

**NEW YORK
CITY BAR**

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H.E. Dr. Jean Ping
President of the African Union
African Union Headquarters
P.O. Box 3243, Roosevelt Street (Old Airport Area)
W21K19, Addis Ababa, Ethiopia

Dear Dr. Ping:

I am writing on behalf of the Association of the Bar of the City of New York (Association). The Association wishes to express its concerns regarding the explicit lack of support by the African Union (AU) for the International Criminal Court (ICC)—an institution this bar association supports¹—and to endorse the recommendation of the AU High-Level Panel on Darfur for a hybrid court for Sudan. Given Sudan's problematic justice record, the Association urges that those most responsible for the crimes in Darfur be tried before the ICC, a court capable of adhering to internationally accepted fair trial standards. However, because of the mass number of perpetrators implicated in the crimes, the limited capacity of the ICC to prosecute no more than a few high level individuals, and the need to rebuild the Sudanese judiciary, the Association nonetheless endorses the AU High-Level Panel's proposal to establishment of a hybrid court to prosecute war crimes, crimes against humanity and genocide committed in Sudan, *in addition to—not to supplant—the role of the ICC*. Such a hybrid tribunal could be formed by agreement between the U.N. and Sudan.

Founded in 1870, the Association is an independent non-governmental organization with more than 23,000 members from 50 countries. The Association has a long history of dedication to human rights and international justice, particularly through its Committee on International Human Rights, which investigates and reports on human rights conditions in the United States and around the world, and its Council on International Affairs and United Nations Committee. The Association also follows legal and policy developments in Africa through its Committee on African Affairs. These committees and the larger Association join in their plea to address the serious justice concerns affecting Sudan.

¹ The Association has endorsed the ICC, and urged the new U.S. Administration to constructively engage with the institution. See Report on the Proposed International Criminal Court, available at http://www.abcny.org/Publications/reports/show_html_new.php?rid=49, and Statement to the National Security Transition Team Regarding U.S. Engagement with The international Criminal Court (Dec. 2008), available at http://www.abcny.org/Publications/reports/show_html_new.php?rid=49.

In July 2009, the AU (composed of 49 African states, 31 of which are parties or signatories to the Rome Statute)² adopted a motion calling for non-cooperation with the warrant issued by the ICC for the arrest of Sudanese President Omar al-Bashir, who is now charged with war crimes, crimes against humanity, and genocide committed in Darfur. The AU reiterated this call at the 15th AU Summit in Kampala, Uganda, this past July. The AU has also repeatedly and unsuccessfully petitioned the U.N. Security Council to suspend the ICC prosecution against Bashir under Article 16 of the Rome Statute. At the same time, the AU also established a High-Level Panel on Darfur to examine the situation in Darfur, and submit recommendations on issues such as accountability, combating impunity, reconciliation, healing, and achieving peace.

In October 2009, the AU High-Level Panel (chaired by former South-African President Thabo Mbeki) issued its report. Specifically, in addition to proposals for resolving the conflict in Darfur, its recommendations as to accountability for the crimes perpetrated there include: (i) the creation of a hybrid court with Sudanese and AU-appointed international judges; (ii) strengthening Sudan's domestic criminal justice system; (iii) removing immunity grants against members of the security forces, armed forces and police; and (iv) creating a truth, justice and reconciliation commission. The AU High-Level Panel did not ultimately opine on what role, if any, it envisions for the ICC. The Panel recommended such measures in response to "the deeply felt concern that the Sudanese national justice system would not, or could not, deal adequately with the crimes of Darfur." In fact, the Sudanese government has not shown any substantial commitment to seriously investigating or prosecuting crimes committed in Darfur. International observers, including Human Rights Watch, members of the U.N. Human Rights Council and the African Union itself, consistently report on the Sudanese deficit of prosecutions. These actors have also repeatedly called upon Sudan to respect human rights norms and address the impunity created by ongoing crimes committed in Darfur since 2003—all to no avail.

In response to international pressure, Sudan did create the Special Criminal Court on the Events in Darfur in 2005. As of late-October 2009, this mobile court had visited three capitals in Darfur, yet Human Rights Watch and the AU High-Level Panel on Darfur report that only ordinary crimes, such as theft, were prosecuted. Other Sudanese attempts at justice for crimes perpetrated in Darfur have similarly met with little success, as acknowledged by the AU High-Level Panel. Given the magnitude of the crimes committed, there is obviously a lack of political will that has prevented Sudanese officials from bringing perpetrators within its own borders to trial. For example, the Sudanese Government has not taken measures towards prosecuting former senior Janjaweed leader, Ali Muhammad Ali Abd-Al Rahman (commonly known as Ali Kushayb). After the ICC issued a warrant for Ali Kushayb in 2007, Sudanese officials assured the international community that Ali Kushayb was in custody and would stand trial in Sudan. Instead, he was released in April 2008. Whereas criminal charges within Sudan were subsequently issued against Kushayb in 2009, there has been little progress in his prosecution. In October 2010, Sudan's State Minister for Justice, Mohamed Bushara Dosa, announced that the focus of his ministry in the upcoming year would be the focus on domestic prosecutions for crimes committed in Darfur.³ In addition, the Minister also announced that it

² <http://www.icc-cpi.int/Menu/ASP/states+parties/African+States/>.

³ Human Rights Watch, *Mbeki Panel One Year On*, October 29, 2010, available at <http://www.hrw.org/en/news/2010/10/27/mbeki-panel-report-one-year>

began investigations in a number of cases and crimes which were committed in Darfur, saying that Special Prosecutor for Darfur is currently in the region to investigate all incidents and to bring those who are involved to justice.⁴ While these developments appear helpful, it is far too soon to determine if they represent serious commitments to justice; given Sudan's past fostering of impunity, we remain deeply skeptical that the prosecutions will reach the appropriate levels of responsibility.

Since the Sudanese government has successfully eluded meaningful prosecutions for the crimes committed in Darfur, the only viable option for prosecuting those *most responsible* for the crimes remains the ICC. The ICC stands for the transparent and fair prosecution of genocide, war crimes and crimes against humanity. By design, it targets only the most responsible actors, for widespread “core” international crimes, when the domestic judicial system has failed to do so. Under the “complementarity” principle of Article 17 of the Rome Statute, a good faith investigation or prosecution by a national court would render a case “inadmissible” before the ICC. The prosecutions attempted by the Sudanese government, to date, do not approach these standards of good faith investigations or prosecutions.

Even with skepticism about Sudan's commitment to justice, the notion of a hybrid tribunal for Sudan should nonetheless be pursued. Because of the large scope of the crimes at issue, the limited number of ICC prosecutions that can be anticipated—there are currently a total of three people against whom the ICC has issued warrants for the crimes perpetrated in Sudan, and three “summonses”—and the weakness of the current Sudanese justice system, there is need for a hybrid tribunal to examine the crimes committed in Darfur, Sudan, *in addition to the prosecutions of top-level perpetrators by the ICC*. Because of Sudan's track record, however, it would be crucial to ensure that any selection of judges for such a tribunal be done in a manner that ensures that only highly qualified individuals are appointed, with the goal of ensuring that justice is in fact done. Any hybrid tribunal for Sudan (which would be composed of international and Sudanese judges and staff) should also be mandated to apply the internationally accepted fair trial standards defined in Article 14 of the International Covenant on Civil and Political Rights (to which Sudan acceded in 1986), and the internationally accepted definitions of the crime contained in the Rome Statute (considered to reflect customary international law). As concluded by the AU High-Level Panel's report: there needs to be “[p]rosecution of individuals suspected of crimes in Darfur by competent and independent courts which would accord [the defendants] fair trials.” A truth, justice and reconciliation commission, as well as strengthening Sudan's domestic criminal justice system and removing immunity grants would also be welcome measures. Above all, if there were to be a hybrid court for Sudan or other regional court to adjudicate the crimes committed in Darfur,⁵ it is crucial that the court (or prosecutions in Sudan's domestic courts) not be designed

⁴ Sudanese Media Center, *Dosa: Ministry of Justice started investigation in Crimes Committed in Darfur*, October 6, 2010, available at <http://smc.sd/eng/news-details.html?rsnpid=30262>

⁵ While the Association generally commends the AU High-Level Panel's thoughtful and thorough report, it does not endorse every aspect of it, particularly the characterization of the crimes by the Government of Sudan against the people of Darfur as a “counter-insurgency offensive.” AU High-Level Panel report at vii. While the Government may have had that goal in 2003 when the crimes started, there have been extensive reports to the effect that the crimes eventually resulted in genocide. *See, e.g.*, Trahan, Jennifer, “Why The Killing In Darfur Is Genocide,” 31 *Fordham Int'l L. J.* 990 (2008). The AU High-Level Panel refers to the crimes as “extreme violence and gross violations of human rights,” AU High-Level Panel report, xiv, which again does not seem to sufficiently characterize the crimes.

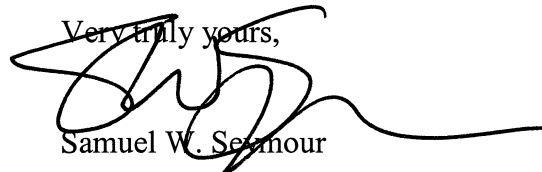
merely to frustrate the workings of the ICC by offering a false promise of justice. Given Sudan's past tolerance of impunity, we remain deeply skeptical that the prosecutors can or will investigate and successfully prosecute those with significant levels of responsibility for major crimes, including murder, rape, crimes against humanity, war crimes and genocide.

As states party to the Rome Statute, Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Uganda, and Zambia have an affirmative obligation to cooperate fully with the ICC. Additionally, under Article 18 of the Vienna Convention on the Law of Treaties (1969)—generally recognized to constitute customary international law—signatories to the Rome Statute, including Algeria, Angola, Cameroon, Côte d'Ivoire, Egypt, Guinea-Bissau and Mozambique, bear the obligation “to refrain from acts which would defeat the object and purpose of” the Rome Statute. AU member states that are parties to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) also owe obligations to punish that crime before a national or international tribunal, which also needs to be respected in relationship to the outstanding warrants for President Bashir. We call upon these countries to affirmatively respect these legal obligations, as well as their obligations (and those of Sudan) under article 4 of the Constitutive Act of the African Union to reject impunity, a commitment the AU has only recently reaffirmed when it stated: “The African Union has always emphasized its commitment to justice and its total rejection of impunity”⁶

We are aware that the AU, while speaking with one voice, represents many different voices, and many, many African countries are staunch supporters of the ICC. We also realize the tremendous pressure being brought to bear on these states by certain powerful states within the AU, and urge AU member states to stand true to their convictions. We therefore urge AU member states that are parties to either the Rome Statute or the Genocide Convention to adhere to their treaty obligations, and, at minimum, deny permission for President Bashir to enter their respective nations.

The Association stands ready, willing and able to assist the AU and Sudan with its plans to create a hybrid tribunal, including through training sessions on fair trial standards and/or the application of internationally accepted definitions of the crimes of genocide, war crimes and crimes against humanity.

Very truly yours,

A handwritten signature in black ink, appearing to read "Samuel W. Seymour", written over a horizontal line.

Samuel W. Seymour

⁶ See AU, “Communiqué on the 3 February 2010 Judgment of the international Criminal Court Appeals Chamber on Darfur,” Addis Ababa, February 4, 2010.

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