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

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I. INTRODUCTION

1. The 22nd Ordinary Session of the Assembly of the African Union held in Addis Ababa, Ethiopia, in January 2014 considered the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court (ICC). Subsequently, the Assembly adopted Decision Assembly/AU/Dec.493.(XXII), *inter alia*, as follows:

“12. DECIDES that:

- (i) *African States Parties should comply with African Union Decisions on ICC and continue to speak with one voice to ensure that the African proposals for amendments to Articles 16 and 27 of the Rome Statute of the ICC are considered by the ASP working Group on amendments as well as by the forthcoming sessions of the Assembly of States Parties (ASP) to the Rome Statute;*
- (ii) *There is an imperative need for all Member States to ensure that they adhere and articulate commonly agreed positions in line with their obligations under the Constitutive Act of the African Union;*
- (iii) *The Group of African States Parties in New York and the African Members of the Bureau of ASP should follow-up on the implementation of various Decisions of the Assembly on ICC, in collaboration with the Commission and ensure that the African proposals and concerns are properly considered/addressed by the ASP and report to the Assembly through the Commission on actions taken regularly;*

13. RECALLS *its decision aimed at extending the jurisdiction of the African Court of Justice and Human Rights to hear international crimes in the Continent and* **REQUESTS** *the Commission in collaboration with all stakeholders to speed up the process with a view to reporting thereon to the Assembly in June 2014;*

14. REQUESTS *the Commission to present a report on new developments in the issue, which is important to Africa, at its 24th Ordinary Session in January 2015”.*

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. ACTIONS TAKEN WITH RESPECT TO THE EXPANSION OF THE JURISDICTION OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

3. The Assembly through its Decision adopted in January 2014 requested the Commission in collaboration with all stakeholders to speed up the process of expanding the jurisdiction of the African Court of Justice and Human Rights to try international crimes in the continent. Following this decision, the Commission convened in May 2014 the first session of the AU-STC on Justice and Legal Affairs (*Former African Conference of Ministers of Justice/Attorneys General from Member States but now including Ministers responsible for issues such as human rights, constitutionalism and rule of law*) with a view to considering the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

4. As finalized and recommended by the STC on Justice and Legal Affairs, the Draft Protocol was adopted by the 23rd Ordinary Session of the Assembly held in Malabo, Guinea Equatorial, on 26 and 27 June 2014. To date, no Member State has signed and ratified the said Protocol. It should be recalled that fifteen (15) ratifications are required for the entry into force of the Protocol and subsequently the operationalization of the International Criminal Law Section of the African Court of Justice and Human Rights in order to try international and transnational crimes.

III. ACTIONS TAKEN IN RESPECT OF THE IMPLEMENTATION OF PARAGRAPH 3 OF THE DECISION Assembly/AU/Dec.419 (XIX)

5. The 19th Ordinary session of the Assembly of the Union held in Addis Ababa, Ethiopia in July 2012 adopted the Decision Assembly/AU/Dec.419 (XIX) on the International Criminal Court (ICC), which, *inter alia*, stated as follows:

« 3. *ENDORSES the recommendations of the meeting of Ministers of Justice/Attorneys General to approach the International Court of Justice (ICJ) through the United Nations General Assembly (UNGA), for seeking an advisory opinion on the question of immunities, under international law, of Heads of State and senior States Officials from States that are not Parties to the Rome Statute of ICC and this regard, requests the Commission to undertake further Study on the advisability and implications of seeking such advisory opinion from ICJ and to report thereon to the Executive Council ».*

6. To implement this Decision, the Commission developed a comprehensive Draft Study on the advisability and implications of seeking advisory opinion from ICJ on the immunities of Heads of State and senior States Officials from States that are not Parties to the Rome Statute of ICC. To consider the Draft Study, the Commission undertook in March 2014 consultations with the African Group (Ambassadorial level) in New York and the African Legal Experts of the Sixth Committee of the United Nations General Assembly (UNGA).

7. During these consultations, the Members of the African Group and the African Legal Experts of the 6th Committee of the UNGA made preliminary observations to be incorporated in the draft Study.

8. The Commission is finalizing the Draft Study to be submitted to the upcoming meeting of the AU Specialized Technical Committee on Justice and Legal Affairs to be held in 2015 prior to the consideration of its recommendations by the AU Policy Organs.

IV. UPDATE ON THE PROCEEDINGS INITIATED BY ICC AGAINST THE PRESIDENT OF THE SUDAN

9. During the reporting period, no major developments occurred with respect to the proceeding initiated by ICC against the President of The Sudan. However, by Decision ICC-02/05-01/09-195 dated 9 April 2014, the Pre-Trial Chamber II of the ICC found that the Democratic Republic of the Congo (DRC) has failed to cooperate with the Court by not arresting and surrendering the President Bashir of the Sudan to the Court during his visit to the Democratic Republic of Congo on 26 and 27 February 2014 in order to attend the COMESA Summit. The Chamber referred the matter to both the United Nations Security Council and the Assembly of States Parties (ASP) to the Rome Statute. It is now up to the ASP and the UN Security Council to take the measures they deem necessary regarding this matter.

10. At the time of finalization of the report, no action was taken by the ASP and the UNSC with respect to the non-cooperation of the DRC with ICC for the arrest and surrender of the President Bashir of the Sudan.

11. As reported in December 2014 by the Prosecutor through the 20th Report to the UNSC, the Pre-Trial Chamber issued on 14 October 2014 a decision on President Bashir's travel to Egypt on 18 and 19 October 2014. The Chamber invited Egypt to arrest and surrender President Bashir to the Court. In the same vein, Pre-Trial Chamber II issued on 4 November 2014 a decision on President Bashir's travel to Ethiopia on 5 November 2014 and invited the competent Ethiopian authorities to arrest and surrender him to the Court. It should be recalled that Egypt and Ethiopia are not parties to the Rome Statute.

V. DEVELOPMENTS WITH RESPECT TO THE PROCEEDINGS INITIATED BY THE ICC AGAINST THE PRESIDENT AND DEPUTY PRESIDENT OF KENYA

12. The trial of Mr. Uhuru Muguai Kenyatta, President of the Republic of Kenya was scheduled on 7 October 2014. However, on 28 August 2014, the Trial Chamber V (b) issued an order requiring the Prosecution to file a notice by 5 September 2014 indicating whether or not it anticipated being in a position to start trial on the above-mentioned date. Following this order, the Prosecution filed the same date its notice indicating that it would not be in a position to proceed to trial on 7 October 2014. In the same vein, the

Prosecution requested that the case be further adjourned until the Government of Kenya fully executes the Prosecution's revised cooperation request.

13. By Decision N0.ICC-01/09-02/11 of 19th September 2014, the Trial Chamber V (b) vacated the trial date of 7 October 2014 and convening two status conferences on 7 and 8 October 2014 in the case of the Prosecutor v. Uhuru Muigai Kenyatta. In the same vein, the Chamber required Mr. Uhuru Muigai Kenyatta ***"to be present at the status conference on 8 October, 2014"***.

14. The African Union Commission expressed its total disagreement with the decision of the Trial Chamber V (b) of the ICC which did not take cognizance whatsoever of the amendments to the Rules of Procedure and Evidence of the ICC adopted by the 12th Ordinary Session of the Assembly of the States Parties to the Rome Statute held in the Hague, the Netherlands, in November 2013. The above-mentioned Rules provide ground and mechanisms for the participation of the President Kenyatta to the said status conference through his Legal Representatives or by Video Conference without undermining his ability to fulfil its constitutional responsibilities as Sitting Head of State of Kenya.

15. It should be recalled that on 25 September 2014, the Defence of H.E Mr. Kenyatta filed a request for the accused to be excused from attendance at the Status Conference, pursuant to Rule 134 *quater* of the Rules of Procedure and Evidence of the Court, or, in the alternative, for the Status Conference to be rescheduled to a later date, and for the accused to be permitted to attend via video-link at that later date. However, on 30 September 2014, the Chamber rejected the request and ordered that the accused ***"to be present, in person, at the status conference on 8 October 2014"***.

16. Following this rejection, H.E Mr. Kenyatta adhered to the summons of the Court in his private capacity and attended the status conference held on 8 October 2014. In doing so, H.E Mr. Kenyatta was obliged to set aside his duties as President and his Chair of the East African Summit to respect the Court Ruling for his attendance. Upon attending the status Conference, H.E Mr. Kenyatta was not required to speak or to answer any questions. He sat through the entire proceedings and the Court's adjournment proceeded to return back to Kenya. The consequence of not adhering to the summons was clear as H.E Mr. Kenyatta was at threat of a warrant arrest.

17. Following the status conference, the Chamber V (b) issued on 3 December 2014 a decision rejecting the Prosecution's request for a further adjournment of the case against President Kenyatta, as well as the Defence's request to terminate the proceedings. In light of the above-mentioned decision of the Chamber, the Prosecutor decided on 5 December 2014 to withdraw its charges against President Uhuru Kenyatta due to insufficient evidence to prosecute. The Commission welcomed this decision through a Communiqué issued on 5th December 2014.

18. With respect to the Proceedings against the Deputy President of Kenya, no major developments occurred during the reporting period. The trial opened on 10 September 2013 is on-going.

VI. INVESTIGATIONS, PROSECUTIONS AND PRELIMINARY EXAMINATIONS BY THE ICC

19. Since its establishment, the ICC has opened investigations in relation to eight (8) situations. All of these situations arise from AU Member States. The eight (8) situations relate to crimes committed or allegedly committed in the Democratic Republic of Congo; Uganda; the Central African Republic (CAR); Sudan (Darfur); Kenya; Libya, Cote d'Ivoire and Mali. More recently, on 30 May 2014, the ICC Prosecutor received a new referral from the Central African authorities regarding crimes allegedly committed on CAR territory since 1 August 2012.

20. During the reporting period, the Office of the Prosecutor of the ICC opened preliminary examinations in the Central African Republic, Iraq, Ukraine and Palestine; continued preliminary examinations in Afghanistan, Colombia, Georgia, Guinea, Honduras and Nigeria; and concluded its preliminary examinations in the Republic of Korea and the "Gaza Freedom Flotilla" incident.

VII. OUTCOME OF THE 13th ASSEMBLY OF STATES PARTIES (ASP) TO THE ROME STATUTE OF THE ICC

21. The 13th Session of ASP took place in New York, USA from 8 to 17 December 2014. The Commission was represented at this session in order to follow up the implementation of Assembly Decisions on the ICC in consultation with the Group of African States Parties. This Summary will focus on the proceedings of the 13th ASP with respect to the elections of its President and Judges respectively and the Amendment proposals to the Rome Statute.

22. The 13th ASP elected Adv. Sidiki Kaba, Minister of Justice and Keeper of the Seal of the Republic of Senegal as the first African President of the ASP for the next three (3) years, as endorsed by the Council in June 2014.

23. In the same vein, the ASP elected six (6) Judges including an African Judge Adv. Antoine Kessia-Mbe Mindua from Democratic Republic of Congo. This candidature was also endorsed by the Council in January and June 2014. However, this endorsement was not respected by some Member States. This situation, which continues to repeat itself in several other instances, should be considered by the Ministerial Committee on candidature within International System with a view to implementing the relevant provisions of the Rules of Procedure of the said Ministerial Committee and the Constitutive Act, in order to strengthen the African Common Positions and Endorsements.

24. The amendment proposals to the Rome Statute on the issues of immunities of sitting Heads of State and Government as submitted by the Group of African States Parties in November 2013 pursuant to the Decision of the Extraordinary Session of the Assembly of October 2013 were not considered by the 13th Session of the ASP despite the request made by some African States Parties. However, the ASP invited its Working Group on Amendments to continue the consideration of all amendment proposals in 2015 and report to the fourteenth session of the ASP to be held in The Hague from 18 to 26 November 2015. The Commission does not expect any progress in the consideration of the said amendment proposals in 2015 due to the insufficient support from African States Parties and the strong opposition of the majority of other States Parties to any amendment to the Rome Statute.

VIII. RECOMMENDATIONS

25. The Commission would like to propose for consideration by the Assembly through the Executive Council the following recommendations:

- R1. *The Assembly should reiterate the commitment of the African Union and its Member States to fight against impunity in accordance with the Constitutive Act;*
- R2. *The Assembly should reiterate its previous Decisions adopted on ICC;*
- R3. *The Assembly should express its deep concern following the summing of President Kenyatta through a decision of the Trial Chamber V (b) of the ICC which did not take cognizance whatsoever of the amendments to the Rules of Procedure and Evidence of the ICC adopted by the 12th Ordinary Session of the Assembly of the States Parties to the Rome Statute held in the Hague, the Netherlands, in November 2013;*
- R4. *The Assembly should express its deep concern regarding the wisdom of the continued prosecution of the case of Mr. Ruto;*
- R5. *The Assembly should commend the President Kenyatta for the leadership shown and the unprecedented act of appointing an Acting President so as to respect the relevant Assembly Decision and protect the sovereignty of the Kenyan people as well as the dignity of the continent;*
- R6. *There is an imperative need for all African States Parties to ensure that they adhere and articulate commonly agreed positions in line with their obligations under the constitutive Act of the African Union;*
- R7. *The Assembly should decide to continue to pursue the political, legal, and strategic approach in addressing AU's concerns on the proceedings initiated by ICC against African Sitting Heads of State and Government*

and the threat that it may pose to the on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability, not only in the concerned AU Member States, but also in the continent;

- R8. *The Group of African States Parties in New York and The Hague as well as the African Members of the Bureau of the Assembly of the States Parties to the Rome Statute of the ICC should follow-up on the implementation of various Decisions of the Assembly on ICC, in collaboration with the Commission and ensure that the African proposals and concerns are properly considered/addressed by the ASP and report to the Assembly through the Commission on actions taken;*
- R9. *The Assembly should regret that the AU's endorsement of one person as sole African candidate for the post of judge of the ICC was not respected by some African States Parties and should request the Executive Council to implement provisions of Rule 16 (sanctions for non-compliance with Decisions) of the Rules of Procedure of the AU Ministerial Committee on candidature within International system adopted in January 2014;*
- R10. *The Assembly should 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;*
- R.11. *The Commission in collaboration with all stakeholders should follow-up on this matter with a view to ensuring that the African proposals and concerns are considered/addressed by the forthcoming ASPs and to report regularly to the Assembly through the Executive Council.*

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