

**Twelfth session**

The Hague, 20-28 November 2013

**Special segment as requested by the African Union:
“Indictment of sitting Heads of State and Government and its
consequences on peace and stability and reconciliation”****Informal summary by the Moderator****I. Introduction**

1. On 1 November 2013, the Bureau of the Assembly of States Parties of the International Criminal Court decided to recommend to the Assembly, pursuant to rule 13 of the Rules of Procedure of the Assembly, the inclusion in the agenda of the twelfth session of the Assembly of an additional item entitled “Special Segment as requested by the African Union: “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation”. In this regard, the Assembly received as documentation the explanatory memorandum contained in document ICC-CPI/12/1/Add.2.

2. Informal consultations among delegations and Bureau members in The Hague and New York resulted in the formulation of ideas on how such a segment could be conducted. Based on those informal consultations, the Bureau decided on 8 November 2013 that the segment would be conducted in the format of a panel discussion, with subsequent informal interactive discussion. At the same meeting, the Bureau appointed the Permanent Representative of Jordan to the United Nations and first President of the Assembly, H.R.H. Prince Zeid Ra’ad Zeid Al-Husseini, as moderator of the panel.

3. The composition of the panel and the topics to be discussed were entrusted to the moderator, on the understanding that such composition would be undertaken in close consultation with African States Parties and with the President of the Assembly. Reference was made to choosing the panellists from among key experts over the years, who have a comprehensive understanding of the Rome Statute provisions and, if possible, the negotiating history.

4. As a result, the panellists were Professor Cherif Bassiouni, Chair of the Drafting Committee at the 1998 Rome Conference, Professor Charles Jalloh, who had been suggested by African States Parties members of the Bureau, and Ms. Djenaba Diarra, the acting Legal Counsel of the African Union, also suggested by African States Parties. Ambassador Rolf Einar Fife, Director General of the Department of Legal Affairs of Norway, who had been one of the coordinators at the 1998 Rome Conference, had prepared a pre-recorded video contribution. Further, the Bureau was informed on 21 November of the proposal by the African Group, by consensus, that Professor Githu Muigai, Attorney-General of Kenya, be included as a panellist.

5. The special segment took place on 21 November 2013 from 15:00 to 20:30. Following the introductory interventions of the panellists, 29 States Parties and 1 Observer State took the floor. Several NGOs also participated in the interactive discussion.¹

II. Discussion

6. Opening statements were made by Professors Bassiouni and Jalloh. The views of the African Union were presented by the Legal Counsel of the Organization and supported by the Attorney-General of Kenya.

7. The ensuing discussion on the issue of the indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation confirmed the firm commitment of the international community to the fight against impunity for the most serious crimes of international concern.

8. The debate seemed to indicate that any substantive change to the Rome Statute was unlikely to materialize in the near future, particularly taking into account the amendment procedure provided therein. There was nonetheless broad agreement that the Assembly should consider looking into practical solutions consistent with the existing legal framework that would address concerns expressed by the African Union. One such avenue was the possibility of amending the Rules of Procedure and Evidence in order to ensure the necessary degree of flexibility when dealing with specific circumstances which could not have been foreseen when the Statute was adopted .

9. There was also a discussion regarding the delicate balancing act required to achieve the objectives of the fight against impunity on the one hand, and peace and stability on the other. It was recognized that this constituted a challenge in the exercise of prosecutorial discretion. The appropriate evidential threshold was an issue to be taken into consideration in this context. It was moreover emphasized that deciding whether it was opportune and timely to proceed with an indictment was a difficult question faced by prosecutors before any criminal judicial organ.

10. Another element generally highlighted in the debate was the importance of the principle of complementarity and the fact that the International Criminal Court was a court of last resort. Accountability should be first and foremost pursued at the national level; assisting States in strengthening their judiciary was a pivotal endeavour to which all contributors could contribute.

11. There was broad satisfaction that an open process of dialogue had been started in order to address the concerns of African States and with the manner in which the special segment had been organized and conducted. It was agreed that this dialogue should continue and develop further, focusing also on possible practical measures to deal with the issues that had been raised.

¹ The following NGOs intervened: Human Rights Watch; Kenyans for Peace, Truth and Justice; Kenya Human Rights Commission (member of FIDH); International Commission of Jurists (ICJ), Kenyan section; Club des Amis du droit du Congo. A legal representative for victims also made an intervention.