

On the International Criminal Court and Its Impact on African Conflicts
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'If you want to attack a cat, do not attack it in a closed door; Keep a window or the door a bit open. Otherwise a cornered cat fights to the end' an old Ethiopian saying.

The Princeton Project composed of eminent international jurists has contributed significantly to the foundation of the International Criminal Court (ICC) and its enabling act famously called the Rome Statute. In 2001, a year before ICC's establishment, these eminent jurists extended a wise word of caution to the ICC and its prosecutor in by saying:

"The imprudent or untimely exercise of universal jurisdiction could disrupt the quest for peace and national reconciliation in nations struggling to recover from violent conflicts or political oppression...hence [p]rudence and good judgement are required here, as elsewhere in politics and law. [And universal jurisdiction should be used] in a reasonable solicitude for the quest for peace".¹

Just two months ago in a meeting I was chairing a Sudanese colleague working for a very famous multilateral international organization asked me if the indictment of officials and individuals from Sudan and Uganda by the International Criminal Court (ICC) is contributing to the peace processes in Africa. Within a short time, I was alarmed by the recent news which still remains breaking news from The Hague on the possible indictment and arrest warrant of the Sudanese President. In a historic decision, ICC pre-trial chamber was presented with the charges against a President in power and an arrest warrant was issued.

My good friend's question was impregnated with an answer: that ICC's indictments might be contributing negatively to efforts of peace processes. This very question raised by my Sudanese friend is a question I have been contemplating upon and was wondering if there are full-fledged researches on the topic since the ICC started taking its first and testing cases from Africa. This article does not attempt to address all the questions but only the impact of ICC's indictments on an on-going conflict. With its active involvement, new arguments and disagreements are emerging with regard to ICC's role and particularly its effect on peace processes. The concern stems from ICC's focus on countries with on-going conflicts such as Darfur and Northern Uganda. Most of the indictments of ICC are also from Africa: Joseph Coney of Lord Resistance Army of Uganda, Charles Taylor of Liberia, and Muhammad Harun of the Sudan and Ali Mohamed Ali Abdelrahman of the Janjeweeds of Darfur.

In addition to the recent news from The Hague, on May 1, 2007, the ICC issued an arrest warrant on two Sudanese who have been indicted for their involvement in crimes against humanity and war crimes in Darfur.² These are Ali Mohamed Ali Abdelrahman commonly known Ali Kushayb head of the Janjeweeds and Muhammad Harun, formerly

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Sudanese Interior Minister and now Minister of State for Humanitarian Affairs. One would naturally be forced to think what will be, if there is, the effect of ICC's arrest warrant on the Darfur crisis and peace process. Cases of crimes against humanity, war crimes and other massive violations of human rights in Darfur were referred to ICC in 2005 by the UN Security Council 1593.³ The ICC Pre-Trial chamber has ruled that the evidence of the ICC Prosecutor is indeed admissible and has "reasonable grounds" that the suspects have been involved in crimes under the ICC Rome Statute. The ICC is meant to serve as 'instrument of in the struggle to defend human rights'.⁴ The main principle of ICC is that Crime against Humanity, War Crime or the Crime of Genocide, committed in any location by human being of any nationality or against a human being of any nationality is universal crime therefore could be prosecuted in any country or by ICC. Even if Sudan is not a state member to the ICC, it however, is legally bound to respect the ruling of the court as the prosecution is based on the request of the UN Security Council.⁵ Failure to hand over the suspects could lead to further measures by the UN Security Council.⁶ **The Pre-Trial Chamber ordered the Registrar to inform of its decisions and arrest warrant to all State Parties and also specifically Egypt, Eritrea, Ethiopia and Libya for their cooperation. These four countries are not state members to ICC Rome Statute.** Moreover, it is not clear if there are any other considerations taken as to why the ICC wants to inform these countries specifically. Clearly, the UN Security Council has an entire mandate to instruct these countries to cooperate with the ICC.

The hope is that ICC indictment would deter other people from committing similar acts of international crime by inducing what I call "*The ICC-Effect*". The question at this point is similar to the question raised by my good friend from Sudan: **yes ICC indictment will have 'effect' but will it be 'effective' to bring justice and peace or more insecurity on the side of those indicted leading to more conflict and injustice? There is a very big difference and some times an extremely opposed one between 'effect' and 'effectiveness'.** The ICC indictment will surely have an effect be it negative or positive on the ground, but ensuring it remains effective in terms of serving justice and contributing to peace is another challenge. Then will the ICC's indictment be effective in serving justice and bringing peace.

Arguably, the ICC indictment would consolidate the efforts of the African Union and the United Nations in Sudan.⁷ Nonetheless, experts on Darfur crisis such as Mr. Eric Reeves strongly doubts if there will be any "deterrent effect" from ICC's indictments and arrest warrants. He said:

*"Certainly there is no evidence whatsoever to support Human Rights Watch's "deterrence" theory, even as there is very considerable evidence of the dramatic deterioration in security for aid operations throughout Darfur over the past year and a half. Today the BBC reports that humanitarian groups are bracing for possible reprisals, a very real fear given the ongoing war of attrition against these groups."*⁸

This assertion and its variants has to answer questions that need empirical research. However, I believe that in this kind of assertion makes three incorrect assumptions with

regard to “deterrence effect” of arrest warrants. The first one is the assumption that issuance of arrest warrant should have ‘deterred’ the perpetrators of human rights violations in Sudan. Nonetheless, this is incorrect as deterrence is futuristic in perspective. The “deterrence effect” does not necessarily mean “clear, present and immediate effect”. Secondly, deterrence effect does not necessarily have deterrence on those who are already bathed by the blood of Darfurians and other Sudanese victims of massive violations of human rights; on those people rather retribution will be more effective. Deterrence has better effect on those people who might be predisposed to involve in such activities, than those already are indicated in international crimes. Thirdly, such assertions are agnostic to the facts on the ground in Darfur and Khartoum. There was some measure of concern and discussion on the indictment within Sudan when the ICC issued the arrest warrant. Within the government of Sudan, top officials at Cabinet level had discussions on how to respond to the ICC warrant. These officials had strong disagreements whether to accept the ICC ruling and hand over the suspects.⁹ Since last year, the Sudanese Ministry of Justice was under severe criticism by Sudanese media and people for its failure in handling the ICC request for cooperation. Reports from many independent press outlets also proved this. The Sudan Tribune, Al-Rai Al-Aam, and others reported the attempts by some prosecutors and top Sudanese officials such as SPLM leader Salva and the former leader of SLA-splinter group Mini Acor Minawi to cooperate with the ICC. The two ICC suspects with other police officials—Hamdi Sharaful Din and Abdelrahman Dawood Humaida—were charged by Sudanese chief prosecutor in a court in Darfur on similar crime with mass in nature but less severe.¹⁰ A year ago, one could not rule out the discussion within the politicians on consequences of defying ICC warrant. It is also worthy to note that the Government of Sudan was not until last week uniform in its stand on ICC’s request for cooperation. Diverse in view and interest, animosity, power struggle and inter-group and personal conspiracy is all over as it is in any other government in crisis. Hence, to assume all officials of the Government of Sudan will be against extradition of the indicted officials was simply simplistic and was not supported by the facts on the ground. In the Darfur case, I saw the *ICC-Effect* working. But now, of course with the indictment of the sitting president, the reaction will be completely different. A backlash will not be limited to complication of the peace effort but also as discussed at the end of this article, the government of Sudan will fight like a cornered cat.

The Old Saying: ‘*A cornered cat fights to the end*’

There is a saying: *If you want to attack a cat, do not attack it in a closed door; Keep a window or the door a bit open.* Otherwise if you cornered a cat, then you force her to fight and it fights to the end. If a cat feels threatened, she tries to get a way out, and provided there is a way out. If not it will fight a fight of a cornered cat. The Cornered cat saying is very apt in this case. A sitting head of state like Omar Bahsir or a rebel leader like Joseph Coney may act like a cornered cat. The ICC indictment of the Sudanese President may create not only a cornered president but also many other cornered political leaders in Sudan.

People have to be responsible for their actions, and therefore accountable for their misdeeds and crimes. Victims also have the right to justice. But not at all cost, not at the cost of more deaths, more rapes and more victims. Indictment of President of Sudan may actually increase the number of victims. The stakes are higher than bringing justice. Comprehensive Peace Agreement (CPA), Darfur Peace Agreement (DPA), and other initiatives in Sudan are at risk now than ever. United Nation Mission in Sudan (UNAMIS), UN-AU hybrid Mission in Darfur (UNAMID) and other international missions and their personnel will be in danger. Already there are serious concerns among the international personnel in Sudan. The UN Secretary General has informed the Sudanese President that he has nothing to do with ICC. Indeed a dissenting opinion on the Princeton Project made by a famous British jurist Lord Browne-Wilkinson is necessary to quote here. Lord Browne Wilkinson said:

“It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trial proceed: resort to force would be more probable. In any event the fear of such legal actions would inhibit the use of peacekeeping forces when it is otherwise desirable...I believe that the adoption of such universal jurisdiction without preserving the existing concepts of immunity would be more likely to damage than to advance chances of international peace.”¹¹

Prosecutors do not prosecute criminals because they think they are criminals. In a decision making of prosecution, they do not only take into account the crime or the victims. A range of factors such as the deterrence effect, contribution to peace and stability, timing as well as law and order are vital in the equation of decision to prosecute. This is particularly true when the prosecution is of political in nature and a group of people who can affect the law and order of the country, the peace and stability of a community are prosecuted. That is the reason why a mass amnesty is some time granted to a group of criminals. Of course amnesty does not work on the case of crimes against humanity, war crime and the crime of genocide. And in most cases amnesty may amounts impunity. But the question is still is delaying justice impunity.

ICC, Enforcement and Veto Powers Again?

In similar fashion, Mr. Reeves argues that “there is no sign that the International Criminal Court is any more able to halt the continuing genocide by attrition than other international actors of consequence”. No student of international law or international relations expects that ICC will stop the Darfur crisis. A court is like a traffic light, it stipulates prohibition of an act or omission, establish the facts and adjudicate cases and then impose penalty when one is found violating such laws. **As traffic lights do not catch the violator of the rules of traffic, courts do not themselves catch the suspect or the violator or stop the violation. Stopping the crimes is for the function of enforcement forces. Similar to national courts, ICC will have to depend on enforcement bodies. Moreover, ICC like any other global governance institution does not have its own enforcement power.** That is one of the most known natures of international organizations and law, and is not peculiar to ICC. Multilateral cooperation is vital for the enforcement of ICC rulings and judgments. ICC’s hands and powers are long and strong enough to issue rulings of arrest

warrant, to make judgments and render sentences; but not to effect arrest. That is left to the international community. It depends on Member States and the UN Security Council. With the involvement of veto power, things will get more complicated. The peace process and elections expected in Southern Sudan and Darfur will inevitably be hampered by this move by ICC.

Rather the major question in this regard is the role of the sole super power—i.e., United States of America (USA). The ICC indictment forced USA again to face a serious test to its will of putting its political will where its verbal declaration on ending the Darfur crisis is. USA is not a state member to ICC and is *generally* speaking opposed to the ICC. Indeed, it has entered bilateral agreements with several countries that aim to exempt its military personnel and officials from being prosecuted under ICC. For this very reason, it has been very difficult for the US government to formally assist ICC in its Darfur indictments. **Darfur puts USA into the hotspot of dilemma: formally opposed to ICC but also desiring all people responsible for the massive violations of human rights in Darfur to be accountable for their deeds.** Even if the Former Secretary of State of the US Collin Powell has officially announced that there is evidence showing that the government of Sudan has committed Genocide as a matter of policy, the US might not be willing to cooperate with ICC for the above reasons. More specifically it is a serious constraint to the growth of international criminal accountability and more so to the establishment of an enforcement mechanism that ensure the international community's responsibility to protect in the 21st century. This is a serious binding impediment to the sustainable peace in Darfur and in general to the construction of atrocity regime and emergence of ICC as a new global authority as both Rudolph and Leonard indicated.¹² USA could be the main obstacle to this almost globally acquiesced effort of establishing a global justice system similar to the global financial governance institutions such as the World Bank, World Trade Organization and International Monetary Fund to which USA advocates and worked tirelessly to establish. Some would argue otherwise. They argue that to the contrary the opposition of USA and China against the ICC and the very fact that ICC is more popular in developing countries show that it is genuinely institution of justice not a creation of the powerful veto powers.

On the Impact of ICC Indictment: *Delayed Peace or Delayed Justice: Whose Priority Should Matter Most?*

Coming back to the questions posed in the beginning of this article, a more serious and legitimate concern with regard to the role of ICC is whether the ICC arrest warrant may aggravate the situation in Sudan.¹³ As pointed out above in the quote, this is indeed one of the points Mr. Reeves repeatedly, and I assume most importantly and aptly, made a year ago. Will ICC indictment and arrest warrants fuel the conflict, and hence should peace be the priority? This is the very concern my Sudanese friend asked me about.

The Princeton Project of 2001 composed of eminent international jurists and which lied the basis for the Rome Statute and ICC extended a word of caution to the would be ICC and its prosecutor by saying:

“Improper exercise of criminal jurisdiction, including universal jurisdiction, may be used merely to harass political opponents, or for aims extraneous to criminal justice. Moreover, the imprudent or untimely exercise of universal jurisdiction could disrupt the quest for peace and national reconciliation in nations struggling to recover from violent conflicts or political oppression. Prudence and good judgement are required here, as elsewhere in politics and law. What is needed are principles to guide, as well as to give greater coherence and legitimacy to, the exercise of universal jurisdiction. [The Principle of universal jurisdiction] should be used in ‘a reasonable solicitude for the quest for peace.’”¹⁴

There are two arguments with regard to the involvement of ICC in an on-going conflict such as Darfur. Much of these arguments were also made with regard to the ICC’s investigation in the conflict in Northern Uganda. The first argument prioritizes peace over justice. The reasons behind this argument are varied in kind and also in degree. The main point in this argument is that peace is the most urgent need of the local people. To be more specific the victims of these conflicts have a clear sense of urgency and priority—that is, peace. For them peace trumps over claims for justice by others including the international community and human rights NGOs.¹⁵ They argue that ICC should stay out of the conflicts: as local priority is peace not justice. **This argument requires justice be sacrificed for the sake of peace, or at least justice be delayed for peace to reign first.** One would be forced to think that ICC should intervene only once peace is restored. On the contrary, there is a strong counter argument that such priority is inherently short-sighted as it is wrong to assume that sustainable peace is attainable without justice. This is often strongly made by the international human rights organizations such as Amnesty International and Human Rights Watch. They strongly oppose any variety of trade off between peace and justice.

The first argument—i.e., peace as priority seems compatible with the “Do no harm” principle of international humanitarian actors. **In such policy decision which requires setting priority, I strongly believe that the famous, and often aptly cited, saying “justice delayed is justice denied” could be taken less seriously. I say justice delayed for sake of peace might not be equal to justice denied. For the sake of much needed peace in Darfur, a delayed justice remains justice.** This is true however if we could answer one important question: could sustainable peace be achieved by either denying or delaying justice? **If the answer to this (either of the denying or delaying of justice could contribute to peace process) is in affirmative, then local priority for peace should overrides over the preference of international organizations.** According to Akena, the involvement of ICC in the Ugandan civil conflict is not popular in the local population affected by the civil war.

“The ICC referral has always been viewed as a convenient political gimmick especially as there was no prior consultation; and although the people have been said to want justice, they do not view the ICC as the way in which they will achieve justice.”¹⁶

For international organizations to ignore this would tantamount to the attitude of ‘the colonial masters’—*we know what you need regardless of what you think is your priority*. I want to be clear on this point. Globally and comparatively speaking, improvements have been made in the protection of human rights since the Second World War. The credit for this improvement should significantly go to the international human rights organizations such as International Committee for Red Cross, Amnesty International, Human Rights Watch and governments who has been working towards international protection of human rights. Moreover, from my personal experience I strongly support such involvement of the ICC as I and my families are victims of serious human rights violations similar to what is happening in Uganda and Darfur. My humble opinion is that in cases like Darfur or Northern Uganda *delaying* justice is not necessarily *denying* justice as the delay is actually in search of *peace* to a community affected by conflict. Prioritizing peace to save more lives is, in and by itself, doing justice. Ensuring peace is serving group justice. Of course denying justice to all victims altogether is serious human right violation, as access to justice is one of the fundamental human rights. However, unless there is empirical evidence that proves arrest warrants and trials could directly contribute to peace and that delay in provision of justice do contribute to conflicts, then it is reasonable to accept “peace today and justice tomorrow”. ***Hence, justice delayed for sake of peace is not justice denied.***

Another yet important question will be: Why is not possible to have both peace and justice today? In Darfur, it seems that the choice of local people is indeed peace now. It would not be possible to prosecute people violating human rights massively while ensuring peace. What is more, the first wisdom in a successful peace process is to remove any insecurity dilemma of any actor in conflict. Unless we take the local priority for peace as short-sighted choice and needing guidance from enlightened people or organizations, I think such priority is meaningful for the people forced to live with war and conflicts for long time as the Darfuris. I strongly believe that delaying justice is an understandable sacrifice for peace. Denying justice, however, could lead to more conflict and war. After all, the Darfur debacle is the outcome of total denial of justice and unfair governance. The role of justice for sustainable peace may not need empirical evidence as it is clear that in the presence of serious and widespread grievance, then peace is impossible to attain. But to assert that justice should not be delayed for sake of peace requires support by empirical evidence that proves such delay in justice will be anti-peace. Ethnic communities involved directly or indirectly in the Darfur crisis have to feel security for the sake of sustainable peace. Many in the Janjeweeds consider themselves as victims of conspiracy of the government of Sudan and other forces in being dragged to this conflict.¹⁷ Regardless of the truth of such claim of victimization of the Janjeweeds, it is necessary to reach out the Afro-Arab Darfuri and Sudanese so as they could feel secure in future peace settlements. Real or perceived ethnic or other group insecurity in Darfur or to that matter in Sudan could disrupt meaningful and sustainable peace in the region. When such insecurity is at the level of sitting president with all his power, the price in terms of humanitarian aid and peace is higher. ICC indictment should be seen from the prism of security dilemma and fear it may create on leadership in Sudan. Come what may, they may stick to their guns if the threat from ICC is not immediately enforceable.

Regardless of the above arguments and disagreements, for the Darfuri as it is to any people I assume the local priority seems both peace and justice. But if peace and justice were put for vote I think they will say ‘peace today and justice tomorrow’. In the short run, the ICC Effect could have destabilizing effect so here a caution is in order.

Africa and ICC

It is a fact beyond dispute that the ICC is now a major actor in Africa. In the long run ICC and its fear factor could play instrumental role in deterrence of human rights violation in Africa. Generally speaking though, the ICC seems strong on the weaker countries in Africa. All of the four investigations and indictments by ICC are African cases. Speaking from the perspective of human rights, rather ICC could rather prove reliable partner to Africa in struggle to establish a human rights protective regimes. The principles upon which the ICC is established and its jurisdictions are fully in line with the principles and objectives of the African Union as provided in its Constitutive Act. The ratification of ICC Rome Statute confirms this priority. As we speak ICC’s Rome Statute is ratified by 106 countries, the majorities of them are from Africa, followed by Asian countries and Eastern European, Latin American and Western European. Hence one can see that ICC is more famous and accepted by developing countries than by rich countries.

The AU and ICC have common ground and could work together as partners for common purposes. This is confirmed by several official documents and institutions of the African Union including the Statute of the African Court of Justice and Human Rights and the Peer Review Mechanism (APRM) NEPAD, and the Committee of Eminent African Jurists (CEAJ) for the trial of Mr. Hissen Habre—the former president of Chad.¹⁸ Under Articles 3 and 4, the Constitutive Act of the African Union lists down the objectives the Union. These objectives and principles take stoke of the evolution of international law in Africa including universal jurisdiction. These include the total rejection impunity and punishment of perpetrators of Crime against Humanity, the Crime of Genocide and War Crimes, and the right AU to intervene if these crimes are committed.

However, it also puts priority on the priority of an African mechanism to deal with these cases. Thus, the ICC is expected to complement the AU and help in the consolidation of the rule of law and respect for human rights, as well as the preservation of peace and the strengthening of international security. This is inline with the *principle of subsidiarity and complementarity of international mechanisms* such as ICC to regional mechanisms such as AU and Inter-Governmental Authority on Development (IGAD). The principle of subsidiarity assumes that the independence and autonomy of the regional and lower units to make decision of their own; and the international mechanism kicks in only and only if the regional mechanisms are unable or unwilling to perform their duties. This is not only allows for the capacity building of the regional mechanisms and institutions but also contributes to efficiency in terms of cost and time of trial and accessibility to the trial by alleged victims as well as witnesses. These points are also made in the AU decision to establish the CEAJ. Indeed as the African Union, as European Union has done, should approve ICC’s Rome Statute through a Declaration of a Common Position.¹⁹ This would allow for AU to work together with ICC for more coordinated and well consulted

intervention, than what has been done on the case of Sudan, which puts all efforts of AU and UN in Sudan to a futile exercise.

¹ The Princeton Project (2001) *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, New Jersey Pp. 24-25

² ICC www.icc-cpi.int/home.htm: Ahhammed Haroun, former minister in charge of Darfur and Ali Kushayb who is leader of the Janjeweeds

³ *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb")*
<http://www.icc-cpi.int/press/pressreleases/241.html>

⁴ The Princeton Project (2001) *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, New Jersey Pp. 12-13

⁵ *Ibid*

⁶ *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb")*
http://www.icc-cpi.int/library/press/pressreleases/ICC-PIDS-PR-20070502-214C_En.pdf

⁷ www.icc-cpi.int/home.htm

⁸ Reeves, Eric (2007) The ICC "Application" Concerning International Crimes in Darfur, Sudan Tribune Wednesday 28 February 2007: 2

⁹ Sudan Tribune (2007) Sudanese cabinet divided over ICC issue Tuesday 13 March 2007

¹⁰ Sudan Tribune (2007) Sudan will question state minister accused of Darfur war crimes Friday 23 March 2007

¹¹ The Princeton Project (2001) *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, New Jersey Pp 49

¹² Rudolph, "Constructing an Atrocities Regime," *International Organization*, 55 (Summer 2001); and Leonard, "Establishing an International Criminal Court: The Emergence of a New Global Authority?" *Pew Case Studies in International Affairs*, Case 258 (2002)

¹³ As USA is opposed to the ICC as in the Rome Statute, it has been very difficult for the USA to formally assist ICC in its indictments. Darfur puts USA in hotspot of dilemma: formally opposed to ICC but also wanting the all responsible people in Darfur to be accountable for their deeds. Even if the Former Secretary State of the US has officially announced that it has evidence showing that the GoS has committed Genocide as a matter of policy, the US is not willing to cooperate with ICC. This is a serious constraint to the growth of international criminal accountability and particularly to the establishment of an enforcement mechanism that assists the international community's responsibility to protect. This is a serious binding constraint to the sustainable peace in Darfur and in general to the construction of atrocity regime and emergence of ICC as a new global authority as both Rudolph and Leonard indicated.¹³ While this is an opportunity in terms of enforcement of international law, norms and perhaps in inducing what I call the "ICC-Nightmare", it could also be constraint for the other efforts of UN for example its diplomatic endeavours to get approval of the GoS.

¹⁴ The Princeton Project (2001) *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, New Jersey Pp 24-25

¹⁵ Rowling, Megan (2007) Uganda's war victims prefer peace over punishment? Reuters Alert April 20, 2007
<http://www.alertnet.org/thenews/newsdesk/L30161196.htm>

¹⁶ Akena, Achieng (2008) Uganda: whose justice is it anyway? the African Files www.africafiles.org/

¹⁷ *Ibid*

¹⁸ **AU (2006) Committee of Eminent African Jurists (CEAJ)** The Summit of African Union Heads of State and Government in Khartoum, The Sudan, in January, 2006 Assembly/AU/Dec.103 (VI)

¹⁹ EU (2003) Commons Positions 2002/474/CFSP, June 16 2003 and 2003/444/CFSP