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STATEMENT

**BY Mr. BEN KIOKO, LEGAL COUNSEL OF THE AFRICAN
UNION COMMISSION
ON BEHALF OF THE AU COMMISSION**

**AT THE REVIEW CONFERENCE OF THE ROME STATUTE
OF THE INTERNATIONAL CRIMINAL COURT (ICC)**

**KAMPALA, UGANDA
31 MAY-11 JUNE, 2010**

Mr. President
Honourable Ministers
Heads of Delegations
Distinguished Delegates and participants
Ladies and Gentlemen

I am honoured to deliver this statement on behalf of the African Union at this Review Conference of the Rome Statute of the International Criminal Court (ICC). I would like to thank you Mr. President, the Secretariat, the people and Government of Uganda for all efforts exerted towards the successful organization of this conference.

At the outset, let me point out that the issues to be discussed during this meeting are issues of significant importance to the African continent. Millions of children, women and men on our continent have been victims of unimaginable atrocities that shock the conscience of humanity. Without doubt therefore, there is need to combat impunity, promote democracy, the rule of law and good governance throughout the continent as enunciated in the Constitutive Act of our Union which characterises the commission of these crimes as unacceptable to AU Member States and as a sufficient legal basis for intervention by the Union in a Member State, without the consent of the concerned State.

In addition, there are many instruments that have been adopted under the aegis of the OAU/AU and which set out the shared values of the Union and which underline Africa's unflinching commitment to combating impunity. The fight against impunity –including the crime of genocide, war crimes and crimes against humanity- constitutes a fundamental principle in the basic law of the Union, and is part of the shared values of the Union to which all Member States have committed themselves. This principle is therefore not negotiable.

As we meet here in Kampala for the first Review Conference of the Rome Statute permit me to underline that Africa is the largest regional grouping of States Parties to the Rome Statute with 30 out of the 111 States Parties being African States. It is also noteworthy that the situations referred to the ICC by States Parties are in Africa.

Furthermore, as evident testimony of African States commitment to the overall objective of the ICC, the African Union in its Strategic Plan 2004-

2007 adopted by the Assembly of the Union in January 2004 called for the universal ratification of the Rome Statute of the ICC by AU Member States in order to reinforce the fight against impunity.

The unflinching commitment of the African Union to the fight against impunity is well articulated and pursued within the Union. Those who have doubted this commitment either do this out of ignorance or for reasons best known to them. The AU is committed to continued engagement in order to reassure those concerned of this commitment.

The position of the Union reflects that of its Member States more than three fifths of whom are States Parties to the Rome Statute. The policies and decisions of the Union are determined by the AU Member states within the collective framework of the policy organs of the Union including the Assembly which is the supreme decision making organ of the Union.

It should be noted that some of the decisions that will necessarily be taken by the Policy organs will be political in nature when important geopolitical issues are deemed to be at stake.

I would now like to turn to two issues: the situation in Darfur and the inescapable link between peace and justice and finally the crime of aggression.

The position of the AU on the situation in Darfur and the subsequent indictments against among others President Omar Bashir of the Sudan, has been misunderstood. Following the application for indictment in July 2008 and the indictment in March 2009, the AU Peace and Security Council (PSC) and the Assembly of the African Union noted with regret that this decision came at a critical juncture in the process to promote lasting peace, reconciliation and democratic governance in the Sudan.

Indeed, as a direct consequence of the indictment, the political talks convened in Doha, Qatar, at the time between the Government of the Sudan and the Justice and Equality Movement (JEM) were suspended as the latter put additional conditions for their continuation.

The PSC and the Assembly of the AU since then have expressed deep regret that despite the risks posed by the ICC process to the search for lasting peace and stability in the Sudan, the appeal by African States for

deferral under Article 16 of the Rome Statute has not been accepted to date.

In making this request for the Security Council to make use of its powers under Article 16 of the Rome Statute, the AU is in no way condoning impunity. There is no doubt, as stressed by the Assembly and the PSC on a number of occasions, that in order to achieve lasting peace and reconciliation in Darfur, it is imperative to uphold the principles of accountability and bring to justice the perpetrators of gross human rights violations in that region. At the same time, it is equally important to ensure that the search for justice is pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace. This point was strongly made by H.E President Yoweri Museveni yesterday with regard to Burundi.

Ladies and Gentlemen,

The African Union High Level Panel on Darfur, chaired by former President Thabo Mbeki examined this issues in depth and *made* very important recommendations on how the current peace efforts could be expedited to create conditions conducive to the promotion of justice, healing and reconciliation and how to ensure an appropriate balance between retributive justice and restorative justice, in a way that helps promote lasting peace in Darfur and in the Sudan as a whole. In this regard, in presenting his report to the UN Security Council, President Mbeki underlined that “***The Sudan is not the first African Country to be faced with the challenge to find the necessary balance in addressing the inter-related issues of peace, justice and reconciliation. Therefore if necessary, beyond considering decisions taken by AU PSC in this regard, the negotiators for a Darfur Agreement could draw on this wider African experience.***”

Furthermore, the President Mbeki Panel also expressed the view that “**the objectives of peace, reconciliation and justice in Darfur are interconnected, mutually dependent and equally desirable. They must be pursued in a manner consistent with the need to achieve democratic and socio-economic transformation in Sudan**”.

The Panel Report quotes a nomad who appeared before the Panel in El Fasher, North Darfur, on 20 June 2009, whose words underline this dichotomy vividly.

“We want peace. If it is flying in the air, I am prepared to fly and catch it. If it is buried underground, I am prepared to dig to get it. If it is available in the market, I will find the money to buy it.”

The processes under way in Sudan are too critical for the future of the country and the stability of the region and the continent as a whole to be allowed to fail. The Sudan is the largest country in Africa and shares borders with 9 other countries. Accordingly, instability in The Sudan could have devastating repercussions for the entire continent. The AU has developed a holistic approach to the situation in The Sudan, which is shared by many of its partners. All tracks are positively or negatively influenced by progress or deepening crisis on anyone of them.

At this juncture, allow me to make a mention in passing to the crime of aggression that will be considered by this Review Conference. We, like all previous speakers, share the view that it would be important to make some progress on the crime of aggression. The Special Working Group on the crime of Aggression has done a lot of good work. But at the same time we are all too aware of the critical and unique nature of the crime of aggression which has hindered all efforts aimed at establishment of an International Criminal Court for a period in excess of 80 years starting with the end of the First World War. These efforts failed mainly because of divergence of opinion on the crime of aggression.

The Convention for the creation of an International Criminal Court adopted in 1937 did not attract any single ratification. There were many other attempts after that in 1946, 1950, 1954, 1974, etc, including UN General Assembly Resolutions, drafts submitted by the International Law commission (ILC). Between 1949 and 1954, the ILC drafted a series of statutes for an International Criminal Court. But opposition on both sides of the Cold War hindered their progress based mainly on the crime of aggression. The UN General Assembly effectively abandoned the effort, pending the definition of aggression and the development of a Code of International Crimes.

Furthermore, by definition the crime of aggression is committed by (and charges can only be brought against) Heads of State and Governments or other senior officials of a country, who are in a position of authority or responsibility in respect of an act of aggression that has been allegedly

committed. It is unavoidable that the exercise of jurisdiction over the crime of aggression by ICC will generate perceptions of political bias particularly where there is no prior determination by another body that an act of aggression has occurred. At the same time, we must remind ourselves that the ICC is still a relatively young institution.

There is therefore an imperative need to ensure the widest possible consensus on all aspects of the crime of aggression before adopting a decision on this critical issue by the Review Conference.

Mr. president
Ladies and Gentlemen

I wish this historic meeting fruitful deliberations.