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OPEN LETTER TO THE HEADS OF STATE AND GOVERNMENT OF THE AFRICAN UNION

Your Excellences,

RE: ARTICLE 46A BIS OF THE DRAFT PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

I am writing to you ahead of the 23rd Ordinary Session of the Assembly of Heads of State and Government of the African Union, scheduled for 26-27 June, to urge you not to adopt the proposed amendment to Article 46A *bis* of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Draft Protocol).

The Ministerial Meeting of the Specialized Technical Committee resolved, following their deliberations of 15 and 16 May, that Article 46A *bis* of the Draft Protocol should be amended to read: *“No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”*

Amnesty International is concerned by this proposal, as well as other recent efforts by the African Union (AU) to ensure immunity for Heads of State and Government. These include the AU’s decision in: (a) October 2013, asserting that senior state officials must not be prosecuted by the International Criminal Court; and (b) January 2014 calling on AU members to support amendments to Article 27 of the Rome Statute to preclude the prosecution of Heads of State and Government. I respectfully call upon you to review the proposed Article 46A *bis* amendment during your forthcoming deliberations.

The Draft Protocol on the Statute of the African Court of Justice and Human is an extremely important legal instrument. It substantially amends the legal framework establishing the African Court of Justice and Human Rights (African Court). Among other measures, it extends the jurisdiction of the African Court to crimes under international law, including genocide, war crimes, and crimes against humanity.

Article 46A *bis* of the Draft Protocol poses serious risks to the integrity of the African Court and of the African Union’s declared goal of ensuring justice for victims of serious crimes under international law. It evinces an intention to create one rule for those in positions of power and another rule for the masses.

If adopted, Article 46A *bis* will prevent the African Court from investigating and prosecuting serving Heads of State and Government who mastermind acts of genocide, crimes against humanity and war crimes such as those that occurred in Rwanda in 1994. The provision would also preclude the prosecution of those who commit atrocities in neighbouring African countries, such as Charles Taylor who was indicted when he was the President of Liberia and later convicted by the Special Court for Sierra Leone for committing war crimes and crimes against humanity in Sierra Leone.

At Amnesty International, we are concerned with the Technical Committee's proposal that African Heads of State and Government and other senior officials should effectively be granted, for as long as they are in office, immunity before the African Court for crimes under international law such as mass murder, rape, torture, and the forcible displacement of entire communities. If the proposed Article 46A *bis* is adopted, statements that the expansion of the African Court's jurisdiction will help to address the scourge of genocide, war crimes and crimes against humanity that have afflicted the continent will ring hollow.

The Constitutive Act of the African Union: (a) grants the AU the right to intervene if war crimes, crimes against humanity and acts of genocide are being committed in a Member State (Article 4(h); and (b) requires the AU to respect human rights (Article 4(m)), and to ensure the sanctity of human life and reject impunity (Article 4(o)). In addition, a key objective of the African Union is the promotion and protection of human rights contained in the African Charter on Human and Peoples' Rights and other human rights instruments. By granting immunity from prosecution to sitting Heads of State and Government and other senior officials from the criminal jurisdiction of the African Court, Article 46A *bis* violates these principles and objectives – all of which are integral tenets of the AU Constitutive Act.

In support of the stated objective, that the African Court is being created to end impunity for serious crimes under international law, Amnesty International urges that you review Article 46A *bis* and replace it with a provision incorporating the fundamental principle contained in Article 27 of the Rome Statute of the International Criminal Court.¹

I look forward to the outcome of your deliberations and in particular to your decision affirming that no one is or should be above the law and that in Africa, all those who commit serious crimes under international law will be brought to justice, irrespective of their status.

Yours sincerely,

Salil Shetty
Secretary General

Sent to:

President of Algeria, H.E. Abdelaziz Bouteflika
President of Angola, H.E. José Eduardo dos Santos
President of Benin, H.E. Yayi Boni
President of Botswana, H.E. Ian Khama

¹ Article 27 of the Rome Statute of the International Criminal Court provides: "*Irrelevance of official capacity:*

1. *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

2. *Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."*

President of Burkina Faso, H.E. Blaise Compaoré
President of Burundi, H.E. Pierre Nkurunziza
President of Cape Verde, H.E. Jorge Carlos Fonseca
President of Cameroon, H.E. President Paul Biya
Acting President of the Central African Republic, H.E. Catherine Samba-Panza
President of Chad, H.E. Idriss Déby
President of the Comoros, H.E. Ikililou Dhoinine
President of the Republic of Congo, H.E. Denis Sassou Nguesso
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President of Djibouti, H.E. Ismail Omar Guelleh
President of Egypt, H.E. Abdel Fattah el-Sisi
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Prime Minister of Equatorial Guinea, H.E. Vicente E Hate Tomi
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Deputy President of Kenya, H.E. William Ruto
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President of Liberia, H.E. Ellen Johnson-Sirleaf
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President of Mali, H.E. Ibrahim Boubakar Keita
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President of Mauritius, H.E. Anerood Jugnauth
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Prime Minister of Senegal, H.E. Aminata Touré
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President of Sierra Leone, H.E. Ernest Bai Koroma
President of Somalia, H.E. Hassan Sheikh Mohamud
President of South Africa, H.E. Jacob Zuma
President of South Sudan, H.E. Salva Kiir Mayardit
President of Sudan, H.E. Omar al-Bashir
Prime Minister of Swaziland, H.E. Barnabas Sibusiso Dlamini
President of Tanzania, H.E. Jakaya Kikwete
President of Togo, H.E. Faure Gnassingbé
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Prime Minister of Zimbabwe, H.E. Morgan Tsvangirai