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ASSEMBLY OF THE AFRICAN UNION

Thirteenth Ordinary Session

1-3 July 2009

Sirte, Libya

Assembly/AU/13(XIII)

REPORT OF THE COMMISSION ON THE MEETING OF STATES PARTIES TO THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT (ICC) [ASSEMBLY/AU/DEC.221 (XII)]

**INTRODUCTION TO THE REPORT OF THE MEETING OF AFRICAN STATES
PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT (ICC)**

1. In implementation of Decision Assembly/AU/ Dec.221 (XII) on the application by the ICC Prosecutor for the indictment of the President of the Republic of the Sudan, adopted by the Twelfth Ordinary Session of the Assembly of the Union held in Addis Ababa, Ethiopia in February 2009, a Ministerial Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC) was held in Addis Ababa, Ethiopia, from 8 to 9 June 2009. The purpose of the meeting, pursuant to the said decision, was to exchange views on the work of the ICC in relation to Africa, particularly in light of the proceedings instituted against certain African personalities and to submit recommendations thereon taking into account all relevant elements.

2. Out of the thirty (30) African States Parties to the ICC, twenty-six(26) African State Parties were in attendance, namely, **Benin, Botswana, Burkina Faso, Burundi, Chad, Congo, Democratic Republic of Congo, Djibouti, Gabon, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda, and Zambia.** Other AU Member States which are non-States Parties to the Rome Statute were invited by the Commission as observers. However, the meeting decided that non-State Parties should not participate since the Assembly decision had called for a meeting of African States Parties to the Rome Statute.

3. The Commission had prepared and presented a Concept Note for the meeting, which comprehensively examined the work of the ICC, its establishment, jurisdiction, structure, as well as its investigation and prosecutorial mandate. A brief was also given on the status of the various African cases pending before the ICC and the various options set out in the Concept Note for consideration by the Meeting and which could form the basis for the recommendations to be submitted to the Policy Organs.

4. After the discussions and deliberations, the meeting adopted recommendations for consideration by the Assembly of the Union through the Executive Council, which are set out in the attached Report. Additionally, the meeting bracketed other proposals for which there was no consensus. It was agreed that they should be bracketed and submitted to the Assembly through the Executive Council at the upcoming Summit taking place in Sirte, Libya in June/July 2009.

5. The Report and the Concept Note are attached hereto as annexes.

Annex I: Report of the Ministerial Meeting

Annex II: Concept Note

Assembly/AU/13(XIII)
Annex 1

**REPORT OF THE MEETING OF AFRICAN STATES PARTIES
TO THE ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT (ICC)**

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**Meeting of African States Parties to the
Rome Statute of the International Criminal Court (ICC)
8 – 9 June 2009
Addis Ababa, Ethiopia**

**MinICC/Rpt.
Original: English**

RESTRICTED CIRCULATION

**REPORT OF THE MEETING OF AFRICAN STATES PARTIES
TO THE ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT (ICC)**

**8 - 9 June 2009
Addis Ababa, Ethiopia**

REPORT OF THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

I. INTRODUCTION

1. Pursuant to Decision Assembly/AU/Dec.221 (XII), the Ministerial Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) was held from 8 to 9 June 2009, in Addis Ababa, Ethiopia, to exchange views on the work of the ICC in relation to Africa, particularly in light of the proceedings instituted against certain African personalities.

II. ATTENDANCE

2. The following African States Parties to the Rome Statute of the ICC attended the meeting: **Benin, Botswana, Burkina Faso, Burundi, Chad, Congo, Democratic Republic of Congo, Djibouti, Gabon, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda, and Zambia.**

3. Member States that are not parties to the Rome Statute had been invited to participate in the meeting as observers. However, the meeting decided that non-State Parties should not participate since the Assembly decision had called for a meeting of African States Parties to the Rome Statute. In this regard, the meeting also decided that there was no need for the Commission to explain the rationale for inviting non-States Parties as observers.

III. OPENING OF THE MEETING

Welcoming Remarks by H.E. Mr. Ramtane Lamamra, Commissioner for Peace and Security on behalf of H.E. Mr. Jean Ping, Chairperson of the African Union Commission

4. In his opening remarks, H.E. Mr. Ramtane Lamamra, Commissioner for Peace and Security representing the Chairperson of the Commission, H.E. Mr. Jean Ping, welcomed all the Ministers and delegations to Addis Ababa. He thanked them for having found the time to attend the Ministerial Meeting of African States Parties to the Rome Statute of the ICC pursuant to the mandate given by the Assembly of the Union to examine and review the work of the ICC in relation to Africa, particularly in light of the proceedings instituted against certain African personalities.

5. The Commissioner reiterated the unflinching commitment of the African Union to fight impunity on the continent. To buttress his point, he cited various African Union legal instruments, which are essentially an indication of Africa's resolve to respect

human rights and combat impunity. As a further illustration of Africa's commitment to fight impunity, he indicated that, of the one hundred and eight (108) current States Parties to the Rome Statute of the ICC, thirty (30) are African State Parties, thereby making Africa the single largest regional membership block in the ICC.

6. The Commissioner recalled that, following the application for the indictment of the Sudanese President on 14 July 2008 by the ICC Prosecutor, the AU Peace and Security Council meeting at Ministerial level, had expressed its conviction that, in view of the delicate nature of the processes underway in The Sudan, approval by the ICC Pre-Trial Chamber of the applications for indictment could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in The Sudan. To this end, the African Union had requested the UN Security Council to defer the application of the indictment against President Bashir, a request which the UN Security Council merely took note of, to the frustration of the African Union, its Member States and other UN Member States.

7. The Commissioner further stressed that the AU Commission had established and taken the necessary steps for operationalization of the High Level Panel on Darfur, currently chaired by former President Thabo Mbeki and tasked to conduct an in-depth assessment of the situation in Darfur, review measures taken by the Sudanese authorities to address human rights and international humanitarian law violations, and propose or recommend legal and political processes relevant to peace, justice, reconciliation and compensation of victims.

8. In conclusion, the Commissioner reminded the meeting that more sustained efforts needed to be made to improve security in Darfur, ensure adequate and unfettered delivery of humanitarian assistance, facilitate the conclusion of the political process and promote regional peace and stability. Beyond Darfur, there was also a need for the international community, including the AU, to provide further support towards the implementation of the Comprehensive Peace Agreement of January 2005, which has entered a critical phase with the elections scheduled for 2010 and the referendum on self-determination of South Sudan, due to take place in 2011.

IV. ELECTION OF THE BUREAU

9. After consultations, the meeting elected the following Bureau:

- Chair: Hon. SERIGNE DIOP, Senior Minister and Mediator of the Republic (Senegal)
- 1st Vice Chair: Hon. DIKGAKGAMATSO NDELU SERETSE, Minister of Defence, Justice and Security (Botswana)

- 2nd Vice Chair: Hon. KIDDU MAKUBUYA, Minister of Justice/Attorney General (Uganda)
- Rapporteur: H.E. Mrs EIPHANIE KABUSHEMEYE-NTAMWANA, Ambassador to Ethiopia and Permanent Representative to the AU (Burundi)

V. CONSIDERATION AND ADOPTION OF THE DRAFT AGENDA

10. The meeting adopted the following Agenda:

1. Opening of the Meeting
2. Election of the Bureau
3. Consideration and Adoption of the Draft Agenda
4. Organization of Work
5. Presentation of the Concept Note- Ben Kioko, Director/Legal Counsel
6. General Remarks
7. Discussions on Concept Note
8. Adoption of the Report and the Recommendations
9. Any Other Business
10. Closing Ceremony

VI. ORGANISATION OF WORK

11. The meeting adopted the following working hours:

- Morning: 10h00 – 13h00
- Afternoon: 14h00 – 18h00.

VII. PRESENTATION OF THE CONCEPT NOTE

12. In his presentation, the Director/Legal Counsel, Mr. Ben Kioko recalled the mandate given to the Commission to convene the Ministerial meeting pursuant to Assembly Decision Assembly/AU/Dec. 221 (XII) taken during the 12th Ordinary Session of the Assembly of the Union held in Addis Ababa, Ethiopia in January 2009, to exchange views on the work of the ICC in relation to Africa, particularly in light of proceedings instituted against certain African personalities, and to submit recommendations thereon, taking into account all relevant elements.

13. The Legal Counsel further highlighted the main parts of the Concept Note including the work of the ICC, its establishment, jurisdiction, structure, as well as its

investigation and its prosecutorial mandate. The Legal Counsel then briefed the meeting on the status of the various cases pending before the ICC.

14. In conclusion, the Legal Counsel took the meeting through the various options set out in the Concept Note for consideration by the Meeting of African States Parties to the Rome Statute of the ICC.

VIII. GENERAL REMARKS

15. During the discussion under this agenda item, the AU Commission was commended for the high quality of the concept note, and the following issues were raised as general remarks:

- i) There is commitment among Member States to fighting impunity as enshrined in the Constitutive Act of the African Union.
- ii) African States Parties to the Rome Statute support the work of the ICC and will respect the obligations they have entered into thereto.
- iii) The recommendations could be separated into those that are political and those that are legal and the meeting could decide on which ones to deal with.
- iv) There is need for the ICC to maintain continuous dialogue with its members as well as with other international organizations.
- v) A permanent dialogue between the ICC and the African Union and its member States is necessary. In this regard, the request by the ICC to have a Liaison Office in Addis Ababa to work closely with the AU should be considered.
- vi) There is need for a cooperation framework between the ICC and the AU and the latter should consider preparing and submitting a progress report to future meetings of the policy organs.
- vii) Whether a sitting Head of State enjoys immunity under international law such that no prosecution can be instituted against him/her by the ICC. The AU and its Member States should consider seeking an advisory opinion on the question of immunity of a sitting Head of State from the International Court of Justice.
- viii) Whether the concept note focuses mostly on one personality rather than all the African personalities indicted by the ICC.
- ix) Whether a meeting of experts should have been convened before the Ministerial meeting.
- x) Whether or not there is a conflict between Articles 27 and 98 of the Rome Statute with regards to immunities of state officials.

- xi) The need for Africa to have national, regional and continental mechanisms to address international crimes.
- xii) The ICC is a relatively new institution which is going through a learning process and it is important that adjustments are made to ensure that it works as an independent, transparent and universal institution. The three ways of accessing the ICC should be reviewed – by a State Party, by the UN Security Council and by the ICC Prosecutor.
- xiii) The interaction of legal, political, and security considerations inherent in the work of the ICC should be addressed.
- xiv) The ICC prosecutor should engage with the African Union to identify African prosecutors with whom he would work with in establishing elements of a crime.
- xv) There is a complementary relationship between peace and justice and none should be pursued at the expense of the other.
- xvi) Reaffirm the decision of the Assembly requesting the application of Article 16 by the UN Security Council to defer prosecution of President Bashir of The Sudan for a year.
- xvii) In reiterating the request for application of Article 16 of the Rome Statute by the UN Security Council, it is important to insist that the UNSC makes a clear decision on the matter and not merely take note of the request.
- xviii) Whether concern should be expressed on the conduct of the ICC Prosecutor.
- xix) Whether the Prosecutor has been selective in his choice of situations to investigate and persons to prosecute.
- xx) Whether or not to request from the ICC evidence of universality of the Court relative to the issuance of indictments against other regional sovereign leaders who may have committed crimes against humanity.
- xxi) There is need to ensure that the recommendations that would be made to the Assembly of the Union in July 2009 are consistent with the letter and spirit of the February 2009 Summit decision.
- xxii) Whether the situation in the territory of Palestine (Gaza) constitutes a test case for the ICC and the UN Security Council as the atrocities committed there also deserve attention.

16. In responding to some of the issues raised, the representative of the Commission explained that the Commission had no problem with the ICC and that there was ongoing dialogue between the two organizations. On the proposal for the ICC to open a Liaison Office in Addis Ababa, he indicated that the AU had received a formal communication from the President of the Court and the same was under consideration. On the Draft Cooperation Agreement, he indicated that progress had stalled because there were certain provisions on which agreement could not be reached.

17. At the end of the general debate, the meeting agreed to reaffirm the decision of the Assembly underlining the importance of the UN Security Council to apply Article 16 of the Rome Statute and defer the proceedings against President Bashir of The Sudan.

IX. RECOMMENDATIONS

18. At the end of its consideration of the options set out in the Concept Note, the Meeting adopted the following recommendations for consideration by the Assembly of the Union through the Executive Council:

R.1 Reiterate the unflinching commitment of AU Member States to combating impunity and promoting democracy, the rule of law and good governance throughout the entire Continent, in conformity with the Constitutive Act of the Union.

R.2. The AU Commission should ensure early implementation of Assembly decision, Assembly/Dec. 213(XII), adopted in February 2009 mandating the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes.

R.3. A programme of cooperation and capacity building should be initiated and implemented to enhance the capacity of legal personnel in Member States regarding the drafting and scrutiny of model legislation dealing with international crimes, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies

R.4. The legal recourse and processes as provided for in the Rome Statute be followed by any affected party regarding the appeal process, and the issue of immunity; In this regard, there is need to reiterate the commitment of African States Parties to the ICC.

R.5. There is need for a preparatory meeting of African States Parties at expert and ministerial levels to be held preferably before the end of 2009 to prepare fully for the Review Conference of States Parties scheduled to take place in Kampala, Uganda in May 2010. The following issues can be addressed within the framework of the Review Conference:

- Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC
- Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year;
- Procedures of the ICC;

- Clarification on the Immunities of officials whose States are not Party to the Statute;
- Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute;
- The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and
- Any other areas of concern to African States Parties.

R.6. As a follow up to its earlier request, another formal resolution should be presented by the Assembly of Heads of State and Government to the United Nations Security Council to invoke Article 16 of the Rome Statute by deferring the Proceedings against President Bashir of The Sudan as well as expressing grave concern that a request made by fifty three Member States of the United Nations has been ignored.

X. PROPOSALS MADE ON WHICH THERE WAS NO CONSENSUS

19. In addition to the above recommendations that the meeting adopted, other proposals were made for which there was no consensus. However, the meeting agreed that they should be reflected herein in brackets and submitted to the Assembly through the Executive Council as follows:

P.1. (With regard to the provisions of Article 98 of the Rome Statute relating to cooperation with respect to waiver of immunity and consent to surrender, two views emerged.

(Some delegations argued that since the request to the United Nations Security Council for deferral of the indictment issued against President Bashir of The Sudan under Article 16 of the Rome Statute had not been heard and acted upon, the African Union and its Member States should consider reserving their right to take a collective decision in application of Article 98 of the Rome Statute of the ICC on cooperation for arrest and surrender of indicted persons.

(Other delegations argued that the ongoing process at the ICC was a legal process which called for a legal response and further asserted that if there were any further contentious issues, these should be addressed within the context of the Review Conference scheduled for Kampala in 2010. They further noted that the request for deferral was addressed to the UN Security Council in which lay the power to defer proceedings under Article 16, and if the latter has not acted on this, then the ICC should not be blamed. Accordingly they would not accept a political declaration.)

P.2. (Two views emerged from the discussions on relating to the discretionary power of the Prosecutor, how it has been exercised and what could be done about it as well as the conduct of the Prosecutor.

(Some delegations were of the view that these recommendations could undermine the independence of the Office of the Prosecutor. They further indicated that as is the case with national jurisdictions such office should not be influenced by any external force.

(Other delegations expressed the view that the manner in which the ICC Prosecutor has exercised his powers required some form of oversight and guidelines which the Prosecutor would be obliged to take into account in making prosecutorial decisions. Furthermore, there were concerns relating to his conduct.)

P.3. (Two views emerged from the discussions with regard to the procedures for withdrawal of membership under the Rome Statute of the ICC.

(Some delegations were of the opinion that the matter should not be discussed as such an option could not be taken collectively at the level of the meeting as it impinged on the obligations of the States Parties which individually acceded to the Rome Statute.)

(Other delegations were however of the view that the mandate of the meeting was to make recommendations for consideration by the Assembly through the Executive Council and as such all possible options should be tabled before the Assembly for consideration and decision.)

XI. ADOPTION OF THE REPORT AND RECOMMENDATIONS

20. The Meeting adopted its report and the recommendations contained therein with amendments.

XII. ANY OTHER BUSINESS

21. No issue was raised under this Agenda item.

XIII. CLOSING CEREMONY

22. In his closing remarks, the Chairperson thanked all the delegations for their valuable contribution which had enabled the meeting carry out the mandate given to it by the Assembly of the Union.

23. He also thanked the Commission for the support it had provided to the meeting which had facilitated its work. The Chairperson finally thanked the Rapporteur for her

commitment, and the interpreters for their assistance and patience which had contributed to the successful conclusion of the meeting.

24. Thereafter, the Chairperson declared the meeting closed.

CONFIDENTIAL

Assembly/AU/13(XIII)
Annex II

CONCEPT NOTE
FOR THE MEETING OF AFRICAN STATES PARTIES TO THE ROME
STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

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**MinICC/Legal/3 Rev.1
Original: English**

RESTRICTED CIRCULATION

**CONCEPT NOTE
FOR THE MEETING OF AFRICAN STATES PARTIES TO THE ROME
STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)**

CONCEPT NOTE FOR THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

INTRODUCTION

1. The meeting of the African States Parties to the Rome Statute establishing the International Criminal Court (1998) is convened in accordance with the Decision Assembly/AU/Dec. 221 (XII) of the Assembly of the African Union on “the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Sudan”. In that decision, reached at its 12th Ordinary Session held in Addis Ababa, Ethiopia in February 2009, the Assembly decided *inter-alia*:

1. **“Expresses its deep concern** at the indictment made by the Prosecutor of the International Criminal Court (ICC) against the President of the Republic of Sudan, H.E. Mr. Omar Hassan Ahmed El Bashir
 5. Further requests. the Commission to convene as early as possible, a meeting of the African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.”
2. This meeting is therefore convened pursuant to that decision.
3. This ‘Concept Note’ was prepared to serve as a working document and provides a background to the matter, an analysis of the procedures of the ICC, the implications of the decision and recommendations for consideration by the forthcoming meeting.”

THE INTERNATIONAL CRIMINAL COURT

4. The International Criminal Court (ICC) is established by a multilateral treaty – the Rome Statute of the International Criminal Court – which was adopted by a diplomatic conference in 1998 and which came into force in July 2002. The ICC is an independent judicial institution. Unlike the ad hoc international criminal tribunals created by the United Nations Security Council (the International Criminal Tribunals for the former Yugoslavia and the International Criminal Tribunal for Rwanda), the ICC is not an organ of the United Nations although it has a cooperation agreement with the United Nations. As of May 2009, there are one hundred and eight (108) States that are parties to the Rome Statute, 30 of which are African States thereby making Africa the largest regional grouping of States parties. The African States Parties to the Rome Statute are:

* The Commission acknowledges the input of Prof. Dapo Akande, Lecturer in Law, Oxford University and Visiting Associate Professor of Law & Robina Foundation International Fellow (2008/09) Yale Law School, towards the preparation of this Paper.

Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Congo, Democratic Republic of Congo, Comoros, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda, and Zambia.

5. The Rome Statute obliges States Parties to cooperate with ICC in the investigation and prosecution of crimes, including the arrest and surrender of suspects. Part 9 of the Statute requires all States Parties to “*ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part*”. Under the Rome Statute's complementarity principle, States Parties have an obligation to implement national legislation to provide for the investigation and prosecution of crimes that fall under the jurisdiction of ICC. As of April 2006, the following seventeen (17) African States Parties have enacted or drafted implementing legislation: Benin, Botswana, Burundi, CAR, Congo, DRC, Gabon, Ghana, Kenya, Lesotho, Mali, Niger, Nigeria, Senegal, Uganda, South Africa and Zambia.

The Jurisdiction of the Court

6. The ICC was established for the prosecution of the most serious crimes of concern to the international community. It is intended to contribute to the fight against impunity for the perpetrators of these crimes and to contribute to the prevention of such crimes. Under Article 5 of the Rome Statute, the Court has jurisdiction *ratione materiae* over the following crimes: genocide, crimes against humanity, war crimes (committed in international and non-international armed conflict) and aggression. However, under Article 5(2) of the Rome Statute, the Court is currently unable to exercise jurisdiction over the crime of aggression and will only be able to do so once agreement has been reached on (i) a definition of that crime and (ii) the conditions under which the Court may exercise **jurisdiction with respect to** the crime. Negotiations have been taking place within the Assembly of States Parties to the Rome Statute with a view to ensuring that the Statute will be amended to provide for jurisdiction over aggression, at the Review Conference scheduled to take place in May 2010 in Kampala, Uganda.

7. There are three (3) trigger mechanisms for the exercise of jurisdiction by the ICC. Under Article 13 of its Statute, the Court may exercise jurisdiction where:

- a. a situation in which one or more crimes appears to have been committed has been referred to the ICC Prosecutor [the Prosecutor] by a State party;
- b. a situation in which crimes appears to have been committed is referred to the Prosecutor by the United Nations Security Council acting under Chapter VII of the United Nations Charter;
- c. the Prosecutor has initiated an investigation acting *proprio motu*, i.e. on his own motion or initiative.

8. Where the Prosecutor acts on his own motion (i.e., without referral either from a State Party or the Security Council) and where he concludes that there is a reasonable basis to proceed with an investigation he is obliged to obtain approval for such investigation from the Pre-Trial Chamber of the Court (Article 15(3)) of the Rome Statute. In other cases, the Prosecutor need not secure approval of the Pre-Trial Chamber for investigations though certain aspects of the Prosecutor's work (e.g. issuance of an arrest warrant and confirmation of charges against an accused person) remain subject to approval by the Pre-Trial Chamber.

9. Under Article 25(1) of the Rome Statute, the ICC only possesses jurisdiction over individuals and may not prosecute States or organizations. In order for the ICC to exercise jurisdiction over an individual, one of the following conditions must be satisfied:

- a. the State on whose territory the crime was committed is a party to the Statute; [Article 12 (2)(a)]; *or*
- b. the accused person is a national of a State party to the Statute; [Article 12 (2)(b)]; *or*
- c. either the State on whose territory the crime was committed or the State of nationality of the accused, though not a party to the Statute, has accepted the jurisdiction of the Court with respect to the crime in question; [Article 12 (3)]; *or*
- d. the Court is exercising jurisdiction on the basis of a referral by the Security Council [Articles 12(2) & 13(b)].

10. The effect of Article 12 is that there is no need for both the State in whose territory the offence was committed and the State of nationality of the accused to be parties. Acceptance of jurisdiction by either one of these States suffices to provide jurisdiction to the ICC.

11. In the case of referrals by the United Nations Security Council, the situation does not have to relate to crimes committed within the territory of a State party to the Statute nor does the accused person need to be a national of a State Party to the Statute. Article 12 (2) excludes cases arising from Security Council referrals from the requirement that the territorial State or national State consent to ICC jurisdiction. Indeed, the purpose of Security Council referrals is precisely to allow the ICC to exercise jurisdiction in cases where the State concerned has not accepted the jurisdiction of the Court.

12. The temporal jurisdiction of the ICC is restricted by Article 11 of the Rome Statute to crimes committed after the entry into force of the Statute in July 2002. Moreover, where a State becomes a Party to the Statute after its entry into force, the ICC may only exercise jurisdiction with respect to crimes committed after the entry into

force of the Statute for that State, unless that State has made a declaration, under Article 12(3) of the Statute accepting the exercise of jurisdiction by the ICC with respect to the crime in question.

The Structure of the ICC

13. The ICC is made up of four (4) organs established by Article 34 of the Statute: (i) the Presidency; (ii) Judicial Divisions; (iii) the Office of the Prosecutor and (iii) the Registry.

14. The Presidency is responsible for the overall administration of the Court apart from the Office of the Prosecutor. It is composed of the President of the Court and two Vice Presidents who are elected from among the judges of the Court. There are three (3) Judicial Divisions made up of eighteen (18) judges elected to the Court by the Assembly of States Parties. They are divided into an Appeals Division (or Appeals Chamber) composed of five (5) judges; a Trial Division and a Pre-Trial Division (which is divided into two Pre-Trial Chambers). The Pre-Trial Chambers exercise the judicial function of the Court during the investigation stage and prior to the commencement of a trial. Its functions include issuance of arrest warrants or summons to appear, confirmation of charges and decisions relating to the admissibility of cases.

15. The Prosecutor is elected by the Assembly of State Parties for a term of nine years. The Office of the Prosecutor is responsible for receiving referrals and for conducting investigations and prosecutions before the Court. The current Prosecutor is Luis Moreno-Ocampo, an Argentinean national who began his term of office in June 2003. Under Article 42 of the Statute, the Office of the Prosecutor is required to “act independently as a separate organ of the Court.” Furthermore, members of the office “shall not seek or act on instructions from any external source.” The Registry is the administrative organ of the Court responsible for the non-judicial work and for servicing the other organs of the Court.

INVESTIGATIONS AND PROSECUTIONS BY THE ICC

16. Since its establishment, the ICC has opened investigations in relation to four situations. All of these situations arise from African States. The four (4) situations relate to crimes committed or allegedly committed in the Democratic Republic of Congo; Uganda; the Central African Republic; and Sudan (Darfur). It is important to note that in the case of CAR, DRC and Uganda, the ICC has exercised jurisdiction on the basis of a referral by the State Party on whose territory the crimes have been committed.

Situation Relating to the Democratic Republic of Congo (DRC)

17. The situation relating to the DRC was referred to the ICC in March 2004 by the Government of the DRC. Following investigations, the Prosecutor has begun proceedings against four individuals all of whom are alleged leaders of armed groups that operated in the DRC. Three (3) of these individuals are in custody and one is still at

large. Two (2) of the four (4) individuals will be prosecuted in a joint trial and therefore three (3) cases are being heard. The first case, *Prosecutor v Thomas Lubanga Dyilo* is the first ever case before the ICC and is currently before the Trial Chamber of the ICC. The second case, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* is currently before the Pre-Trial Chamber but the trial is scheduled to commence in September 2009. In the third case, *Prosecutor v. Bosco Ntaganda*, the accused person is still at large. In that case, the Pre-Trial Chamber issued a warrant of arrest under seal in 2006 but the warrant was unsealed in April 2008.

18. The *Lubanga* case has faced a number of serious problems which delayed the commencement of the trial. The main problem arose from the failure of the Prosecutor to disclose exculpatory evidence in his possession to the defence, as required by Article 67(2) of the Statute. Exculpatory evidence referred to by that provision is evidence which either “shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.” In the *Lubanga* case,¹ the Prosecutor had in his possession exculpatory material, much of which was obtained from the UN under conditions of confidentiality, which he failed to disclose to the defence. Moreover, this material was not initially disclosed to the judges of the ICC either and when the existence of the material came to light, the Prosecutor sought to impose conditions on access to the material by the judges. In June 2008, The Trial Chamber held that disclosure of exculpatory evidence is a fundamental aspect of the accused person’s right to a fair trial and that the failure to disclose the exculpatory evidence had improperly inhibited the accused in the preparation of his defence. The Trial Chamber imposed a stay on proceedings, thus halting the trial in all respects until the stay was lifted and it also ordered that the accused be released. The decision to stay proceedings was upheld by the Appeals Chamber in October 2008. The Appeals Chamber held that the Trial Chamber must be allowed access to the evidence held by the Prosecutor in order to allow the Trial Chamber to consider whether the material contains exculpatory evidence that must be disclosed to the defence. However, the Appeals Chamber asked the Trial Chamber to review the decision to release the accused. As a result of the decision of the Appeals Chamber, the Prosecutor disclosed to the Trial Chamber all of the exculpatory evidence in question. Following review by the Trial Chamber of the material, in November 2008, that Chamber ordered that the exculpatory evidence be disclosed to the defence, subject to certain protective measures being taken. The Trial Chamber also lifted the stay of proceedings. The *Lubanga* trial commenced in January 2009.

The Situation in Northern Uganda

19. The situation in Northern Uganda was referred to the ICC in December 2003 by the Government of Uganda. In 2005, after conducting investigations, the Prosecutor sought arrest warrants for five leaders of the Lord’s Resistance Army (LRA) Joseph Kony; Vincent Otti; Okot Odhiambo; Dominic Ongwen and Raska Lukwiya. These

¹ For, a comprehensive history of the proceedings described in this paragraph, see *Prosecutor v. Thomas Lubanga Dyilo*, Reasons for Oral Decision lifting stay of proceedings, Decision of Trial Chamber 1, 26 Jan. 2009, <http://www.icc-cpi.int/iccdocs/doc/doc622878.pdf>

warrants were issued by the Pre-Trial Chamber and unsealed later that year. Following the death of Mr. Raska Lukwiya, proceedings against him have been terminated. The other four accused persons are still at large and the case against them is currently before the Pre-Trial Chamber. That Chamber held, in March 2009, that the case against the four (4) LRA leaders is admissible under Article 17 of the Statute providing for the principle of complementarity.

20. The ICC intervention in Uganda has been controversial as it has had an impact on the peace process in that country. There are differing views on the impact it has had. Some have argued that the ICC arrest warrants have given impetus to the peace talks in Juba which resulted in the August 2006 Agreement on Cessation of Hostilities. Others have argued that the arrest warrants have constituted an impediment to the peace process as the refusal of the ICC to withdraw those warrants has led to the refusal of the LRA leaders to turn up for the signing ceremony of those agreements in 2008. with the effect that the agreements have not been brought into force. However, whatever view is taken it is perhaps of crucial importance to note that the ICC intervention in the Northern Ugandan situation arose out of a referral of the situation to the ICC by Uganda itself. This was not a unilateral intervention by the ICC. Of equal importance in considering the ICC's handling of the situation is that the Ugandan government has not withdrawn backing for the ICC's prosecution of the LRA leaders. In its November 2008 submission to the ICC in connection with proceedings to determine the admissibility of case against Joseph Kony and the other three LRA leaders, the Uganda government stated that:

"in the absence of a comprehensive peace agreement signed by Mr. Joseph Kony himself, [the Agreement on Accountability and Reconciliation and all the other protocols that were agreed upon during the negotiations] are of no legal force. As a result, the status of Joseph KONY, Vincent OTTI, Okot ODHIAMBO and Dominic ONGWEN as persons indicted and triable by the International Criminal Court remains unchanged.

*In conclusion, therefore, it is the position of the Government of Uganda that the case against Joseph KONY, Vincent OTTI, Okot ODHIAMBO and Dominic ONGWEN is still admissible before the International Criminal Court."*²

The Situation in the Central African Republic (CAR)

21. The situation in the Central African Republic (CAR) was referred to the ICC by the Government of CAR in December 2004. Proceedings have so far commenced in one case *Prosecutor v. Jean-Pierre Bemba Gombo*. The accused is a national of the DRC and leader of an armed group in that State who is accused of taking part in the armed conflict in the CAR. The accused person was arrested in Belgium in 2008 and proceedings against him at the ICC are currently at the pre-trial stage. Hearings relating

² Letter dated Nov. 18, 2008, from Solicitor General of Uganda (B. Kainamura) to the Registrar of the ICC, ICC-02/04-01/05-354-Anx2.

to the confirmation of charges against Jean-Pierre Bemba commenced in January 2009 but have been suspended as a result of a request by the Pre-Trial Chamber that the Prosecutor consider amending the charges to include charges addressing Article 28 of the Statute dealing with command/superior responsibility.

The Situation in Darfur (Sudan)

22. Unlike the other three (3) situations described above, the situation in Darfur relates to a State that is not a party to the ICC Statute. The situation in Darfur was referred to the ICC Prosecutor by the United Nations Security Council by virtue of Security Council Resolution 1593 (2005). That resolution was adopted by the Security Council after the January 2005 report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60). That Commission, which was established pursuant to Security Council Resolution 1564 was composed of members appointed by the then UN Secretary General Kofi Annan. It reported to the UN in January 2005 and concluded that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur and recommended that the situation be referred to the ICC.³

23. Following investigations, the ICC Prosecutor has initiated three (3) cases (against six persons) arising out of the Darfur situation. The first case initiated by the Prosecutor, *Prosecutor v. Ahmad Muhammad Harun & Ali Muhammad Ali Abd-Al-Rahman (Ali Kushyab)*, involves the indictment of the Minister of State for Humanitarian Affairs of Sudan (formerly Minister of the Interior) and an alleged leader of the militia operating in Darfur. Both of these accused persons remain at large. The most recent case initiated by the Prosecutor in relation to Darfur is against three (3) rebel commanders in relation to an attack by the rebel forces on African Union peacekeepers in Haskanita on 29 September 2007. In May 2009 one (1) of those rebel commanders Bahr Idris Abu Gadr surrendered to the ICC voluntarily. The hearings relating to confirmation of charges against him have been scheduled for October 2009.

24. The most controversial proceedings initiated by the ICC Prosecutor are those against the Sudanese President Omar Al Bashir. On 14 July 2008, the Prosecutor applied publicly for a warrant of arrest for the Sudanese President. According to the request, the President was accused of having committed war crimes, crimes against humanity and genocide in Darfur. The request for an arrest warrant was granted by the Pre-Trial Chamber of the ICC in March 2009.⁴ The Pre-Trial chamber, acting under Article 58 of the ICC Statute, found that there are reasonable grounds to believe that President Bashir is responsible for war crimes and crimes against humanity in Darfur. However, the Pre-Trial Chamber, by a 2 to 1 majority, rejected the genocide charge. The Pre-Trial Chamber directed the ICC Registry to transmit the request for arrest and the surrender of President Bashir to all states parties to the ICC Statute and all UN Security Council members.

³ http://www.un.org/news/dh/sudan/com_inq_darfur.pdf

⁴ *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber 1, 4 March 2009 (henceforth "Al Bashir Arrest Warrant Decision")

25. In addition to the fact that the Prosecutor sought a warrant of arrest for a sitting Head of State, perhaps the most controversial aspect of the Prosecutors request is the inclusion of a genocide charge. Although some groups and States had labelled the crimes committed in Darfur as genocide, it is important to bear in mind that the fact that widespread killings may have taken does not mean that genocide has occurred. Genocide, as defined in the 1948 Convention on the Prohibition and Punishment of Genocide, is a very specific crime and one which requires the proof of specific intent – the intention to destroy, in whole or in part, a racial, ethnic, national or religious group. The International Commission of Inquiry had concluded in 2005 that although war crimes and crimes against humanity had been committed in Darfur, the Government of Sudan had not pursued a policy of genocide in Darfur. In particular, the Commission was of the view that the attacks which took place in Darfur were, generally speaking, not conducted with the intent to destroy in whole or in part a group distinguished on racial, ethnic, national or religious grounds. However, the Commission did note that some individuals in Darfur, including some government officials, may have acted with genocidal intent in some instances. Given the findings of the Commission and given the difficulty of proving genocide, it was therefore surprising that the Prosecutor included the genocide charge in his request for an arrest warrant. In order to substantiate the genocide charge, and in particular in order to show genocidal intent, the Prosecutor sought to rely on evidence of attacks that were committed after the report of the International Commission. The majority of the Pre-Trial Chamber in its March 2009 decision on the request for the arrest warrant rejected the genocide charge. It held that the existence of genocidal intent by the Government of Sudan was not the only reasonable conclusion from the materials before it and that therefore the evidentiary standard provided for in article 58 of the Statute had not been met.⁵

26. It is worth noting that some, including the dissenting judge in the Bashir case, have argued that the majority misapplied the evidentiary standard provided for in Article 58 when it rejected the genocide charge. That provision requires that the Prosecutor demonstrate only that there are “reasonable grounds to believe” that the accused person is responsible for the crimes for which he is sought. At this stage of the proceedings definitive proof of the crimes is not required. However, in this case, the majority stated that the standard in Article 58 “*would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS’s dolus specialis [Government of Sudan specific intent] to destroy in whole or in part [the relevant groups].*”⁶ The requirement stated by the majority - that the *only reasonable conclusion* to be drawn from the materials is that there was a specific intent - appears to conflate the standard to be established at trial (a beyond reasonable doubt standard) with the standard to be established in a request for an arrest warrant. In the latter proceedings all that is normally required are reasonable grounds to believe that the person is responsible. It may well be that though there are reasonable grounds to believe such responsibility there are also reasonable grounds to

⁵ *Al Bashir Arrest Warrant Decision*, para. 159

⁶ *Al Bashir Arrest Warrant Decision*, para. 158

believe the opposite. Which belief is the more reasonable or cogent is a matter for trial. The Prosecutor has appealed that part of the decision rejecting the genocide charge.⁷

Other Situations under Analysis by the ICC

27. The Office of the Prosecutor of the ICC is currently analysing the situation in five (5) other countries in order to make a decision as to whether to investigate and bring prosecutions for crimes within the jurisdiction of the Court. The five (5) countries involved are: Colombia, Georgia, Kenya, Côte d'Ivoire, and Afghanistan. In addition, in January 2009, the Palestinian National Authority lodged a declaration accepting the jurisdiction of the Court under Article 12(3) of the Statute. This raises the question whether the ICC is competent to, and whether it ought to bring prosecutions in relation to the situation in Israel and the Palestinian Territory. The key question is whether the Palestinian Authority is competent to make the declaration it made. Article 12(3) is confined to declarations by States and it is not universally accepted that Palestine is a State. The Office of the Prosecutor is currently examining whether the ICC has jurisdiction to act in this situation.

Is the ICC Targeting African States Unfairly?

28. Given that all of the current investigations and prosecutions that have been initiated by the Prosecutor of the ICC have been in relation to African countries and African nationals, the question arises as to whether the ICC has targeted Africa in a way which is unfair and/or prejudicial to the interests of African countries and the continent in general. In this regard, perhaps the most serious possible charges that may be leveled against the ICC is that it is administering selective justice and that its intervention in some African countries is adversely affecting attempts to end conflicts in those countries and to secure peace.

29. With regard to the charge of selective justice, some may ask why is it that all the current investigations and prosecutions relate to Africa and why it is that crimes committed in other regions of the world (some of which are well known and many of which are particularly serious) have so far escaped investigation.

30. However, considering that African States constitute the largest regional grouping of States that have accepted the jurisdiction of the ICC, it is perhaps not surprising that it is more likely (at least statistically) that more prosecutions will arise from African States.

31. Of even greater importance though is the fact that three of the four situations being investigated by the ICC have been referred to the ICC by African States themselves. In these circumstances, the intervention by the ICC may not be considered

⁷ Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 10 March, 2009, <http://www.icc-cpi.int/iccdocs/doc/doc644001.pdf>

as a unilateral external intervention. Rather it is the States themselves that have taken the view that they wish to address serious crimes that have been committed within their territory. Moreover, they have considered the ICC to be an appropriate forum for addressing these crimes sometimes because they take the view that their national courts are not properly positioned to undertake criminal proceedings against the suspects in question. It is worth recalling that in the case of the CAR, the country's highest court – the Court of Cassation – held in April 2006 that the national authorities are unable to carry out the necessary criminal proceedings in relation to the alleged crimes being investigated by the ICC. In particular, that Court cited difficulties relating to the collection of evidence and obtaining custody of the accused. Similarly, one may refer to the recent position of the government of Uganda regarding the admissibility of the ICC proceedings where it stated that in its view the LRA leaders indicted by the ICC are triable by that Court.

32. Nonetheless, these facts do not in themselves explain why there are no current investigations or prosecutions relating to situations outside the African continent. One possible reason for this lack of prosecutions is that no State outside Africa has referred to the Prosecutor a situation in which crimes within the jurisdiction of the ICC have been committed. But even in the absence of such referrals, the Prosecutor is empowered to act on his own motion and to initiate investigations, subject only to supervision by the Pre-Trial Chamber. Thus far, he has failed to use those *proprio motu* powers conferred on him by the Statute. It is not difficult to imagine why the Prosecutor is more likely to investigate in cases where referrals have come from the State on whose territory the alleged crimes have been committed. In those cases, the prospect of successful prosecutions is made more likely by the fact that cooperation by the referring State will likely be forthcoming and, therefore, it will be easier to obtain evidence of the alleged crimes. However, many would still argue that given that the Prosecutor has powers to proceed independently and given that he cannot rely solely on self-referrals (a device which was not contemplated when the Statute was being drafted, the expectation being that referrals would come from other States rather than the State where the crime was committed), he ought to use or to have used those powers by now.

33. One of the most serious problems of ICC intervention in African conflicts is that it may be viewed as prejudicing attempts to secure peace. The issues here are whether the pursuit of peace and justice are always compatible and whether the pursuit of justice in the form of criminal trials ought perhaps to take a backseat when that pursuit impinges on peace negotiations in prospect or underway. These are issues that arise most prominently in relation to ICC action in Northern Uganda and in Darfur. In relation to the former, it has already been noted above that a key point to bear in mind is that the government of Uganda not only referred the matter to the ICC but is still of the view that the accused persons are triable by the ICC and that the case against them is admissible. With regard to Darfur, the matter was referred to the ICC by the UN Security Council in a resolution which was supported by two (2) of the three (3) African States then on the Council.

34. On the general issue of how to reconcile peace and justice, it is worth bearing in mind that African States have not taken the view that one should necessarily prevail over the other or that the two cannot be reconciled. There is now broad agreement in Africa that impunity for international crimes should not be tolerated. This view, which finds expression in Article 4 (h) of the Constitutive Act of the African Union, has been reaffirmed by organs of the Union on several occasions. In addition, the widespread ratification of the ICC Statute by African countries is a further expression of the belief that there ought to be prosecutions in circumstances where serious crimes of international concern have been committed. Viewed in this light it is not the case that there is no support for the Darfur referral in general. For example, it is likely that States would support the recent prosecutions brought in relation to attacks on AU peacekeepers. However, though there has been African support for the referral of the Darfur situation to the ICC there has also been concern that some of the particular prosecutions sought by the Prosecutor would prejudice attempts to secure the peace. In particular, it is the attempt to prosecute the President of the Sudan that has been of concern to the AU and its members. The rest of the analysis will therefore focus on whether the Prosecutor and the ICC have exceeded their powers in seeking to indict and prosecute a sitting Head of State. Thereafter, recommendations will be made as to how to address the current situation regarding that prosecution and how to address the role of the ICC in African situations in general.

Is the Attempt to Secure the Arrest and Prosecution of President Bashir a Violation of the ICC Statute and International Law?

35. The key question with regard to the case against President Bashir is whether the ICC is entitled to prosecute a sitting Head of State. In particular, the question arises whether the ICC is able to prosecute the Head of a State that is not a party to the ICC Statute. This is not the first time that an international tribunal has indicted a sitting Head of State. The International Criminal Tribunal for the former Yugoslavia (ICTY) issued a warrant for Slobodan Milosevic while he was head of the State of the Federal Republic of Yugoslavia and the Special Court for Sierra Leone indicted Charles Taylor while he was President of Liberia.

36. The question whether proceedings against President Bashir are in violation of international law arises because international law accords immunity from foreign criminal jurisdiction to serving Heads of State. This immunity from criminal jurisdiction includes immunity from arrest by foreign authorities since the person of the Head of State is inviolable. When abroad⁸ In addition, treaties may also confer immunity on the serving Head of State when abroad, for example where the serving of Head of State is part of that State's delegation to an international organization he will be covered by the immunity which attaches to representatives of States to international organizations.⁹ Or

⁸ See the *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, 2002 ICJ Reps., paras. 54-55. where the International Court of Justice was speaking of the Foreign Minister but the same principles apply to the Head of State.

⁹ See, for example, Art. IV Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 90 UNTS 327.

where both States are parties to it, the United Nations Convention on Special Mission 1969¹⁰ will also afford immunity. In the context of the case against President Bashir, it is important to note that the immunity accorded to a serving Head of State, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when he is accused of committing an international crime. The International Court of Justice (ICJ) made this clear in the *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*.¹¹ Although it was speaking of the position of the Foreign Minister, the rule enunciated by the Court applies with greater force for the Head of State. The ICJ stated that:

“[i]t has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”¹²

37. As a general matter, these international law immunities apply not only to proceedings in foreign domestic courts but also to international tribunals. It should be noted that in the *Arrest Warrant case*, the ICJ stated that “the immunities enjoyed under international law ... do not represent a bar to criminal prosecution in certain circumstances. ... [A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.”¹³ However, this should not be taken to mean that international law immunities may never be pleaded in proceedings before international courts and tribunals. A treaty establishing an international tribunal is not capable of removing an immunity which international law grants to the officials of States that are not party to the treaty. This is because immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty.¹⁴ A treaty may not deprive non-party States of rights which they ordinarily possess. The statement by the ICJ that international immunities may not be pleaded before certain international tribunals must be read subject to the condition that (i) the instruments creating those tribunals expressly or implicitly remove the relevant immunity¹⁵ and (ii) that the State of the official concerned is bound by the instrument removing the immunity. Therefore a serving Head of State is

¹⁰ 1400 UNTS 231 (Arts. 21, 39 & 31).

¹¹ *Arrest Warrant Case*, *supra* note 7.

¹² *Arrest Warrant Case*, *supra* note 7, para. 58.

¹³ *Arrest Warrant Case*, *supra* note 7, para. 61.

¹⁴ Article 34 *Vienna Convention on the Law of Treaties* (1969) 1155 U.N.T.S. 331 [VCLT].

¹⁵ See, Judge Shahabuddeen’s opinion in *Prosecutor v. Krstic* (ICTY Case IT-98-33-A), *Decision on Application for Subpoenas*, (July 2003), paras. 11-12, <<http://www.un.org/icty/krstic/Appeal/decision-e/030701.htm>> states that : “In my view . . . there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts. . . . International criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise.”

ordinarily entitled to immunity *rationae personae* before an international tribunal which that State has not consented to.

38. In the context of the ICC's indictment of President Bashir, the key questions are therefore (i) does the ICC Statute remove the immunity of Heads of States and (ii) does any such removal extend to the Head of State of a non-party in the case of a referral of a situation by the Security Council.

Does the ICC Statute Remove the Immunity of Heads of State?

39. There are two provisions of the ICC Statute that deal with immunity. The first is Article 27 which provides that:

"(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."

This appears to be a straightforward removal of immunity. However, the removal of immunity *vis-à-vis* the ICC by Article 27 is not the end of the matter. The ICC does not have independent powers of arrest and must rely on States to arrest and surrender persons wanted by the Court. Therefore, it was essential for the Statute to address the immunities that officials (such as Head of States) possess from the jurisdiction of, and from arrest by, other States. In order to deal with this issue Article 98(1) of the ICC Statute provides that:

*"The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."*¹⁶

40. Thus, whilst Article 27 provides that the fact that a State official possesses international immunity shall not bar *the ICC* from exercising jurisdiction, Article 98 directs the Court not to take action that would result in the violation by *States* of their

¹⁶ In addition, Article 98(2) provides that: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

international obligations to accord immunity to foreign officials. Given that the Court does not have powers of arrest and will in practically in every case be asking foreign States to arrest suspects, in cases where that suspect has international law immunities there is a clear tension between these two provisions. This tension can be resolved and meaning given to both provisions by making a distinction between immunities accruing to non-parties to the ICC Statute and those accruing to ICC parties. Since the Statute is a treaty and therefore cannot remove immunity belonging to *non-parties*, Article 98 expressly prevents the Court from putting parties in a position where they are asked to ignore the immunity obligations they owe to non-parties. However, the position is different with regard to parties. As between parties to the ICC Statute, immunities of officials of parties are removed by Article 27 when such persons are wanted by the ICC. The Court is therefore free to proceed with a request for arrest and surrender of serving Heads of State of an ICC party but may not *usually* request an arrest and surrender of the Head of State of a non-party.

Do Heads of States of Non-Parties to the ICC Statute Retain Immunity in cases covered by Security Council referrals?

41. Applying the distinction between the immunities of parties and that of non-parties with respect to the ICC to the case of President Bashir is complicated. The problem in this case is that although Sudan is not a party to the ICC Statute, the case arises out of a Security Council referral. The reason for the complication is that the main argument for saying that the ICC Statute does not affect the immunities of non-parties – the argument that treaties may not deprive non-parties of rights – may not apply in the case of referrals. That argument may not apply because in the case of a referral, it is the Security Council resolution (together with the Statute) which confers jurisdiction on the Court. Although the Statute is not itself binding on a non-party, the non-party would be bound by any obligations imposed on it by the Security Council resolution. Moreover, it is accepted that the Security Council may remove immunities that would otherwise accrue to Heads of States or other State officials. Indeed, in establishing both the International Criminal Tribunals for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the Security Council included in their Statute a provision very similar to Article 27(1) of the ICC Statute.¹⁷ Thus, although the ICC Statute may not remove the immunity of a non-party, that immunity may be removed by a Security Council resolution.

42. In Resolution 1593, the Security Council decided that Sudan should cooperate fully with the court but did not explicitly make the Statute binding on it, nor did it expressly address the question of immunity. In its decision to issue the arrest warrant sought by the Prosecutor, the Pre-Trial Chamber of the ICC only addressed the

¹⁷ Article 7(2), *Statute of the International Criminal Tribunal for the Former Yugoslavia* (ICTY)(1993), online: United Nations <<http://www.un.org/icty/basic/statut/statute.htm#7>>; Article 6(2), *Statute of the International Criminal Tribunal for Rwanda* (ICTR)(1994), online: International Criminal Tribunal for Rwanda <<http://www.ictr.org/ENGLISH/basicdocs/statute.html>>

question of Bashir's immunity implicitly.¹⁸ The Pre-Trial Chamber held that "the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case."¹⁹ The PTC reached this decision based on a number of considerations. It stated that one of the core goals of the Statute is to put an end to impunity and observed that Article 27, which it said provides "core principles", was included in the Statute in order to achieve this core goal. The PTC also based its ability to exercise jurisdiction on the view that:

"by referring the Darfur situation to the Court, pursuant to article 13(b), the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole."²⁰

Implied in the Court's statements is the view, that the Security Council has implicitly adopted Art. 27 and thus implicitly sanctioned the exercise of jurisdiction by the Court over a serving head of State who would otherwise be immune from jurisdiction.

43. According to some expert opinion, the Pre-Trial Chamber was right to hold that the Security Council has accepted that investigations and prosecutions from the Darfur situation will take place in accordance within the ICC's statutory framework. Firstly, the Security Council, in referring the situation regarding Darfur to the ICC, was taking advantage of a provision in the ICC Statute (Article 13(b)). Secondly, in the case of the Darfur referral, the expectation that proceedings would take place in accordance with the Statute can also be implied from the various references in Res. 1593 to the Statute of the Court.²¹ Thirdly, and more generally, given that the Security Council, in referring a situation to the ICC, intends the Court to take action (to investigate and prosecute as appropriate), and given that the Council itself provides no procedure by which the investigation and prosecution is to take place, the Council must be taken as expecting the Statute to be the governing law. The Court can only act in accordance with its Statute since Article 1 of that Statute provides that "[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."²² As this is the case, a decision by the Security Council that the Court may act implies a decision that it act within its Statute.

¹⁸ *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber 1, 4 March 2009.

¹⁹ *Bashir Arrest Warrant decision*, para. 41

²⁰ *Bashir Arrest Warrant decision*, para. 45.

²¹ The Council recalls provisions of the Statute in three preambular paragraphs of Res. 1593 and in para. 4 "*also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur." (emphasis in original)

²² See Art. 1 (second sentence), ICC Statute.

44. Despite the fact that the very decision to refer a situation regarding a non-party implies a decision that the Court act in accordance with its Statute, the question remains whether the Statute is binding on that non-party. At a minimum, the referral of a situation to the ICC is a decision to confer jurisdiction on the Court (in circumstances where such jurisdiction may otherwise not exist). That decision is made under Chapter VII of the United Nations Charter and by Article 25 of the Charter “Members of the United Nations agree to accept and carry out the decisions of the Security Council . . .” Thus, the decision to confer jurisdiction must be accepted by the members. They are legally bound to accept that the Court has jurisdiction in the circumstance in which the Security Council has conferred jurisdiction. Art. 25 estoppes them, as a matter of law, from taking a contrary position. Moreover, since the jurisdiction and functioning of the Court must take place in accordance with the Statute a decision to confer jurisdiction is a decision to confer it in accordance with the Statute. Thus, all States (including non-parties) are bound to accept that the Court can act in accordance with its Statute. In this sense, at least it could be argued that, a non-party to the Statute is bound by the Statute in the case of a referral – in the sense that it is bound to accept the jurisdiction of the Court and legality of the Court’s operation in accordance with its Statute.

45. In the present context, there is a further reason for regarding the Council as subjecting Sudan to the Statute and for regarding the whole of the Statute as binding on that State. By requiring Sudan to cooperate fully with the Court,²³ the resolution explicitly subjects Sudan to the requests and decisions of the Court. Since the Court must, under its own Statute, act in accordance with the Statute, making the decisions of the Court binding on Sudan is to subject Sudan to the provisions of the Statute indirectly.

46. It should be pointed out however that some legal experts have expressed a contrary view to the effect that because the Security Council does not and did not explicitly remove immunity, and because Sudan is not a party to the ICC Statute, the immunities of the Sudanese President are preserved. This is an issue on which there is little prior judicial authority. Furthermore, the Pre-Trial Chamber in its decision failed to address the question of immunity in full. It is particularly regrettable that the Pre-Trial Chamber chose to ignore Article 98 in its analysis as that Chamber proceeded to make a request for arrest and surrender in circumstances where immunity is in issue. A reader of that decision would think that the Chamber was unaware that Article 98 appears to apply in precisely this sort of case. The Pre-Trial Chamber ought to have dealt with the applicability of Article 98 and how it relates to Article 27 in the proceedings before it. As stated above, the Prosecutor has appealed against the Pre-Trial Chamber’s decision to reject the genocide charge. It is to be hoped that when the *Arrest Warrant decision* is considered by the Appeal Chamber, it will examine the question of immunity in greater detail. However, this should not be left to chance; the issue of immunity ought to be brought to the attention of the Appeals Chamber by interested parties.

²³ SC Res. 1593, para. 2,.

47. The view has also been expressed by other legal experts that Article 27 must be regarded as binding on Sudan. The Security Council's decision to confer jurisdiction on the ICC, being (implicitly) a decision to confer jurisdiction in accordance with the Statute must be taken to include every provision of the Statute that defines how the exercise of such jurisdiction is to take place. Article 27 is a provision that defines the exercise of such jurisdiction in that it provides that "immunities . . . which may attach to the official capacity of a person, whether under international law or national law, shall not bar the Court from exercising jurisdiction over a person." The fact that Sudan is bound by Article 25 of the UN Charter and implicitly by Security Council Res. 1593 to accept the decisions of the ICC puts Sudan in an analogous position to a party to the Statute. The only difference is that Sudan's obligations to accept the provisions of the Statute are derived not from the Statute directly but from a United Nations Security Council resolution and the Charter. On this view, the immunities of Sudanese Officials including of the Sudanese President are removed by Article 27 thus meaning that under Article 98, the Court is not barred from requesting arrest and surrender.

OPTIONS

48. According to the Assembly Decision, the Meeting of African States Parties is expected to make recommendations to the Assembly for its consideration. In this regard, the available options open to States Parties encompass both political and legal avenues for the consideration of the Assembly:

R.1 The AU Member States should reiterate their unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire Continent, in conformity with the Constitutive Act of the Union. This commitment encompasses the fight against the crime of genocide, war crimes and crimes against humanity as enunciated in Article 4(h) of the Constitutive Act and in other legal instruments of the Union. This commitment was underlined by the Assembly in February 2009 by virtue of decision Assembly/Dec. 213(XII), mandating the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, to examine the implications of the African Court of Human and peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity and war crimes.

R.2 The Government of Sudan, other African States, and the African Union should consider participating in the appeals proceedings concerning the decision to issue an arrest warrant against President Bashir. The purpose of this participation would be to raise the issue of the immunity of the Sudanese President and the impact of Article 98. There is a reasonable argument to be made that Article 98 of the Statute requires that the Arrest Warrant be cancelled and that the Court ought to reverse the decision to request the arrest and surrender of President Bashir. This argument should be put to the Appeals Chamber.

R.3 There are a number of ways in which it may be sought to overturn the request for the arrest of President Bashir using procedures of the ICC. President Bashir himself has a right of appeal, under Article 82 (1). However Rule 155 of the ICC's Rules of Procedure and Evidence stipulate that a request for leave to appeal by a party under Article 81(d) must be filed within 5 days of being notified of the decision.

R.4 Sudan and other States may also seek a decision to the effect that the ICC's request for surrender raises problems in respect of Article 98. To do this, Sudan and other African States may seek to exercise their right under Rule 195 of the ICC's Rules of Procedure and Evidence which provides for opportunity to raise issues in respect of Article 98.

R.5 Alternatively, Sudan, other States or the African Union itself may seek to make submissions as *amicus curiae* in the appeals proceedings instituted by the Prosecutor. Under Rule 103 of the Rules of Evidence and Procedure, a Chamber may grant leave to a State, Organization or persons to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

R.6 The ICC operates on the basis of the principle of complementarity. This means that the ICC is meant to be a court of last resort and will not take action where national investigative and judicial authorities have taken action. Cases are inadmissible where:

- “(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.”

R.7 African States should seek to ensure that they investigate or prosecute persons who are suspected of having committed crimes within the jurisdiction of the ICC. In particular, such investigations should take place where the crimes are allegedly committed by their nationals or on their territory. African States should explore the full range of options for delivering local justice before considering recourse to international tribunals. A further reason emphasising the importance

of this type of action is that many African States are parties to some treaties which require them to prosecute certain international crimes. In instances where African States may be willing but unable to take action with regard to international crimes they should seek technical, financial or other assistance which would enable them to exercise jurisdiction over crimes committed within their territory. Such assistance may include drafting of model legislation dealing with international crimes, training of members of the police and judiciary, and strengthening cooperation amongst judicial and investigative agencies.

R.8 During the Review Conference of States Parties scheduled to take place in Kampala, Uganda in 2010, African States Parties will have the opportunity to raise issues of African concern, particularly in the following areas:

- The power of the UN Security Council under the Rome Statute to refer cases to the ICC and to defer cases for one (1) year;
- Oversight on the prosecutorial discretion of the ICC Prosecutor;
- Procedures of the ICC;
- Clarification on the Immunities of officials whose States are not Party to the Statute; and
- Any other areas of concern to African State Parties.

R.9 In cases where it is considered that prosecutions would be prejudicial to the peace and security of States or the region as a whole, African States should seek to take advantage of the provision of Article 16 of the ICC Statute. Under that provision, the United Nations Security Council may defer, by decision taken under Chapter VII of the UN Charter, ICC investigation or prosecution for a year. In this regard, African States and the African Union should consider continuing to push for a deferral by the UN Security Council of proceedings initiated against President Bashir in conformity with previous decisions of the Peace and Security Council and the Assembly of the Union.

R.10 There has been some concern expressed about the Prosecutor's choice of investigations and prosecutions. As explained in this report, the two main allegations have been charges of selective justice and that some prosecutions have impacted negatively on peace processes in the countries concerned. In order to address this concern, African States or the African Union should consider taking steps in order to influence prosecutorial discretion in cases where investigation or prosecution would not serve the interests of justice. Under Article 53(2)(c) of the Statute, the Prosecutor may decide that there is not a sufficient basis for prosecution because "a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime." The Office of the Prosecutor issued a policy paper in September 2007 setting out its understanding of the concept of interests of

justice.²⁴ In that paper, the Prosecutor emphasised that the exercise of discretion not to prosecute, on the grounds that investigation or prosecution would not serve the interests of justice, should be exceptional. He also stated that there is a difference between interests of peace and interests of justice thus indicating that the Prosecutor would not consider the interests of peace when exercising the discretion to refrain from prosecution. African States may wish to call for a revision of this prosecutorial policy.

R.11 The steps that may be taken to influence the formation of prosecutorial discretion may include the following options:

- (i) a revision of the Statute of the Court. That revision may include the addition of other factors that the Prosecutor should consider when exercising his discretion not to investigate or prosecute, in the interests of justice, under Article 53 of the Statute. The first opportunity to amend the Statute of the Court when a Review Conference of State parties takes place in 2010 in Uganda; or
- (ii) promulgation by the Assembly of States Parties of Guidelines which the Prosecutor should take into account in exercising these functions. These guidelines need not be part of the Statute but would be a set of principles which the Prosecutor is obliged to take into account in making decisions regarding investigation or prosecution; or
- (iii) advocating for a revision of the Prosecutor's policy by the issuance of a policy paper suggesting for a broader set of circumstances in which investigation or prosecution would not be in the interests of justice. Under this option, it would be up to the Prosecutor to revise his own policy paper but the push for this would come from States parties reacting to his current policy.

R.12 Some criticism has been levelled against the conduct of the current ICC Prosecutor Luis Moreno-Ocampo. Some of that criticism relates to the cases he has brought. For example, some have criticised the decision to bring proceedings against President Bashir at all. Others criticise the timing of the proceedings and public manner in which the arrest warrant for President Bashir was sought and argue that the Prosecutor should have sought a sealed arrest warrant (i.e. one that was not made known). Some others criticise the inclusion of the genocide charge in the request for the arrest warrant. They note that the International Commission of Inquiry had come to the view that though crimes against humanity and war crimes had been committed in Darfur, the Government of Sudan had not pursued a policy of genocide (see paragraph 22 above). Serious criticism has also been levelled against the Prosecutor arising out of the mishandling of the initial stages of the trial in the *Lubanga* case (see paragraph 15 above). That

²⁴ <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>

mishandling put the proceedings in serious jeopardy as the Trial Chamber not only ordered a stay of proceedings but initially ordered the release of the accused. Further criticism has also been levelled against the Prosecutor as a result of the way in which he handled allegations of sexual misconduct made against him. It is important to point out that the allegations of sexual misconduct were dismissed as manifestly unfounded but the Prosecutor has been seriously criticised for the way in which he treated the staff member who brought the allegations to light. That staff member was dismissed by the Prosecutor, a decision that the International Labour Organization's Administrative Tribunal has held to be a breach of due process.²⁵ All of these matters have led some Member States of the African Union to call for the resignation of Mr. Ocampo. Additionally, a prominent British journalist has also called for the resignation of the ICC Prosecutor.²⁶ African States and the African Union may wish to consider whether to join that call for the resignation of the Prosecutor by making a formal statement to that effect.

In considering matters relating to the conduct of the Prosecutor, it is important to bear in mind that the Prosecutor is intended to be independent and that steps should not be taken which may compromise the independence of the office. Although the Prosecutor is and ought to be under the ultimate authority of the States Parties to the Statute, it is also important that this and any future Prosecutor should feel free to act independently and should not feel bound to follow the views of any particular State or States. Steps taken to discipline or remove the first Prosecutor may have the effect of undermining the independence of future prosecutors.

R.13 In the event that there is very deep dissatisfaction with the work of the Court, States Parties have the option of withdrawing from the Statute of the Court in accordance with Article 127 of the Statute. Indeed one (1) African State Party to the Rome Statute of the ICC has already formally communicated to the AU Commission her intention to consider withdrawing from the ICC. Such a withdrawal takes effect one (1) year after receipt of the notice of withdrawal and does not affect obligations arising in connection with investigations and prosecutions commenced during membership. Those States that have signed but not ratified the Statute may also indicate an intention not to ratify the Statute²⁷ thus freeing the signatory State from the obligations (under Article 18 of the

²⁵ For media coverage of this matter, see Joshua Rozenberg, "Why the World's Most Powerful Prosecutor Should Resign: Part 2", The Telegraph (London), 14 Sept. 2008, <http://www.telegraph.co.uk/news/newstopics/lawreports/joshuarozenberg/2446064/Why-the-worlds-most-powerful-prosecutor-should-resign-Part-2.html>

²⁶ See Joshua Rozenberg, "Why the World's Most Powerful Prosecutor Should Resign: Part 4", The Telegraph (London), 18 Sept. 2008, <http://www.telegraph.co.uk/news/newstopics/lawreports/joshuarozenberg/2700448/Why-the-worlds-most-powerful-prosecutor-should-resign-Part-4.html>

²⁷ As the United States of America and Israel seem to have done with regard to the ICC Statute.

Vienna Convention on the Law of Treaties) not to defeat the object and purpose of the treaty.

However, the option of withdrawing from an important treaty such as the ICC Statute is not one that should be exercised lightly nor is it one that is recommended in this case. States Parties ratified the treaty because of the importance they attach to the view that there should be no impunity for international crimes. African States have indicated in Article 4(h) of the Constitutive Act of the African Union a commitment to action against genocide, war crimes and crimes against humanity. The organs of the AU have on many occasions also reaffirmed the view that there should not be impunity for international crimes. Withdrawing from the ICC Statute would send the wrong signal regarding African commitment to justice where serious international crimes are committed. A wrong signal would be sent to perpetrators and potential perpetrators of international crimes. That signal could have a particularly adverse impact when foreign States are considering the exercise of universal jurisdiction. This is because withdrawal from international mechanisms of justice is likely to encourage the exercise of universal jurisdiction by foreign States. Moreover, withdrawal from the ICC Statute would confer few advantages given that the ICC is able to exercise jurisdiction with respect to crimes committed by nationals of non-parties or on the territory of non-parties. The ICC may exercise jurisdiction with respect to non-parties in cases where there is a referral of a situation by the UN Security Council (as was the case with the situation in Darfur). Also, the ICC may exercise jurisdiction over nationals of non-parties where such persons commit those crimes on the territory of a non-party.

2009-07-01

Report of the commission on the meeting of states parties to the Rome statute on the international criminal court (ICC)

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