Mr. Sang Hyung Song
President
The International Criminal Court
P.O. Box 19519
2500 CM, The Hague
The Netherlands

Dear Mr. President,

We, members of the African Union, write to you in furtherance of the rights of the accused before the International Criminal Court (the “ICC” OR “the Court”), on the proceedings of the ICC including in most recent cases before the ICC. The attached report shows astonishing breaches of basic principles of criminal courts in general and, more specifically, the ICC itself.

While the report identifies many flaws in the processes and procedures of the ICC, we believe the following four present the greatest danger of undermining especially the rights of the accused thereby offending fundamental principles of international justice:

1. The Court fails to adhere to the stringent evidentiary standards and investigation of techniques critical to the collection of reliable evidence with the guarantees of protections for the rights of the accused, in particular, by outsourcing critical functions of the Court’s Office of The Prosecutor (“OTP”) to unregulated and often privately funded and managed intermediaries – such as non-governmental organizations (NGOs) and individuals;

2. The impact of permissible funding from private sources on the justice delivered by the Court;

3. The Court’s grounding in principles of humanitarian not criminal law;
4. Through the exercise of *proprio motu* jurisdiction, the ICC can bring cases, including for alleged crimes against humanity, without garnering the cooperation necessary to ensure the integrity of the proceedings.

We address these points in turn:

1) The Court implements low evidentiary standards and unregulated investigative techniques, which result in a collection of information (as opposed to evidence) that creates pressure to hold someone responsible but fails to provide the necessary protections to fairly determine who that person is. Nevertheless, the Court and its investigating authority, the OTP, can and do rely on this information to select, investigate and prosecute cases. The Court lacks transparency and standards as to how cases according to the Court’s own statements, the Court’s own inability to impose even minimal standards. Key investigative functions are outsourced to unregulated, and often privately funded, intermediaries – such as organizations and individuals – who are not subject to the rules of the Court and are not accountable to the Court or the judicial process and may, and often do, have incentives beyond or inimical to this process. NGOs employ researchers who often have no investigative training or skills. These are focused on humanitarian efforts, not criminal investigations. As such, they research terrible atrocities, high crimes, without using objectively non-bias investigating techniques employed by highly trained and disciplined investigative agencies as is customary in the interest of fair trials around the world. Based on their research, they then conclude that “crimes against humanity” have occurred, without specifying what definition of that term they are applying and then seek to assign blame for those events. In addition, in many cases, the identity of the researchers, the NGOs or other intermediaries who conducted the work or brought the report to the OTP is not disclosed to the accused or his lawyers. This is problematic because the objectivity, biases and motivation of the private intermediaries and actors cannot be evaluated properly or, when necessary, challenged. Thus the NGOs and intermediaries often identify, collect and bring to the OTP’s attention “evidence” and witnesses.

From a comparative point of view, the whole process of outsourcing critical prosecutorial functions of the Court involving a gender-driven, privately funded, often non-transparent and unaccountable NGOs to the unacceptable
detriment of the rights of the accused, would be impermissible in any criminal justice system of member countries of the international community.

2) The concerns are compounded by the Court’s ability to accept private funding, often from NGOs, for specific purposes or activities with very little oversight or transparency. Private funding can have the effect of directing the work of the Court and thus influencing the Court’s impartiality or, at minimum, appearing to do so. A practical result is that an individual accused of a crime by the OTP may have no awareness of who is conducting the investigations into his or her activities or advocating for his or her prosecution, and may have no ability to find out that information on what motivations are driving the investigations.

The problem of privately funding the Court is well demonstrated. As you know, initiatives by the Court to impose guidelines on the NGOs active in the Court’s operations have been discouraged by the Court’s own Budget Committee for fear of consequent withdrawal of financial support by the these NGOs. These, obviously, cannot serve the course of justice, and, in particular the rights of the accused, since so much of the work of these NGOs form the basis for decisions of the OTP.

3) A prominent feature of the ICC – as compared to the national courts of countries in the international community – is that the ICC is grounded in principles of international humanitarian law, while purporting to investigate and judge as criminal charges, crimes against humanity, genocide, war crimes and the crimes of aggression. Combined with the uniquely broad mandate and geographic reach of the ICC’s jurisdiction to investigate and prosecute these crimes wherever they occur, the Court is unlike other international tribunals that have been established in the past, such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia.

The emphasis on humanitarian law, itself a laudable element, is however, inappropriate in terms of justice, when not balanced with firm protection of the rights of the accused. Such impermissible imbalance, is now the case, as the Court, with the outsourcing by its OTP of critical investigative functions to unaccountable intermediaries “NGOs”, with, additionally demonstrated financial sway over the Court, is not capable of providing such protection of the rights of the accused at a level commensurate to that existing in the juridical process in the countries of the International community.
4) Members of the African Union acting in unison are concerned about the asserted authority and function of the ICC. Specifically, there is lack of transparency and criteria in the absence of *proprio motu* jurisdiction by the ICC Office of The Prosecutor ("OTP") which places enormous power in the hands of the OTP. *Proprio motu* jurisdiction allows the OTP to initiate the case without referral of a member state or the UN Security Council. Without a referral from a member state, the OTP runs the serious risk of lack of cooperation which undermines the integrity of an investigation. Without a referral from the UN Security Council, the OTP discretion is unchecked and lacks the focus and political support obtained by having the UN Security Council narrow the issues (such as in Yugoslavia and Rwanda) and provide the necessary international political support which arises through debate and decision making in the UN Security Council. This is particularly true where the OTP brings charges of crimes against humanity, a less well-defined concept under international law.

At bottom, under present processes and procedures, the exercise of *proprio motu* jurisdiction by the OTP to bring a case based on crimes against humanity places undue discretion in the hands of the OTP particularly where its decision can be subject to substantial influences by the outside sources. In fact, as much of the critical work of the OTP is outsourced to private intermediaries, NGOs, by extension and on practice the exercise of *proprio motu* jurisdiction effectively yield significant power to prosecute to such NGOs.

We request that the ICC develop a plan to repair these issues in the interest of justice. We ask you to inform us of a pattern of concrete, satisfactory steps to remedy all these four issues by April 30th, 2014. The issues for the Court raised herein, and in the report, are of the highest importance for its deposition of justice, as the concept is accepted internationally. Therefore, if the Court fails to do so, the writers of this letter shall not extend further cooperation to the ICC, whether obliged by treaty or otherwise.

Sincerely,