Cour Pénale Internationale
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Le Bureau du Procureur
The Office of the Prosecutor

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*Seminar Hosted by the Attorney General of the Federation and Minister of Justice of Nigeria*

**International Seminar on the Imperatives of the Observance of Human Rights and International Humanitarian Law Norms in International Security Operations**

*Check against delivery*

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Excellencies,
Your honours,
Ladies and gentlemen,

Honourable Minister of Justice/ Attorney General, thank you for inviting me to address this international seminar this morning. Permit me to state at the outset that I very much appreciate the attention that the Nigerian Government is giving to my Office's report on its Preliminary Examination Activities with respect to the situation in Nigeria. To be sure, this is a clear demonstration of Nigeria's strong commitment to address the security and human rights challenges that face this country today. For this, you are to be commended.

Over the next two days, senior government officials and highly respected experts will deliberate on important issues with the aim of promoting understanding of the professional and legal underpinnings that attend internal security operations. My presence and the participation of my staff in these deliberations demonstrate how the International Criminal Court (ICC) and States Parties can work collaboratively together in identifying challenges as well as solutions, including strengthening domestic judicial responses to mass crimes in full respect of the noble principle of the primacy of national authorities to deal with these crimes. This is the Rome Statute system at work, a mutually reinforcing system, combining national, regional and international actors, working together towards a common goal: justice and durable peace.

I commend Nigeria's leadership in this regard and reiterate my Office's pledge to continue to cooperate with the Government in order to ensure accountability, and

contribute to putting an end to these crimes. As a Prosecutor, I am guided solely by the law as set by the Rome Statute and the cardinal principles of independence, impartiality and fairness.

Allow me to briefly outline the activities of my Office with respect to the preliminary examination in Nigeria. More often, this process, which is mandated by the Rome Statute, is not well understood and I take this opportunity to clarify it.

The Rome Statute endows my Office with the responsibility for *independently* determining whether or not to open an investigation in any given situation irrespective of how that situation is referred to the Office. By law, this determination has to be preceded by a preliminary examination, which is carried out following clear and sound legal criteria established by the Rome Statute. The final determination whether or not to open an investigation can thus only be based on sound legal criteria.

A preliminary examination into a situation may be initiated by my Office on the basis of: (a) my decision, taking into account information I receive from States, individuals or groups of individuals, intergovernmental organizations or non-governmental organizations; (b) a referral from a State Party or United Nations Security Council, or (c) a declaration pursuant to article 12(3) of the Rome Statute lodged by a State which is not a Party to the Rome Statute. The decision to proceed with an investigation, the selection of situations, cases inside the situations, and persons to be investigated is always an independent prosecutorial decision based on the Statute and the information and evidence collected.

With respect to Nigeria, the decision to open a preliminary examination was published on 18 November 2010. This preliminary examination was initiated on the basis of information received by my Office from individuals and organizations.

Under the Statute, there is no time limit for conducting a preliminary examination and the length of a preliminary examination differs from situation to situation depending on the circumstances of each situation. For Nigeria, the process is still on-going: this means that I have not yet made a decision on whether or not to open an investigation in Nigeria.

The main purpose of the preliminary examination process is to determine whether there is a reasonable basis to proceed with an investigation into the situation. This is a legal, not a political process and in making this determination, the Rome Statute requires the Office to consider three major benchmarks: jurisdiction, admissibility and the interests of justice.

1. Regarding jurisdicton, my Office has to examine (a) whether the alleged crimes are those defined under the Rome Statute namely: genocide, crimes against humanity or war crimes; (b) whether the alleged crimes were committed after the entry into force of the Rome Statute (i.e. after July 2002), and (c) whether the crimes were committed in the territory of a State Party or by a national of a State Party to the Rome Statute. A thorough factual and legal assessment of the alleged crimes is conducted with a view to identifying potential cases falling within the jurisdiction of the Court.

2. If all the above requirements are satisfied the next step is to examine the admissibility of potential cases. At this stage the Office assess two issues: (i) are there

any on-going, genuine national proceedings in relation to the potential cases that the ICC may investiagte, and (ii) what is the gravity of the alleged crimes? According to the fundamental principle of the Rome Statute, the principle of complementarity, the ICC can only investigate and prosecute crimes in a State if that State is not doing so itself either because it is unwilling or unable to do so genuinely. Simply put, my Office has to respect the soveriegn right of States to investigate and prosecute their nationals. States are thus the first bulwark of defence against impunity, with ICC intervening only if States fail in their primary duty.

The reason that the ICC is investigating crimes in Uganda; Democratic Republic of the Congo; Kenya, Central African Republic; Cote D'Ivoire, Mali; Sudan, Libya, etc. is because at the time my Office proceeded to investigations in each of these countries – which by the way, most of these countries invited my Office to do so – there were no on-going national proceedings. Indeed, had there been any genuine investigations and prosecutions, my Office would not have proceeded at all.

Let me stress that the assessment of whether or not there are on-going genuine national proceedings is not just a mere formality, it is a legal requirement prescribed by Article 17 of the Rome Statute. A State that is investigating crimes that are subject to ICC proceedings can thus challenge my Office by presenting evidence before judges showing that it is already undertaking concrete genuine investigations in respect of such crimes. In fact, Libya made such a challenge and succeeded in taking the case of Mr Abdullah Al-Senussi, the former intelligence chief of Libya away from my Office because the judges were satisfied that the country was conducting genuine investigations against him.

In assessing whether the alleged crimes are *grave* enough to warrant investigation, my Office examines the scale, nature, manner and impact of the alleged crimes committed in the situation. Hence this gravity assessment is not simply a question of numbers, but a more holistic analysis of the full impact of the crimes in question.

3. Finally, should a potential case be deemed admissible, my Office will still have to examine the interests of justice in order to formulate the final recommendation on whether to initiate an investigation. During this examination, the Office must assess whether, taking into account the gravity of the crime(s) and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. When determining whether to open an investigation, operational feasibility is not a factor under the Statute, and does not figure in our interests of justice assessment. Moreover, the interests of justice should not be confused with interests of peace. To conclude on this point, there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional.

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How has my Office applied this process in Nigeria and where are we now?

As you well know, Nigeria became a State Party to the Rome Statute on 27 September 2001. Consequently, the ICC has jurisdiction over Rome Statute crimes committed on the territory of Nigeria or by Nigerian nationals from 1 July 2002 onwards.

Over the years since opening the preliminary examination, my Office has engaged with the national authorities and received additional information which it analysed in accordance with criteria outlined earlier. The information received to date contained a series of allegations against different groups and forces at different times throughout the various regions of the country. This includes inter-communal, political and sectarian violence in central and northern parts of Nigeria; violence in the Niger Delta, as well as alleged crimes arising from the activities of Boko Haram and the related security operations.

The analysis published in my Office's report on 5 August 2013 concluded that it does not appear that ICC crimes were committed in the central and northern States in connection with the inter-communal violence, nor in the Niger Delta.

However, with respect to the situation related to Boko Haram, the analysis concluded that there is a reasonable basis to believe that, since July 2009, Boko Haram has committed crimes against humanity, in particular the crimes of murder and persecution on religious grounds. As a matter of fact, reports about serious crimes continue to reach us. The recent upsurge of attacks against civilians in northern Nigeria has not gone unnoticed. I am very concerned about these new crimes that include crimes particularly targeted against women and children.

Currently, the focus of the analysis is to assess whether the Nigerian authorities are conducting genuine proceedings in relation to the crimes allegedly committed by Boko Haram. In accordance with the principle of complementarity, my Office will only open investigations if the analysis concludes that there are no on-going genuine Nigerian national investigations of these crimes.

Excellencies,
Ladies and Gentlemen,

Let me now turn to our most recent finding that touches upon the issues to be discussed in this seminar: the finding that the hostilities between Boko Haram and Nigerian security forces appear to have reached the level of a non-international armed conflict.

Under international law, every State has the right to defend itself against terrorist threats. There are many examples of internal security operations against terrorists in states all over the world, and I understand we will hear experiences from some of these states during this seminar. However, not all of these operations may legally qualify as an internal armed conflict. So the main question is: when does an internal security operation to quell an armed attack meets the threshold of an internal armed conflict under international law?

Two issues must be considered in this regard: the level of organization for the armed group/groups engaged in hostilities with national forces and the intensity of hostilities. With respect to organization, the requirement is that the group must be organized enough to be able to plan and carry out military activities. To qualify as an armed conflict, the intensity of the hostilities must have reached a level that exceeds internal disturbances and tensions or isolated and sporadic acts of violence.

My Office has thoroughly examined the level of organisation of Boko Haram as an armed group and the intensity of the armed confrontations between Boko Haram and the Nigerian security forces since July 2009. As regards to *organisation*, the analysis has concluded that Boko Haram fulfils a sufficient number of relevant

criteria to be considered an organised armed group, with well-defined structure, capable of planning and carrying out military activities.

With respect to the *level of intensity* of the hostilities between Boko Haram and Nigerian security forces, the analysis considered over 200 incidents which occurred between July 2009 and May 2013. Subsequent incidents are the subject of on-going analysis by my Office. The analysis has concluded that both elements of organization and level of intensity appear to have been met to qualify the conflict in Nigeria as an armed conflict of non-international character. My Office has therefore determined that since *at least* May 2013, allegations of crimes occurring in the context of the armed violence between Boko Haram and Nigerian security forces should be considered within the scope of Articles 8(2)(c) and (e) of the Statute, the sections dealing with war crimes in internal armed conflicts.

My Office is thus conducting a new jurisdictional assessment to determine whether alleged crimes committed in this conflict could fall under the jurisdiction of the ICC.

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What does this mean for Nigeria? As you are well aware, the conduct of armed conflict is governed by well-established law. As a signatory to the Geneva Conventions, Additional Protocol 2 to the Geneva Conventions and the Rome Statute, Nigeria is well equipped with the necessary legal frameworks. These frameworks address a range of different conducts considered illegal in a non-international armed conflict such as the current one in Nigeria. This includes but is not limited to murder, mutilation, cruel treatment and torture, humiliating and

degrading treatment, taking of hostages or carrying out executions without previous judgment pronounced by a regularly constituted court.

The Rome Statute has directly imported the clear provisions of the Geneva Conventions and the Additional Protocols regarding international humanitarian law and the legal limits governing military conduct during warfare. Military commanders all over the world have adjusted their operational standards, training and rules of engagement; many others are in the process of doing the same. This is a clear and effective way to control violence and to prevent commission of crimes during armed conflict. The law makes a clear distinction between a soldier and a terrorist. Should military or security operations be conducted in accordance with the law, there would be no grounds for a criminal investigation at the national or international levels.

However, it should also be clear that any violations committed by Boko Haram members or members of the security forces taking part in the hostilities need to be investigated and prosecuted, in compliance with the relevant international legal standards accepted and adopted by the national authorities.

My Office and the Government of Nigeria share a common vision for ending impunity for crimes that the Rome Statute defines as shocking the conscience of humanity. No perpetrator, irrespective of status, should be immune from investigations for these crimes. Commanders all over the world must ensure that troops under their command do not commit crimes. Attacks on women, recruitment of children, pillaging and destruction of villages should not be tolerated. My Office stands ready to work with the Nigerian Government in ensuring that alleged crimes

are effectively investigated either under Nigerian national laws or at the international level. Victims of these heinous crimes deserve no less.

Your discussions over the next two days will surely shed more light on some of these intricate and fundamental issues.

I thank the organisers once again for convening this important conference; I thank you for your attention and wish you all fruitful deliberations. | **OTP**