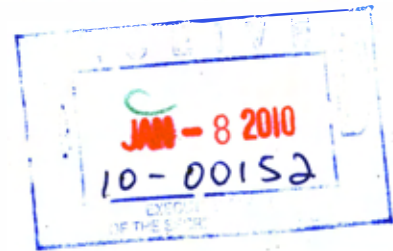


ACTION
CCPY

Guinea
ICC



Note to Mr. Nambiar

Guinea — Commission of Inquiry — ICC

1. The purpose of this Note is to advise you, further to your Note of 30 December 2009, (i) whether it would be appropriate for the Secretary-General to officially transmit the report of the Commission of Inquiry for Guinea to the International Criminal Court (ICC) and (ii), if so, how this should be done.

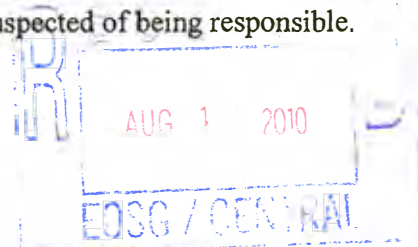
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Whether it would be appropriate

2. The Secretary-General undoubtedly has the lawful authority to transmit a copy of the Commission's report to the ICC Prosecutor.
3. As to whether the Secretary-General should indeed do so, that is essentially a policy question. In this connection, we would draw your attention to the following.
4. Guinea is a party to the Rome Statute of the ICC. The ICC therefore has jurisdiction in respect of the situation in Guinea.
5. In order for the Court to proceed to exercise jurisdiction in respect of any crimes under the Rome Statute that may have been committed in Guinea, one of three things must occur:
 - (a) either a State Party to the Rome Statute must refer the situation to the Prosecutor (this might be Guinea itself or any other State Party),
 - (b) or the Security Council, acting under Chapter VII of the Charter, must refer the situation to the Prosecutor (as happened in the case of Darfur),
 - (c) or the Prosecutor himself, on his own initiative ("*proprio motu*"), must initiate an investigation into the situation.
6. None of these things has yet happened in respect of the situation in Guinea.
7. If the Secretary-General were to officially transmit the report of the Commission of Inquiry to the ICC Prosecutor, it would therefore not have the effect of enabling the Court to exercise its jurisdiction in respect of the situation in Guinea.
8. Any effect that the Secretary-General's transmitting the report would have would therefore be primarily political and practical, rather than legal.
9. That said, it would help focus international attention on the question of accountability in Guinea and would increase pressure on the Guinean authorities to take serious and genuine steps to investigate and prosecute those suspected of being responsible.

Guinea
NFA

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How it should be done

10. If the Secretary-General decides to transmit a copy of the Report to the ICC Prosecutor, the best way of proceeding would be for him to do so under cover of a letter. That letter would refer to Article 5 of the Relationship Agreement between the United Nations and the ICC, which envisages the exchange of documents of mutual interest. We stand ready to prepare a draft for such a letter, if requested.

More information

11. I am attaching to this Note for your information an Annex providing background information on the ICC and the situation in Guinea.


 Patricia O'Brien
 7 January 2010

Guinea
ICC

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Patricia O'Brien
7 January 2010

Annex to Ms. O'Brien's Note of 7 January 2010

1. On 14 October 2009, the Prosecutor announced he had placed the situation in Guinea under preliminary examination. He has therefore begun to analyse that situation with a view to seeing whether there is a reasonable basis to open an investigation.
 2. At this preliminary stage, the Prosecutor may seek and receive information from States, organs of the United Nations, intergovernmental or non-governmental organizations and other reliable sources, including individuals and affected parties. We understand in this connection that the Prosecutor has in fact already received a copy of the report of the Commission of Inquiry from a Member State.
 3. He will review the information that he gathers to see:
 - (i) whether there is a reasonable basis to believe that one or more crimes within the jurisdiction of the Court have been committed;
 - (ii) whether genuine investigations and prosecutions of those crimes are being carried out by the competent national authorities (the "complementarity" test); and
 - (iii) whether, taking into account the gravity of the crimes involved and the interests of the victims, an investigation by the ICC would serve the interests of justice (or, to be more accurate, whether an investigation by the ICC would go against the interests of justice).
 4. It is important to emphasize that the fact that a preliminary examination has begun does not imply that an investigation will necessarily follow. In order to be able to proceed to open a criminal investigation, the Prosecutor must go to the Pre-Trial Chamber and obtain its authorization to do so. If he obtains that authorization, then the ICC may proceed to exercise its jurisdiction in respect of the situation. (This is the "trigger" for the ICC exercising its jurisdiction that is contemplated in Article 13 (c) of the Rome Statute and referred to in paragraph 5 (c) of my Note.)
 5. Besides Guinea, the Prosecutor currently has the following other situations under preliminary examination: Afghanistan (since 2007), Colombia (since 2006), Côte d'Ivoire (since 2003), Georgia (since 2008) and Kenya (also, since 2008). He is also looking at the situation in the Gaza Strip.
 6. In the case of Kenya, the Prosecutor has recently submitted a request to the Pre-Trial Chamber seeking authorization to open an investigation. This is the first time that the Prosecutor has submitted such a request in the history of the ICC. The Pre-Trial Chamber is currently considering his request.
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