Justice

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