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**PROGRESS REPORT OF THE COMMISSION ON THE
IMPLEMENTATION OF THE DECISIONS OF THE ASSEMBLY OF
THE AFRICAN UNION ON THE INTERNATIONAL CRIMINAL COURT**

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UNION ON THE INTERNATIONAL CRIMINAL COURT**

I. INTRODUCTION

1. The Twenty-Sixth Ordinary Session of the Assembly of the African Union held in Addis Ababa, Ethiopia from 30 to 31 January 2016 considered the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court. Subsequently, the Assembly adopted Decision Assembly/AU/Dec.590 (XXVI), the operative paragraphs of which are as follows:

- i) [...REQUESTS] the Overall Dean and the Regional Deans in Addis Ababa, Ethiopia to urgently undertake consultations with a view to submitting their respective representatives to serve on the Bureau [of the Open Ended Ministerial Committee];
- ii) [MANDATES] the Permanent Representatives" Committee (PRC) to approve and provide the adequate resources to the Commission, through the Office of the Legal Counsel, to support the work of the Open ended Ministerial Committee in pursuing all political, legal, and strategic avenues in addressing AU"s concerns before the United Nations, the ICC and the International Court of Justice (ICJ);
- iii) [REITERATES] its previous Decision Assembly/AU/Dec.547(XXIV) on the progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) adopted by the Twenty-Fourth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, in January 2015, and in particular paragraph 17 (d) that requested the ICC to terminate or suspend the proceedings against Deputy President William Samoei Ruto of Kenya until the African concerns and proposals for amendments of the Rome Statutes of the ICC are considered;
- iv) [...] URGES the United Nations (UN) Security Council to withdraw the referral case in The Sudan;
- v) [REQUESTS] the Peace and Security Council (PSC) to examine the Draft ICC Action Plan on Arrest Strategies that is currently under consideration by the ICC and make appropriate recommendations thereon to the next ordinary session of the Assembly, through the Executive Council, in July 2016 to enable adoption of a Common African Position on same;

- vi) The Open-ended Ministerial Committee [should] review the ICC's interpretation of its power pursuant to Article 93 of the Rome Statute that allows the latter to oblige State Parties to forcibly compel unwilling witnesses to testify before the ICC, with a view to rejecting witness compulsion *in toto* and inform the ICC and the next ASP accordingly;
- vii) The Open-ended Ministerial Committee's mandate [should] include the urgent development of a comprehensive strategy including collective withdrawal from the ICC to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council which is mandated to take such decision;
- viii) The Commission, through the AU Mission in Brussels, Belgium, will serve as the secretariat to the Open-ended Ministerial Committee and provide institutional support to the African Group in The Hague, Netherlands to ensure effective coordination of its activities.

2. The present Report has been prepared pursuant to the above Assembly Decision with a view to updating the AU Policy Organs on the developments that occurred since the adoption of the said Decision.

II. THE ACTIVITIES OF THE OPEN ENDED MINISTERIAL COMMITTEE OF MINISTERS OF FOREIGN AFFAIRS ON THE INTERNATIONAL CRIMINAL COURT

A. MEETING AT THE LEVEL OF MINISTERS

3. Under the Chairpersonship of *H.E. DR. Tedros Adhanom Ghebreyesus*, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia, the *Open-ended Ministerial Committee of Ministers of Foreign Affairs* on the International Criminal Court ("The *Open-ended Ministerial Committee*") met once at the level of Ministers on 11 April 2016 during the period under review. The meeting was preceded by a meeting of the Committee [at the level of Ambassadors] on 8 April 2016, principally to prepare for the meeting of the Ministers.

4. During the meeting, the Ministers considered the Matters arising from the last AU Summit in January 2016 [Assembly/AU/Dec.590(XXVI)] that required implementation as follows:

- i) Expansion of the Bureau;
- ii) Working Visit to the United Nations Security Council (UNSC);
- iii) Development of a comprehensive strategy for engagement with the UNSC including the collective withdrawal strategy from the International Criminal Court (ICC); and

- iv) The draft ICC Arrest Strategy.
5. The outcomes from the deliberation were as follows:
- i) **Expansion of the Bureau:** the Bureau was expanded and reconstituted as follows: *Ethiopia (Chair); Algeria (North); Burundi (Central); Nigeria (West); South Africa (South); and Uganda (East).*
 - ii) **Working Visit to the United Nations Security (UNSC):** Subject to the development of the comprehensive strategy to be used for the engagement with the UNSC and the readiness of the Committee, the proposed date for the working visit was initially proposed to take place from 10 to 12 May 2016. The Ministers agreed that the Permanent Mission of Egypt to the AU (in view of Egypt being chair of the UNSC for the month of May 2016) in collaboration with the Commission to facilitate the inclusion of the working visit on the agenda of the UNSC for the month of May 2016. It was also agreed that the composition of each delegation will be made of Ministers of Foreign Affairs and need not include Ministers of Justice/Attorneys General.
 - iii) **Development of a comprehensive strategy for engagement with the UNSC including the collective withdrawal strategy from the International Criminal Court (ICC):** The Ministers resolved that the comprehensive strategy should be developed by the Commission as soon as possible that should take into account the following:
 - a) In order for African State Parties to refrain from withdrawing from the ICC, the organization must undergo reforms including amendments to Rome Statute that have been proposed by the African Union and African States Parties;
 - b) These reforms include, among others, amendments to Article 27 – i) Irrelevance of official capacity, ii) Preambular part of Rome Statute to allow for complementarity of regional judicial institutions, iii) Article 16 on the deferral of cases, and, v) Article 70 – offences against administration of justice. The reforms should also include reduction of the powers of the Prosecutor;
 - c) There is need continental and country level ownership of the international criminal justice space through strengthening of national judicial systems;
 - d) In engaging with the UNSC, it must be clearly articulated that no referral of a situation on the continent should be made without first deferring to Assembly the Union for its decision;

- e) Robust strategy to enhance the ratification of the Malabo Protocol expanding the jurisdiction of the African Court of Justice and Human and Peoples' Rights to include international crimes;
 - f) Timelines for withdrawal should be clearly articulated in the withdrawal strategy taking into account the slow pace that the reforms are likely going to take at the ICC.
- iv) **Draft ICC Arrest Strategy:** In compliance with Assembly decision [Assembly/AU/Dec.590 (XXVI) of January 2016], and the need for the AU to adopt a common position on the draft ICC Arrest Strategy, the Ministers requested the Commission to proceed with the placing of the draft ICC Arrest Strategy on the agenda of the PSC, through the Peace and Security Department.

6. The members of the Open-ended Ministerial Committee also discussed two (2) additional issues that was brought to the attention of the Ministers. The first related to the Provisional Amendment of Rule 165 of the Rules of Procedure and Evidence of the ICC; and the second related to allegations of corruption involving the ICC President, Judge Silvia Fernandez De Gurmendi and some Non-Governmental Organizations.

i) Provisional Amendment of Rule 165 of the Rules of Procedure and Evidence of the ICC

7. Under this agenda item, the Minister of Foreign Affairs and International Trade of the Republic of Kenya, H. E. (Amb.) Amina C. Mohammed brought to the attention of the Committee the judges of the International Criminal Court ("ICC"), during their 34th plenary session, provisionally amended rule 165 of the Rules of Procedure and Evidence, in order to allow for the respective functions of the Pre-Trial and the Trial Chamber, including the confirmation of charges and the trial, to be exercised by one judge instead of a chamber of three judges.

8. This provisional amendment was adopted by the judges in accordance with article 51(3) of the Rome Statute which permits a two-thirds majority of judges to draw up provisional Rules in urgent cases where the Rules do not provide for a specific situation before the Court. The judges considered that the current scarcity of judicial resources and the heavy trial workload of the Court rendered it necessary to adopt the amendments provisionally.

9. The Minister indicated that the amendments by the judges should be rejected at the next ASP, as reducing the number of judges to one (1) will increase prejudice, may be used to circumvent substantive rights enshrined in the Rome Statute, and remove the possibility of the checks and balance in the form of a dissenting opinion. She buttressed her point by adding that there was no emergency that warranted the provisional amendment by the judges in accordance with the Rome Statute. In her conclusion, Amb.

Mohammed informed the Committee that Kenya has sent a letter to the President of the ASP, H.E. Mr. Sidiki Kaba expressing the same arguments.

10. Ministers expressed support for Kenya's position and agreed that African State Parties support the proposal to reject the provisional amendment to rule 165 of the Rules of Procedure and Evidence at the upcoming ASP in November 2016.

ii) Allegations of Corruption Involving the ICC President, Judge Silvia Fernandez De Gurmendi and some Non-Governmental Organizations

11. Under this agenda item, the Minister of Foreign Affairs of the Republic of the Sudan, H. E. Mr. Ibrahim Ghandour informed the Committee of an allegation of corruption relating to alleged huge transfers of funds involving some Non-Governmental Organizations involved in the Darfur crisis and the ICC President, Judge Silvia Fernandez De Gurmendi while she was still serving in the Office of the Prosecutor.

12. The Honorable Minister concluded his remarks by causing to be circulated, the documents showing the alleged acts. At the end of the deliberations, the Ministers decided that the documents contained weighty allegations that warranted a thorough investigation and hence should be referred to the upcoming ASP and the relevant structures in the ICC.

B. MEETING OF THE BUREAU AT THE LEVEL OF AMBASSADORS

13. On the prompting of the Chairperson of the Open Ended Ministerial Committee - H.E. Tedros Adhanom, a meeting at the level of Ambassadors was convened on 31 May 2016 to prepare for the working visit to New York, in view of the new date of 9 June 2016 proposed by the UNSC for the working visit of the Open Ended Ministerial Committee.

14. During the meeting, the Ambassadors agreed on a draft Programme of Work for the Bureau in New York, made input on the Draft Concept Note/Strategy Document; and discussed the different formats that the discussions with the United Nations Security Council should take.

15. In order to ensure that the Ministers visit to New York was effective and in order to ensure wide ranging consultations to maximize the engagement on all relevant issues, the Ambassadors proposed that the following stakeholders should be engaged by the Ministers while in New York: The African Group; A3 (the three (3) current African Non-Permanent members, i.e. Angola, Egypt and Senegal); the UN Secretary General, the Permanent Representatives of members of the Bureau plus the two interested members; the President of the United Nations General Assembly; Friends of Africa in the UNSC; which may include China, Russia, Ukraine, Uruguay and Venezuela, and the ICC Prosecutor, among others.

16. However, the working visit to New York was again postponed due to insufficient confirmation of Foreign Ministers of the Bureau.

C. MEETING BETWEEN THE OPEN ENDED MINISTERIAL COMMITTEE AND THE UNITED NATIONS SECURITY COUNCIL

17. As at the time of preparation of the Progress Report, the meeting between the Open Ended Ministerial Committee and the UNSC could not take place on the proposed dates due to insufficient number of confirmation of Ministers. However, there is a proposal to reschedule the consultation to a later date.

III. UPDATE ON AFRICAN UNION REQUEST TO SUBMIT *AMICUS CURIAE* OBSERVATIONS PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE ON THE RULE 68 AMENDMENTS AT THE 12TH ASP

18. In the last Progress Report of the Commission, the Assembly was informed that pursuant to its decision [Assembly/AU/Dec. 586 (XXV) of July 2015], the Office of the Legal Counsel through an external Counsel engaged for this purpose, filed a Rule 103 (1), *amicus curiae* observations before the Appeals Chamber of the ICC “for the purpose of placing before the Court all the relevant material arising out of the negotiations of Rule 68 of the *Rules of Procedure and Evidence* (“RPE”) during the 12th Session of the Assembly of States Parties (“ASP”) in November 2013.

19. The application was filed pursuant to the appeal of Deputy President William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber granting the *Prosecutor’s request to admit prior recorded testimony* of witnesses who were no longer available, who had since recanted the said evidence or who had testified before the Court that they lied or were coached regarding what they averred in their recorded written statements.

20. On 12 October 2015, the Appeals Chamber granted leave to the African Union Commission (“African Union”) to submit *amicus curiae* observations, which it did on 19 October 2015. On 12 February 2016, the Appeals Chamber ruled in favor of the accused persons by indicating that Rule 68 could not apply in the instant case. The Appeals Chamber found that the application of this rule negatively affected the overall position of Deputy President Ruto and Mr. Sang and accordingly, held that the Trial Chamber applied amended rule 68 of the Rules retroactively to the detriment of the accused.

IV. UPDATE ON THE SITUATION IN KENYA: THE CASE OF WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

21. On 5 April 2016, Trial Chamber V (A) of the International Criminal Court decided, by majority, Judge Olga Herrera Carbucciona dissenting, that the case against Deputy

President William Samoei Ruto and Mr. Joshua Arap Sang be terminated. The decision, not being an acquittal, however, does not preclude new prosecution in the future either at the ICC or in a national jurisdiction.

22. The Chamber also considered the opposing submissions of the Prosecutor and the Legal Representative of the Victims, and received further submissions during hearings. On the basis of the evidence and arguments submitted to the Chamber, Presiding Judge Chile Eboe-Osuji and Judge Robert Fremr, as the majority, agreed that the charges are to be vacated and the accused are to be discharged. They provided separate reasons for this decision.

23. The majority of the Chamber, having concluded that the Prosecution did not present sufficient evidence on which a reasonable Trial Chamber could convict the accused, also concluded that a judgment of acquittal was not the right outcome, but only vacation of the charges and discharge of the accused. The majority also agreed that there is no reason to re-characterize the charges.

V. CONSIDERATION OF THE DRAFT ICC ARREST STRATEGY BY THE AU PEACE AND SECURITY COUNCIL

24. Pursuant to Assembly decision Assembly/AU/Dec.590 (XXVI), the Peace and Security Council (“PSC” or “Council”) at its 606th meeting that held on 20 June 2016 at the AU Headquarters considered the draft ICC Action Plan on Arrest Strategies with a view to making appropriate recommendations to the next ordinary session of the Assembly, through the Executive Council in July 2016 in Kigali, Rwanda.

25. After the presentation of the draft ICC Action Plan on Arrest Strategies by the AU Legal Counsel, most members of the Council reiterated the AU concerns regarding the activities of the ICC in Africa, which have been the subject of various Assembly decisions and generally agreed that the AU should object to the inclusion of language in UN Peacekeeping mandates to assist in the enforcement of ICC arrest warrants, as this will affect the neutrality and impartiality of UN mandated Peacekeeping missions and undermine the ability of member states of the United Nations to contribute troops to UN Peacekeeping Operations.

26. After the deliberations, the PSC made the following recommendations for consideration by the Assembly through the Executive Council:

- a) To direct African States to the Rome Statute to ensure that during the adoption of the draft ICC Action Plan on Arrest Strategies, there is no provision that includes language requiring the UN Security Council (UNSC) to mandate UN Peacekeeping missions to enforce ICC arrest warrants in Africa; and

- b) To mandate the Open Ended Ministerial Committee on the ICC to include this issue in its engagement with UNSC, the Assembly of State Parties to the Rome Statute and other stakeholders on AU concerns on the activities of the ICC in Africa.

VI. RECOMMENDATIONS

27. The Commission would like to propose for consideration by the Assembly the following recommendations:

- R1. *Reiterate the commitment of the African Union and its Member States to fight against impunity in accordance with the Constitutive Act;*
- R2. *Reiterate its previous Decisions adopted on ICC;*
- R3. *Reiterate its previous decisions for the suspension of proceedings against President Omar Al Bashir of The Sudan and urge the UNSC to withdraw the referral case in The Sudan;*
- R4. *Take Note of the decision of Trial Chamber of the ICC to terminate the proceedings against the Deputy President of Kenya due to insufficient evidence adduced by the Prosecutor;*
- R5. *Reiterates its call on all AU Member States to sign and ratify, as soon as possible, the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights adopted in Malabo (Equatorial Guinea) on 27 June 2014;*
- R6. *Reiterate its decision on the need for all Member States to comply with the Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir of The Sudan pursuant to Article 23 (2) of the Constitutive Act and Article 98 of the Rome Statute of the ICC;*
- R7. *Request African State Parties to the ICC should reject the provisional amendment to rule 165 of the Rules of Procedure and Evidence at the upcoming ASP in November 2016;*
- R9. *Request African States to the Rome Statute to ensure that during the consideration and adoption of the draft ICC Action Plan on Arrest Strategies, there is no provision that includes language requiring the UNSC to mandate UN Peacekeeping missions to enforce ICC arrest warrants in Africa;*
- R.10. *Further mandates the Open Ended Ministerial Committee on the ICC to ensure that in its engagement with UNSC, the Assembly of State Parties to*

the Rome Statute and other stakeholders on AU concerns on the activities of the ICC in Africa, the AU member states object to the inclusion of language requiring the UNSC to mandate UN Peacekeeping missions to enforce ICC arrest warrants in Africa;

R12. Reiterate the need for the Open Ended Ministerial Committee to meet with the UNSC to engage on all issues that have been consistently raised by the African Union;

R11. *The Commission to report to the Executive Council on implementation of this decision at its next session in January 2017.*

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