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**ON THE DECISIONS OF PRE-TRIAL CHAMBER I OF THE INTERNATIONAL CRIMINAL COURT (ICC) PURSUANT TO ARTICLE 87(7) OF THE ROME STATUTE ON THE ALLEGED FAILURE BY THE REPUBLIC OF CHAD AND THE REPUBLIC OF MALAWI TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF PRESIDENT OMAR HASSAN AL BASHIR OF THE REPUBLIC OF THE SUDAN**

**Addis Ababa, 9 January 2012** - The African Union Commission has noted with grave concern the decisions ICC-02/05-01/09-139 and ICC-02/05-01/09-140 of 12 and 13 December 2011, respectively, of Pre-Trial Chamber I of the International Court (ICC) on the alleged failure of the Republic of Malawi and the Republic of Chad to comply with the cooperation requests issued by the ICC with respect to the arrest and surrender of President Omar Al Bashir of the Republic of Sudan.

In its decision on Malawi, and *mutatis mutandis* on Chad, the Chamber asserts to have found,

*'in accordance with article 87(7) of the Rome Statute, that the Republic of Malawi has failed to comply with the cooperation requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.'*

With respect to the immunity of Heads of State in relation to requests for arrest and surrender, the Chamber noted that

*"there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests."*

Following these Decisions of ICC Pre-Trial Chamber I, the African Union Commission expresses its deep regret that the decision has the effect of:

- (i) Purporting to change customary international law in relation to immunity *ratione personae*;
- (ii) Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless;
- (iii) Making a decision *per incuriam* by referring to decisions of the African Union while grossly ignoring the provisions of Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States **"to comply with the decisions and policies of the Union"**.

In this regard, the AU Commission wishes to point out that Article 27(2) of the Statute provides that "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". However, this Article 27 appears under the part of the Statute setting out 'general principles of criminal law' and applies only in the relationship between the Court and the suspect. In the relationship between the Court and states, article 98(1) applies. This Article provides: "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".

As a general matter, the immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals: states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal. Indeed, contrary to the assertion of the ICC Pre-Trial Chamber I, article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute. This is because immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. A treaty may not deprive non-party States of rights which they ordinarily possess. In this regard, it is to be recalled that the immunity accorded to senior serving officials, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when the official 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)*. The ICJ stated that "*it 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.*"

The Security Council has not lifted President Bashir's immunity either; any such lifting should have been explicit, mere referral of a "situation" by the UNSC to the ICC or requesting a state to cooperate with the ICC cannot be interpreted as lifting immunities granted under international law. The consequence of the referral is that the Rome Statute, including article 98, is applicable to the situation in Darfur.

Additionally, the African Union Commission expresses its total disagreement with the decisions of the Pre-Trial Chamber I which did not take cognisance whatsoever of the obligations of AU Member states arising from Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States "**to comply with the decisions and policies of the Union**". Moreover, by decision Assembly/AU/Dec. 245(XIII) adopted by the 13<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government, the Assembly "**Decide[d] that in view of the fact that the request by the African Union has never been acted upon (by UN Security Council), 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 Omar El Bashir of The Sudan**". This decision adopted by the AU policy organs pursuant to the provisions of Rule 33 of the Rules of Procedure of the Assembly is binding on Chad and Malawi and it would be wrong to seek to coerce them to violate or disregard their obligations to the African Union.

The African Union Commission recalls that by virtue of their membership of the African Union, Chad and Malawi, and indeed all other African States parties to the Constitutive Act, have committed themselves under Article 4 of the Constitutive Act to “*condemnation and rejection of impunity*” and voluntarily negotiated the Rome Statute and joined the ICC with a view to enhancing the fight against impunity. Indeed, all Member States of the then Organization of African Unity were party to the adoption of decision CM/Dec.399 (LXVII) during the 67<sup>th</sup> Ordinary Session of the Council of Ministers held in Addis Ababa, Ethiopia from 25 to 28 February 1998, urging all Member States to support and participate in the Rome Process, along with a representative of the OAU General Secretariat, in the firm belief that the proposed international Criminal Court would be a unique and independent mechanism in the fight against impunity.

The African Union will continue to fight against impunity as required by Article 4 of the Constitutive Act and the relevant Assembly decisions and shall oppose any ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa. Indeed, the African Union believes that the fight against impunity is too important to be left to the ICC alone.

The African Union believes that issues of peace and justice should be addressed comprehensively and in a holistic manner and will continue to pursue in respect of The Sudan the interconnected, mutually interdependent and equally desirable objectives of peace, justice and reconciliation. It also requests all African Union Member States and Friends of Africa to reject any draft resolution that may be tabled before the UN Security Council as well as the Assembly of the States Parties to the Rome Statute with the intention of sanctioning the Republic of Malawi and Chad.

**Addis Ababa, 9 January 2012**