

ICC justice

The debate continues

We continue with our debate on the work of the International Criminal Court (ICC) in Africa and why human rights groups appear to pick on African personalities disliked by the West. At its Summit in Sirte, Libya (1-3 July), the African Union formally decided not to cooperate with the ICC over the indictment and arrest warrant issued against the Sudanese president, Omar al-Bashir. The AU appears to have been angered by the “disrespect” shown it by the UN Security Council that referred the Sudan-Darfur case to the ICC. On 14 July last year, when the ICC first applied for Bashir’s indictment, the AU had asked the Security Council to invoke Article 16 of the ICC statute to suspend the indictment for a year as, coming at that sensitive time in the AU negotiations over the Darfur case, the indictment had the potential to derail the good work already done by the AU. The Security Council merely

received the AU petition and filed it away.

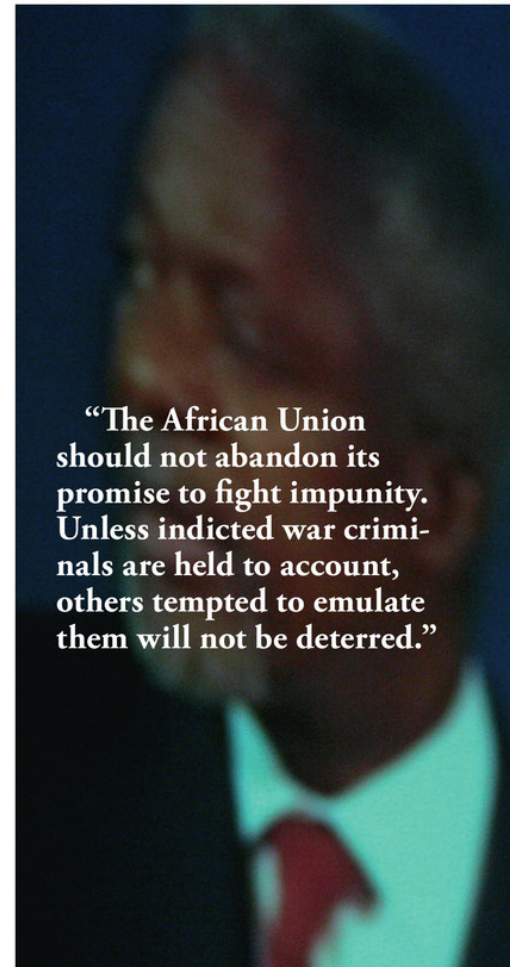
In response to the Security Council’s inaction, the AU set up a commission to take the matter further. When the commission reported to the Sirte Summit, the AU, although reiterating its unflinching commitment to fighting impunity on the continent, decided to withdraw cooperation with the ICC over the Bashir arrest warrant. The debate continues below.

1. The ICC represents hope for victims of atrocities

By Kofi Annan
(former UN secretary general)

Eleven years ago when I opened the Rome conference that led to the founding of the International Criminal Court (ICC), I reminded the delegates that the eyes of the victims of past crimes and the potential victims of future ones were fixed firmly upon them. The delegates, many of whom were African, acted on that unique opportunity and created an institution to strengthen justice and the rule of law.

Now that important legacy rests once more in the hands of African leaders... The African Union summit meeting [*in Libya, which decided not to cooperate with the ICC over the indictment of President Omar Bashir, was*] the first since the ICC



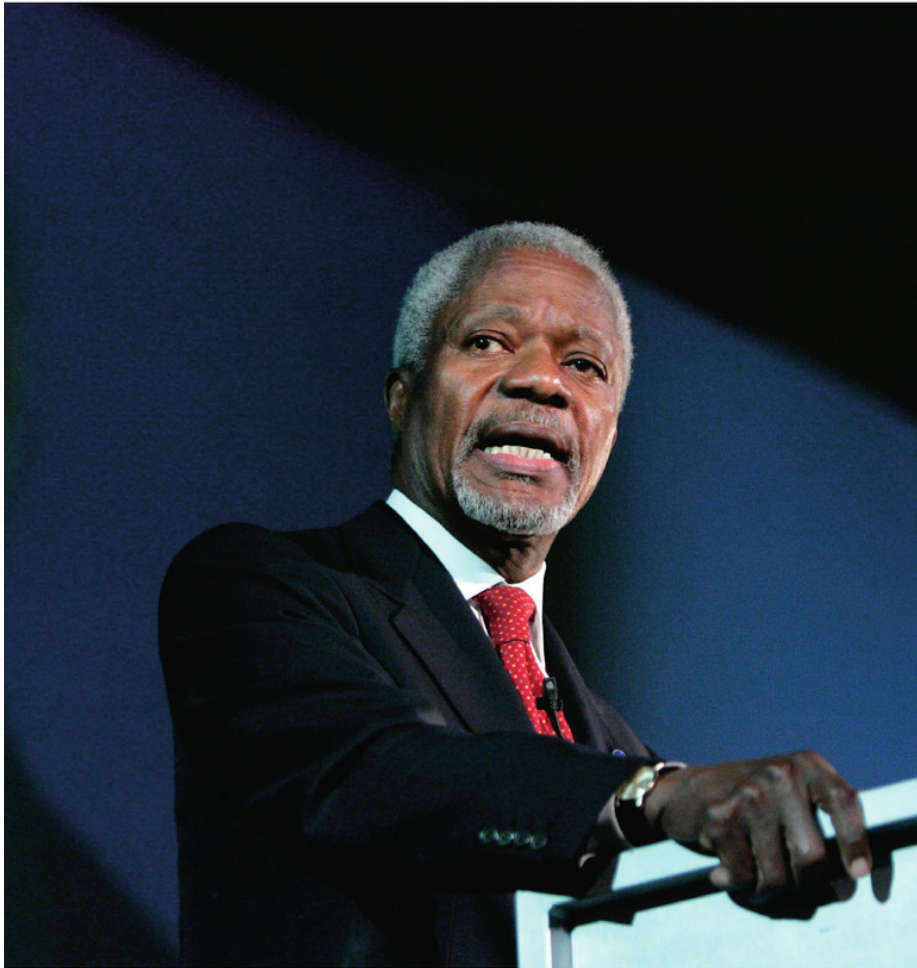
“The African Union should not abandon its promise to fight impunity. Unless indicted war criminals are held to account, others tempted to emulate them will not be deterred.”

issued the arrest warrant for President Bashir, on charges of crimes against humanity and war crimes for his alleged role in the atrocities in Darfur.

The AU’s repeatedly stated commitment to battle impunity will be put to the test. On the agenda is an initiative by a few states to denounce and undermine the international court. In recent months, some African leaders have expressed the view that international justice as represented by the ICC is an imposition, if not a plot, by the industrialised West.

In my view, this outcry against justice demeans the yearning for human dignity that resides in every African heart. It also represents a step backward in the battle against impunity.

Over the course of my 10 years as United Nations secretary general, the promise of justice and its potential as a deterrent



came closer to reality. The atrocities committed in Rwanda and the former Yugoslavia moved the Security Council to set up two ad hoc tribunals, building on the principles of post-World War II courts in Nuremberg and Tokyo.

These new tribunals showed that there is such a thing as effective international justice. But these ad hoc tribunals were not enough. People the world over wanted to know that *wherever and whenever the worst atrocities were committed – genocide, war crimes or crimes against humanity – there would be a court to bring to justice anyone in a government hierarchy or military chain of command who was responsible. That principle would be applied without exception, whether to the lowliest soldier or the loftiest ruler.*

Thus the ICC was formed. It now has 108 states, including 30 African coun-

tries, representing the largest regional bloc among the member states. Five of the court's 18 judges are African. The ICC reflects the demand of people everywhere for a court that can punish these serious crimes and deter others from committing them.

The African opponents of the international court argue that it is fixated on Africa because its four cases so far all concern alleged crimes against African victims. One must begin by asking why African leaders shouldn't celebrate this focus on African victims. Do these leaders really want to side with the alleged perpetrators of mass atrocities rather than their victims? Is the court's failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?

Moreover, in three of these cases, it was the government itself that called for ICC

Kofi Annan: "The ICC sends a message that no one is above the law. That hope and message will be undermined if the African Union condemns the court because it has charged an African head of state"

intervention – DR Congo, the Central African Republic and Uganda. The fourth case, that of Darfur, was selected not by the international court but forwarded by the UN Security Council.

It's also important to remember that the ICC, as a court of last resort, acts only when national justice systems are unwilling or unable to do so. There will be less need for it to protect African victims only when African governments themselves improve their record of bringing to justice those responsible for mass atrocities.

The ICC represents hope for victims of atrocities and sends a message that no one is above the law. That hope and message will be undermined if the African Union condemns the court because it has charged an African head of state. The African Union should not abandon its promise to fight impunity. Unless indicted war criminals are held to account, regardless of their rank, others tempted to emulate them will not be deterred, and African people will suffer.

We have little hope of preventing the worst crimes known to mankind, or reassuring those who live in fear of their recurrence, if African leaders stop supporting justice for the most heinous crimes just because one of their own stands accused.

[Kofi Annan wrote this article originally for The New York Times]

2. Selective justice is not justice at all

*Madibeng Kgwete
(Pretoria, South Africa)*

The debate on the role of the ICC, particularly in relation to its perceived targeting of African leaders, raises emotions amongst those of us who feel – not without reason – that the ICC is one of the several tools that Western leaders use to intimidate our leaders. There are many reasons why we need a court modelled along the lines of the ICC to bring about justice to victims of callous regimes around the world. And this, I believe, is the reason why so many African countries supported the formation of the ICC.

We in Africa have had – and continue

to experience – a fair share of the slaughtering of innocent civilians in several conflicts; and we have no reason to protect or be sympathetic to perpetrators of such heinous crimes when they are called to account for their criminal actions.

I don't think anyone disputes the fact that, "when the ICC investigates those allegedly responsible for serious crimes in Africa, it does so on behalf of African victims", as Lucile Mazangue puts it in *"The case for the ICC"* (NA, July 2009).

The problem is that the court that our leaders thought would bring these perpetrators of violence – particularly violence against civilians – to book is already apparently negating one of the basic principles of justice: impartiality. Selective justice, as we have seen practised by the ICC, is not justice at all. A system of justice is supposed to protect the weak against the bullying of the powerful, but the ICC appears to be doing the exact opposite. It seems to be targeting the weak in apparent pursuance of the interests of powerful Western states. And that is grossly unfair and unjust. The mandate of the ICC, as Mazangue correctly puts it, "is to hold perpetrators of genocide, crimes against humanity, and war crimes to account when national courts are unwilling or unable to do so". And we have seen national courts in Africa, Asia, Europe and the Americas unwilling and unable to act against alleged criminals. Investigators, prosecutors and judges who look the other way when leaders of powerful Western countries break international law implicate their good names in the abortion of justice.

The generally accepted principle that lawyers must practise their trade without fear, favour, or prejudice seems to be a foreign concept to the ICC as an institution. The court is visibly neither willing nor able to charge leaders of rich Western countries with crimes against humanity, despite overwhelming evidence to this effect. Selective justice conceals (seemingly by design) monumental crimes of the type that we have seen in countries such as Iraq, Lebanon, Palestine, DR Congo, Rwanda, Uganda, etc. When will victims in these and many other countries see justice? Does the ICC have both the will and the guts to catch big fish? I await a comprehensive answer from any of the officials or judges at the ICC itself.

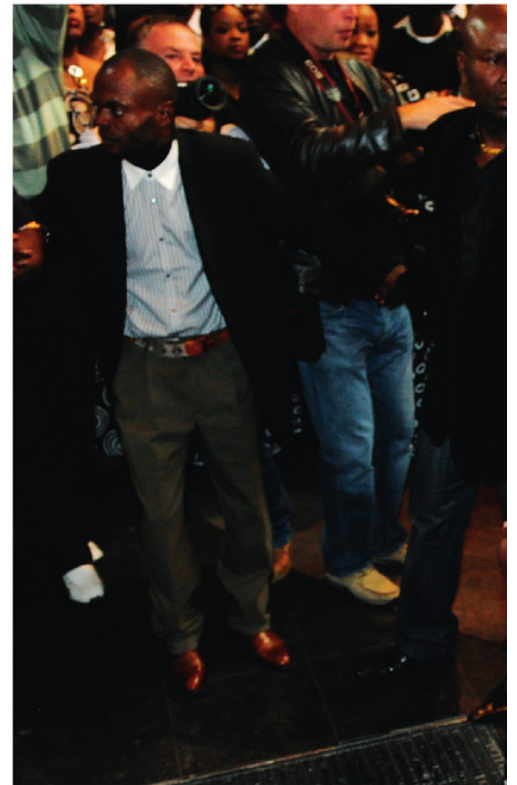
"The problem is that the court that our leaders thought would bring perpetrators of violence to book is already apparently negating a basic principle of justice: impartiality."

3. AU should stand with victims, not abusers

By Param-Preet Singh
(Human Rights Watch, New York)

Respect for the rule of law is one of the founding principles of the African Union (AU). It should therefore come as no surprise that African states make up the largest regional membership bloc of the International Criminal Court (ICC), whose mission is to tackle the worst crimes known to humankind when national courts cannot or will not do so.

What is surprising, however, is the recent assault on the ICC from within the African Union, despite, as outlined in a recent communiqué of its Peace and Security Council, its "unflinching commitment to combating impunity". Several of the AU's North African members – who are not, incidentally, parties to the ICC – are trying to undercut its support on the continent. This assault follows the court's decision earlier this year to issue an arrest warrant for President Omar al-Bashir of Sudan for war crimes and crimes against humanity. Critics claim that because of its exclusive focus to date on Africa, the ICC is an "instrument of colonialism" that is unfairly targeting leaders on the continent while crimes committed by more powerful states remain unaddressed. As several Darfurian civil society activists I met in Banjul recently rightly noted, though, this criticism conveniently forgets the thousands of victims who would be without redress for their unspeakable suffering if not for the ICC. These activists are not alone. From Cape Town to Addis Ababa, in addition to Banjul, over a hundred civil society groups have voiced their support for the court and have urged the AU to do the same.



New African magazine has called for a debate on why international non-governmental organisations such as Human Rights Watch "often appear to pick on African personalities disliked by the West". *Certainly we have to recognise that part of the criticism of efforts to ensure justice for crimes in Africa is rooted in the fact that international justice currently operates on an uneven playing field. More powerful states are in a better position to shield their leaders from the arm of justice.* The veto power of the five permanent members of the UN Security Council – the United States, Russia, China, the UK and France – means that referral of situations to the ICC by the Council is currently far less likely for crimes committed by these countries and their close allies than for states without such support.

There is no question that this playing field should be levelled. Human Rights Watch consistently presses for justice for serious international crimes regardless of where they are committed, including through prosecutions of Bush administration officials implicated in torture, and Russian and Israeli commanders responsible



Surrounded by friends: Jean-Pierre Bemba (centre), DR Congo's former vice president now facing trial at the ICC, was given a temporary remand to attend his father's funeral in Brussels on 7 July. His case was referred to the ICC by Kinshasa

for war crimes. In the meantime, however, the solution is to work for more inclusive justice, not less. To advocate otherwise has the practical consequence of abandoning the victims for whom justice is available. Such an approach feeds, rather than combats, the culture in which abusers think they will suffer no consequences for their actions.

This is a view widely shared by many African states and civil society organisations that have recently taken important steps to stand up for both victims and the ICC. At a meeting convened by the AU Commission in Addis Ababa in June, for example, South Africa and a number of SADC [Southern African Development Community] states – including Botswana, Lesotho and Zambia – led the charge in firmly rejecting efforts by ICC opponents to manipulate them into muting their support for the court. The strength of their collective action should be commended.

Unfortunately, support for the ICC in Africa suffered a setback at the AU summit in Libya in early July. Under pressure from its host, Libya – one of the ICC's main

opponents – the AU adopted a decision that its members should not cooperate with the ICC in the arrest of President al-Bashir, despite the strong objections of Botswana and Chad.

Significantly, since then Botswana and Uganda have reaffirmed their commitment to the Rome Statute establishing the ICC and their support for the court. Botswana in particular has made it clear that it would arrest and transfer al-Bashir to the ICC, as “the people of Africa, including the people of Sudan deserve to be protected from the perpetrators of such crimes”. We look to other African ICC state parties to make similar public statements. In doing so, they would be aligning themselves with the victims of horrific atrocities instead of their abusers.

As the *New African* continues to look at questions of justice, we believe it could make an important contribution by focusing its debate on what African states can do to strengthen justice for the worst crimes wherever they are committed. This would serve victims of abuses in Africa and elsewhere.

4. No debate

*By Alan S. Barnard
(Dar es Salaam, Tanzania)*

The ongoing debate on the ICC may seem newsworthy to many but to me it is old news. More Western interference in African matters. What continues to infuriate me, however, is the level of hypocrisy generated by these supposedly “good guys” taking the moral “high ground” – the descendants of the perpetrators of every kind of evil on humanity now cloaking themselves in the drapes of “justice” and “truth” and “international law and order”, God help us.

Their own law. Their own order. Their own idea of justice. Their own unbearable guiltiness. To load it up still more on the back of the ever-willing African as if he is not carrying enough and has not for the past 500 years! I have only one solution. Africa establishes its own “International Criminal Court”, and we summon the whole damn world of hypocrisy to challenge it. It will be a court of justice. It will be a court of truth. It will be an African court, with African judges. Then we will see what happens to the Western idea of impunity.

5. Some NGOs are front organisations

*By George Bob-Milliar
(Accra, Ghana)*

Human rights as a concept have lately assumed critical importance. States are routinely ranked according to their human rights record and African states feature prominently in this very biased index. Thus, human rights as a concept has become synonymous with “good governance”. And “donor” countries and agencies have added it as one of the conditionalities for receipt of so-called aid. But the concept of human rights had long existed in many ancient civilisations, including those that emerged in Africa. The political, social, economic and religious traditions in Africa mandate rulers to govern justly and compassionately.

While debating this issue, we should not lose sight of the uncomfortable fact that

some human rights NGOs have become front organisations for Western governments, promoting their so-called agenda of “good governance” and “democracy”. The majority of them receive funding from Western governments and agencies, and as such they have become spokespersons for their benefactors.

For a long time, Africans have been denied their economic rights under international trade regimes. Economic rights are human rights too, but don't mention it to the human rights NGOs! If Africans were not cheated and denied their economic rights, the continent would be a better place to live in. The thrust of my argument, therefore, is that human rights NGOs must adopt a holistic approach to human rights issues, and this must include economic, social and cultural rights. The over-concentration on political rights does no justice to the concept of human rights.

Yes, there have been widespread human rights abuses in Africa, sometimes carried out by Western-backed African dictators. But never do we see any Western government held responsible for supporting and protecting some of the worst human rights violators in Africa and elsewhere. It is a huge concern that the West applies human rights principles selectively. Resource-rich (especially oil-rich) countries escape censure while resource-poor states are pilloried.

If the history of Africa tells us anything, it is that we Africans have allowed ourselves to be dictated to for far too long. The work of Western human rights NGOs has strong echoes of the 19th century European-led evangelisation in Africa. They came allegedly to proselytise (Holy Bible in hand) the African, and in the process they colonised us. An AU Human Rights Court should be the forum where alleged African offenders should be tried, not at the ICC.

6. AU decision shows disdain for Darfurians

By Erwin van der Borgh
(Director Africa Programme,
Amnesty International, London)

The editorial line of the *New African*, reiterated in the article “*Human Rights NGOs: The Great Debate*”, published in June, is consistent with Amnesty International's position, namely that those responsible for crimes under international law should

be held accountable by national or international courts and that there can be no immunity for such crimes.

Thus, our organisation supports the views expressed by numerous human rights organisations in Africa, many of whom recently called on the African Union (AU) and its member states to strengthen international justice and in particular continue to collaborate with the ICC, including with regard to the prosecution of Sudanese President Omar al-Bashir for war crimes and crimes against humanity. The recent decision by the AU not to collaborate with the ICC with regard to the arrest warrant issued against President Bashir shows a disdain for people in Darfur who suffered gross human rights violations.

Amnesty International recognises that the current system of international justice has many shortcomings and that impunity is still the norm. However, we regret that these shortcomings are presented by the *New African* as partly the result of a conspiracy theory in which human rights NGOs are allegedly working in collusion with powerful states, even though three of the four ICC investigations involve situations referred by three African states. A careful analysis of Amnesty International's position would show that we have consistently called for an end to impunity and for investigations to be initiated against those suspected of being responsible for human rights violations in all regions of the world. Amnesty International for example has in July published its most comprehensive report on the conflict in Gaza calling for, among other measures, support for the UN Human Rights Council inquiry and the use of universal jurisdiction against perpetrators of war crimes.

It has also called for an international inquiry into war crimes in the conflict in Sri Lanka and the prosecution of perpetrators. Earlier, it had criticised in March statements by President Barack Obama, effectively conferring impunity for acts of torture, and called on the USA to investigate and prosecute those responsible in line with its international legal obligation to bring perpetrators to justice.

If a national or international criminal court issues an arrest warrant against an individual for crimes under international law, Amnesty International will campaign for the arrest warrant to be executed and

the suspect to be given a fair trial without recourse to the death penalty, regardless of who that person might be.

Amnesty International's campaign on international justice not only seeks to ensure that justice takes place but also that the truth about crimes is established and that those who suffered these crimes or their relatives receive full reparations to help them rebuild their lives.

I am sending this article on behalf of my colleagues, directors of Amnesty International Sections in Africa:

- Aimé Tchamie Adi,
Director, Amnesty International
Togo
- Lotfi Azzouz, Director,
Tunisia
- Lindley Couronne, Director,
Mauritius
- Morèle Dehy, Director,
Bénin
- Seydi Gassama, Director,
Senegal
- Nokuthula Magudulela,
Director, South Africa
- Justus Nyang'aya, Director,
Kenya
- Mohamed Sektaoui, Director,
Morocco
- Brima A. Sheriff, Director,
Sierra Leone
- Saloum Traore, Director, Mali
- Yves Boukari Traore, Director,
Burkina Faso
- Cousin Zilala, Director,
Zimbabwe

7. No more double talk

(This is an official FIDH
response to the AU, Paris)

The members of the FIDH International Board want to express their indignation and disappointment with the decision taken by the heads of state and government at the African Union Summit on 3 July 2009 in Syrte, Libya, where they unanimously agreed to support President Bashir who has been served a warrant of arrest by ICC for his alleged responsibility for atrocities committed in Darfur. Although the decision reiterates the com-

Justice Phillippe Kirsch, president of the ICC: The AU has decided not to cooperate with his Court over Bashir's indictment

(d) Whether the ICC prosecutor has been selective in his choice of situations to investigate and persons to prosecute.

(e) Whether the situation in Gaza in Palestine constitutes a test case for the ICC and the UN Security Council as the atrocities committed there also deserve attention.

In the end, the AU expressed grave concern that a request by 53 member countries of the United Nations had been ignored by the Security Council. The AU also acknowledged the fact that the ICC is an independent judicial institution and is not an organ of the UN although it has a cooperation agreement with the UN. As of May 2009, out of the 108 ICC member states, 30 of them were African, thereby making Africa the largest regional grouping of the ICC state parties.

Below is the full AU resolution on the ICC passed on 3 July 2009 in Syrte, Libya:

1. *The AU Assembly takes note of the recommendations of the Executive Council on the meeting of the African states parties to the Rome Statute of the ICC.*

2. *Expresses its deep concern at the indictment issued by the Pre-Trial Chamber of the ICC against President Bashir of Sudan.*

3. *Notes with grave concern the unfortunate consequences that the indictment has had on the delicate peace processes underway in the Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.*

4. *Reiterates the unflinching commitment of [AU] member states to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union.*

5. *Requests the [AU] Commission to ensure the early implementation of Decision Assembly/Dec.213(XII), adopted in February 2009, mandating the 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 being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity.*

6. *Encourages member states to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and security of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies.*

7. *Further takes note that any party affected by the indictment has the right of legal recourse to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity.*

8. *Requests the [AU] Commission to convene a preparatory meeting of African states parties at expert and ministerial levels (foreign affairs and justice) but open to other member states at the end of 2009 to prepare fully for [a] Review Conference of States Parties scheduled for Kampala, Uganda, in May 2010, to address among others, the following issues:*

(i) *Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC.*

(ii) *Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one year.*

(iii) *Procedures of the ICC.*

(iv) *Clarification on the immunities of officials whose states are not party to the Statute.*

(v) *Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute.*

(vi) *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.*

(vii) *Any other areas of concern to African states parties.*

9. *Deeply regrets that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, reiterates its request to the UN Security Council.*

10. *Decides that in view of the fact that the request by the African Union has never been acted upon, the AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Bashir.*

11. *Express[es] concern over the conduct of the ICC prosecutor and further decides that the preparatory meeting of African states parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, inter alia, guidelines and a code of conduct for exercise of discretionary powers by the ICC prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute.*

12. *Underscores that the African Union and its member states reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent.*

13. *Finally requests the [AU] Commission to follow-up on the implementation of this decision and submit a report to the next Ordinary Session of the Assembly through the Executive Council in January/February 2010 and in this regard authorises expenditure for necessary actions from arrears of contributions. ■*



ICC prosecutor Luis Moreno-Ocampo showed the US actress Angelina Jolie, a UN goodwill ambassador, around the ICC premises in The Hague when she attended the trial of the Congolese rebel leader, Thomas Lubanga, in May