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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**

I. INTRODUCTION

1. The Thirtieth Ordinary Session of the Assembly of the African Union held in Addis Ababa, Ethiopia in January 2018, considered the Progress Report of the Commission on the Implementation of the Decisions of the Assembly on the International Criminal Court (“ICC”) and the recommendations of the Open-ended Committee of Ministers of Foreign Affairs on the ICC (“*The Open-ended Ministerial Committee*”). Subsequently, the Assembly adopted Decision Assembly/AU/Dec.672 (XXX) as follows:

The Assembly,

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of the Decisions of the Assembly on the International Criminal Court (ICC) and the recommendations of the Open-ended Committee of Ministers of Foreign Affairs on the International Criminal Court (*The Open-ended Ministerial Committee*);

2. REITERATES:

- i. *the unflinching commitment of the African Union and its Member States to combat impunity and promote democracy, the rule of law and good governance throughout the entire continent, in conformity with the Constitutive Act of the African Union;*
- ii. *its previous decisions on the deferral or termination of proceedings against President Omar Al Bashir of the Republic of The Sudan in accordance with Article 16 of the Rome Statute;*
- iii. *the need for all Member States, in particular, those that are also State Parties to the Rome Statute, to continue to comply with the Assembly Decisions on the warrant of arrest issued by the ICC against President Al Bashir of The Sudan pursuant to Article 23 (2) of the Constitutive Act of the African Union and Article 98 of the Rome Statute of the ICC;*

3. EXPRESSES:

- i. *deep concern with the decision of the Pre-Trial Chamber II of the ICC on the legal obligation of the Republic of South Africa to arrest and surrender President Al Bashir of The Sudan, which is at variance with customary international law and CALLS ON Member States of the African Union, particularly those that are also State Parties to the ICC, to oppose this line of interpretation of their legal obligations under the Rome Statute;*
- ii. *the need for Member States to strengthen national and continental judicial and legislative mechanisms to deal with impunity in order to ensure that justice is served in a fair manner;*

iii. *concern at the slow pace of ratification of 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 and **ENDORSES** the Action Plan for the Ratification of the Malabo Protocol and in this regard, **URGES** all Member States to ratify the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights (Malabo Protocol);*

4. **TAKES NOTE** of the sovereign decision made by the Republic of Burundi to withdraw from the ICC effective October 27th, 2017, and **CONDEMNNS** the decision by the ICC to open an investigation in the situation prevailing in the Republic of Burundi as it is prejudicial to the peace process under the auspices of the East African Community, and constitutes both a violation of the sovereignty of Burundi and is a move aimed at destabilising that country;

5. **REQUESTS:**

- i. *the African States Parties to the Rome Statute to request the ICC Assembly of States Parties to convene a working group of experts from its member states to propose a declaratory/interpretative clarification of the relationship between Article 27 (irrelevance of official capacity) and Article 98 (Cooperation with respect to waiver of immunity and consent to Surrender) and other contested issues relating to the conflicting obligations of States Parties to cooperate with the ICC;*
- ii. *the African Group in New York to immediately place on the agenda of the United Nations General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law;*
- iii. *the Commission to review its standard agreements on hosting of AU Summits and other high-level meetings, to ensure that any ambiguity concerning the provision of privileges and immunities of representatives of Member States are addressed;*
- iv. *the African Group in New York and The Hague to request the next Assembly of States Parties of the ICC to withdraw from its agenda the consideration of the Draft Action Plan on Arrest Strategies;*
- v. *the African Group and the Commission to ensure that decisions of the AU Policy Organs are conveyed during the discussions on Universal Jurisdiction in the Sixth Committee of the United Nations General Assembly and to make recommendations to the Summit on how to move this discussion forward, in view of the apparent impasse in the Sixth Committee.*

2. The present Report has been prepared with a view to updating the Assembly on the developments that occurred since the adoption of the above Decision. The report is structured as follows:

- a. Updates on current situations before the Court;
- b. Activities of the Open-ended Ministerial Committee;
- c. Reconstitution of the Bureau of the Open-ended Ministerial Committee;
- d. The AU's request for an advisory opinion of the ICJ;
- e. The AU's Amicus Curiae Submission before the Appeals Chamber of the ICC; and
- f. Outcome of the 17th Session of the Assembly of States Parties of the ICC.

II. UPDATES ON CURRENT SITUATIONS BEFORE THE ICC

6. The current situations before the Court that are either under preliminary examination or investigation are as follows:

a) Preliminary examinations

1. Afghanistan
2. Colombia
3. Bangladesh / Myanmar
4. Guinea
5. Iraq/UK
6. Nigeria
7. Palestine
8. The Philippines
9. Ukraine
10. Venezuela

b) Situations under investigation

1. Burundi
2. Democratic Republic of the Congo
3. Central African Republic
4. Central African Republic II
5. Côte d'Ivoire
6. Darfur, Sudan
7. Kenya
8. Libya
9. Mali
10. Georgia
11. Uganda

7. Since the last reporting period in January 2018, the only significant change in the situations before the Court is that the preliminary examination opened in the Republic of Gabon on 29 September 2016 was concluded with a decision by the Prosecutor of the ICC on 29 September 2018, not to proceed to investigation, having determined that the legal requirements for opening an investigation had not been satisfied.

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

8. The Seventh Meeting of the Open-ended Committee of Ministers of Foreign Affairs on the International Criminal Court (“The Open-ended Ministerial Committee”) took place on 24 September 2018 at the African Union Permanent Observer Mission to the United Nations in New York, USA, on the sidelines of the Seventy-Third Ordinary Session of the United Nations General Assembly.

9. Discussions at the meeting focused on issues such as the reconstitution of the Bureau of the Open-ended Ministerial Committee; the AU’s Request for an Advisory Opinion of the International Court of Justice on the Question of Immunities of Heads of State and Government; and the AU’s Amici Curiae Submission before the Appeals Chamber of the ICC in the Hashemite Kingdom of Jordan’s Appeal Against the Decision of the ICC Pre-Trial Chamber II.

II. RECONSTITUTION OF THE BUREAU OF THE OPEN-ENDED MINISTERIAL COMMITTEE

10. The reconstitution of the Bureau of the Open-ended Committee has been pending since September 2017 and was deferred at the 6th Meeting of the Committee held in January 2018 due to the fact that some regions had not completed their regional consultations for the nomination of their representatives.

11. While noting the importance of the work of the Bureau to the Committee, the Legal Counsel informed the meeting that the Commission had sent several reminders to the Overall and Regional Deans for the conclusion of consultations, however, so far, only the Eastern Region has communicated Eritrea as its nominee.

12. The Open-ended Ministerial Committee agreed to defer the reconstitution of the Bureau to January 2019 in order to allow the regions that have not yet done so, sufficient time to conclude their consultations, and for Burundi to continue as interim chair until the next meeting.

III. THE AU’S REQUEST FOR AN ADVISORY OPINION OF THE ICJ

13. The African Union has, for several years, expressed concern at the different opinions advanced by the International Criminal Court (ICC) on the question of immunities of heads of state and government and other senior officials, in particular as it relates to Non-State Parties to the Rome Statute and to the obligation of State Parties, to cooperate with the Court in the arrest and surrender of a person against whom it has issued a warrant of arrest. This issue was further heightened by the decision of the ICC Pre-trial Chamber II finding that the Republic of South Africa had failed to comply with its legal

obligation to arrest President Omar al-Bashir of The Sudan while attending the AU Summit in Johannesburg in June 2015.

14. In the aforementioned Decision Assembly/AU/Dec.672(XXX) on the ICC, the Assembly requested the African Group in New York to immediately place on the agenda of the United Nations General Assembly (UNGA), a request for an advisory opinion from the International Criminal Court (ICJ) on the question of immunities of heads of states and government as it relates to the conflicting obligations of States under different sources of international law such as international law on immunities, the Rome Statute of the ICC and UN Security Council Resolutions.

15. In implementing this aspect of the Decision, the Commission convened two (2) meetings of the African Group of Ambassadors and the Legal Advisers/African Members of the Sixth (Legal) Committee of the UN General Assembly in New York, in May and June 2018, respectively, to draft the question to be put to the ICJ and develop a strategy for placing the request on the agenda of the UNGA and obtaining the support of UN Member States in order to ensure the referral of the question to the ICJ.

16. The request was submitted on behalf of the African Group of Ambassadors in New York, by the Permanent Representative of the Republic of Kenya in his capacity as Chairperson for the month and was subsequently included on the Provisional Agenda of the seventy-third Session of the UNGA for consideration in September 2018.

17. The Commission also addressed the weekly meeting of the African Group in New York on 20 September 2018 and convened the 7th meeting of the Open-ended Ministerial Committee on the ICC, on the margins of the 73rd Session of the UN General Assembly in September 2018, during which it briefed on efforts to table the question before the ICJ.

18. The Open-ended Ministerial Committee requested the Commission, in collaboration with the African Group, to finalise the framing of the question for consideration by the UNGA in May 2019. In this regard, the Commission convened a technical working group of international law experts from 13 to 14 December 2018 in The Hague, to frame the question.

19. On the recommendation of the Open-ended Ministerial Committee, the working group was composed of experts from Africa and other continents in order to ensure that the AU considers all possible arguments, both for and against the opinion. The Commission will convene a number of other working group sessions with both African and global experts for finalization of the draft question, prior to consideration by the UNGA in May 2019.

20. The African Group and the AU Commission also continue to engage with non-African Members of the UN in order to garner support for the approval of the AU's request for an advisory opinion during the consideration of the agenda item by the General Assembly. The Commission would urge AU Member States to also lobby Non-African States in order to secure the requisite votes for the referral of the request to the ICJ.

IV. THE AU'S AMICUS CURIAE SUBMISSION BEFORE THE APPEALS CHAMBER OF THE ICC

21. In response to the 6 July 2017 judgment of the Pre-Trial Chamber II (PTC-II) of the International Criminal Court (ICC), that the Republic of South Africa had failed to comply with its legal obligation to arrest President Omar al-Bashir and surrender him to the ICC when he attended the Assembly of Heads of State and Government of the African Union (AU) in Johannesburg in June 2015, the Assembly, in the January 2018 Decision, expressed concern and called on AU Member States to oppose this line of interpretation by the Court.

22. The Pre-Trial Chamber II issued a similar judgement against the Hashemite Kingdom of Jordan on 11 December 2017 for its failure to execute the Court's request for the arrest and surrender of President Omar Al-Bashir of the Sudan, while he was on the Jordanian territory attending the League of Arab States' Summit on 29 March 2017.

23. On 12 March 2018, the Hashemite Kingdom of Jordan filed an appeal before the Appeals Chamber of the ICC, against the decision of the PTC-II, challenging, among others, the findings of the PTC-II regarding the effect of the Rome Statute on the immunity of President Al-Bashir and the conclusion that the United Nations Security Council resolution 1593 of 2005, affected Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir.

24. Following Jordan's appeal filing, the Appeals Chamber of the ICC issued an order, inviting, among others, international organisations including the African Union, to submit observations by 16 July 2018 on the legal questions raised by the Hashemite Kingdom of Jordan in its appeal. In this regard, the Commission, on behalf of the AU, presented the written Amicus Curiae Submission before the Appeals Chamber of the ICC on 13 July 2018 and subsequently, gave an oral presentation from 10 to 14 September 2018 in The Hague, Netherlands.

25. The AU's participation in the proceedings focused on clarifying the legal obligations of States under the Rome Statute and customary international law in respect of the immunities of Heads of State and other senior officials, which for so long has resulted in conflicting interpretations being offered by the Pre-Trial Chambers of the ICC. The AU therefore reiterated its long-standing position that there are no exceptions to the fundamental rule of international law on the immunity of heads of state and requested the Appeals Chamber to hold in its decision, that the UN Security Council Resolution 1593 does not waive the immunity of President Al-Bashir.

26. The judgment of the Appeals Chamber is still pending.

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CONCLUSIONS OF THE SEVENTH MEETING OF THE OPEN-ENDED COMMITTEE OF MINISTERS OF FOREIGN AFFAIRS ON THE INTERNATIONAL CRIMINAL COURT

A. INTRODUCTION

1. The Seventh Meeting of the Open-ended Committee of Ministers of Foreign Affairs on the International Criminal Court ("**The Committee**") took place from 11.30 to 13:30hrs on Monday, 24 September 2018 at the African Union Permanent Observer Mission to the United Nations in New York, USA, on the sidelines of the Seventy-Third Ordinary Session of the United Nations General Assembly.

2. The Meeting was convened pursuant to previous decisions of the Assembly of Heads of State and Government of the African Union ("**The Assembly**"), most recently Decision Assembly/AU/Dec.672(XXX) adopted during its Thirtieth Ordinary Session held in Addis Ababa, Ethiopia, in January 2018.

B. ATTENDANCE

3. The following members of the Committee attended the Meeting: **Angola, Burundi, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Libya, Namibia, Nigeria, Senegal, Sudan and Uganda.**

4. The African Union Commission was represented by the Office of the Legal Counsel.

C. OPENING

5. Honourable *Ambassador NIBIGIRA Ezechiel*, Minister of Foreign Affairs of the Republic of Burundi and interim Chairperson of the Committee, chaired the Meeting.

6. The Chairperson welcomed the Ministers and Delegates to the meeting and recalled that Burundi has acted as interim chair since its nomination by the 5th Meeting of the Committee held in September 2017 pending the reconstitution of the Bureau. He invited the delegations to consider the draft agenda before them.

D. THE AGENDA

7. The Meeting adopted the following agenda as presented:
- i. Opening Remarks
 - ii. Adoption of the Draft Agenda
 - iii. Reconstitution of the Bureau
 - iv. Briefing on the AU's Request for an Advisory Opinion of the International Court of Justice on the Question of Immunities of Heads of State and Government
 - v. Briefing on the AU's Amici Curiae Submission before the Appeals Chamber of the ICC in the Hashemite Kingdom of Jordan's Appeal Against the Decision of the ICC Pre-Trial Chamber II
 - vi. Any Other Business
 - vii. Closing Remarks.

E. RECONSTITUTION OF THE BUREAU

8. The Chairperson informed the Meeting that the reconstitution of the Bureau of the Open-ended Committee has been pending since September 2017 and was deferred at the 6th Meeting of the Committee held in January 2018 due to the fact that some of the regions are yet to complete their regional consultations for the nomination of their representatives. He emphasized the need to complete the process as soon as possible as the work of the Bureau is important to the Committee.

9. In this regard, the Chairperson invited the Legal Counsel, Ambassador (Dr.) Namira Negm, to provide the meeting with an update on the nominations received from the various regions.

10. The Legal Counsel informed the meeting that the Commission had sent several reminders to the Overall and Regional Deans for the conclusion of consultations, however, so far, only the Eastern Region has communicated Eritrea as its nominee. She clarified that while the Northern Region had indicated Libya as its representative during the meeting of the Ambassadors held on 19 September 2018 in Addis Ababa, the nomination will only be taken into account once it is officially communicated to the Commission.

11. Some delegations proposed that the reconstitution of the Bureau should once again be deferred to the next meeting of the Committee in order to allow the regions that are yet to do so, to complete consultations.

12. One delegation proposed that the next meeting of the Open-ended Committee should be convened on the sidelines of the upcoming Extraordinary Summit scheduled to take place in November 2018 in order to reconstitute the Bureau. However, other

delegations were of the view that the meeting should be convened on the margins of the January 2019 Ordinary Summit.

13. Following deliberations, the Chairperson, in consultation with the Legal Counsel, proposed that the Bureau be reconstituted at the meeting of the Committee to be held in January 2019 in order to allow the regions that have not yet done so, sufficient time to conclude their consultations.

14. With no objections to the Chairperson's proposal, the meeting decided to defer the constitution of the Bureau accordingly and for Burundi to continue as interim chair until the next meeting of the Committee.

F. BRIEFING ON THE AU'S REQUEST FOR AN ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON THE QUESTION OF IMMUNITIES OF HEADS OF STATE AND GOVERNMENT AND OTHER SENIOR OFFICIALS

15. The Legal Counsel briefed the meeting on the efforts of the African Group in New York, with the support of the AU Commission, in implementing Decision Assembly/AU/Dec.672(XXX) adopted in January 2018, wherein the Assembly requested the African Group in New York to immediately place a request on the agenda of the United Nations General Assembly (UNGA) to seek an advisory opinion from the International Court of Justice (ICJ) on the question of immunities of Heads of State and Government and other senior officials as it relates to the relationship between Article 27 and 98 of the Rome Statute of International Criminal Court and the obligations of States Parties under international law.

16. Amb. Negm added that in the implementation of the above decision, the African Group supported by the Legal Advisers/Members of the 6th Committee and the AU Commission, had finalized and submitted a formal request to the UN Secretary General for the inclusion of the request for the advisory opinion on the provisional agenda of the 73rd UN General Assembly. She informed the meeting that the item was adopted by consensus by the UN General Committee and subsequently by the 73rd Ordinary Session General Assembly on 21 September 2018.

17. She concluded by informing the Committee that the question(s) to be posed to the International Court of Justice (ICJ) is still being crafted by the African Group and the Commission and will be finalized after some consultations with key partners. Additionally, that the questions, when finalized, will be specific and technically and legally sound in order to receive a direct answer from the ICJ.

18. H.E. Dr. Adonia Ayebare, Ambassador of the Republic of Uganda to the UN, also briefed the Committee in his capacity as Coordinator to follow up on behalf of the Group, on all aspects relating to the implementation of the Assembly decision within the UN. He commended the efforts of various parties to ensure that the item was included on the agenda of the UNGA, including those of the Ambassadors of the African Group, the Legal

Advisers and the Office of the Legal Counsel. He especially thanked the Legal Counsel for engaging the services of African Experts in crafting the question(s) to the ICJ.

19. Amb. Ayebare emphasized the importance of support and unity of all AU Member States without exception, noting that there is a huge risk of the AU's position falling short if even one (1) Member States dissents. Finally, he reiterated the need to finalize the question(s) ahead of the January 2019 Summit and called on the AU decision-making Organs to send a strong message of unity in their Decisions on the International Criminal Court.

20. One delegation observed that the right question(s) will have to be put to the ICJ in order to receive a direct answer and therefore urged the African Group and the Commission to ensure that the question(s) is very informed and well advised. However, there is confidence that the Legal Counsel, in collaboration with the African Group in New York, will come up with the perfect question(s).

21. The Chairperson stated that the Legal Counsel should continue to engage African expertise in the process of drafting the question(s) as the sole aim of the exercise is to protect African Heads of States and non-African experts may have a conflict of interest on the issue.

22. While acknowledging that indeed Africa does have excellent lawyers, a delegation opined that there are some lawyers from other parts of the world who support the AU's position and whose engagement would be of benefit to the process. However, the ultimate decision should be left to the Legal Counsel.

23. In response to the observations, the Legal Counsel informed the meeting that the proposal to engage other experts from outside the continent are welcome, however, she clarified that the African experts engaged are well versed in the field of international law and have vast experience before the ICJ and the ICC.

24. On another note, the Legal Counsel invited the Ministers and delegations to lobby for the support of partners in their bilateral meetings with non-African States in order to ensure that the item is referred to the ICJ.

25. The Chairperson concluded this agenda item by encouraging the African Group in New York and the Legal Counsel to continue to work on finalizing the question(s) before the end of October 2018, acknowledging that this is a very short timeline to work with.

G. BRIEFING ON THE AU'S AMICI CURIAE SUBMISSION BEFORE THE APPEALS CHAMBER OF THE ICC IN THE HASHEMITE KINGDOM OF JORDAN'S APPEAL AGAINST THE DECISION OF THE ICC PRE-TRIAL CHAMBER II

26. The Legal Counsel briefed the meeting on the AU's amicus curiae submission before the ICC Appeals Chamber in the appeal of the Hashemite Kingdom of Jordan

against the decision of the ICC Pre-trial Chamber II for Jordan's non-compliance with the request of the Court to arrest and surrender Omar Al-Bashir of The Sudan. She informed the Committee that the Commission made written and oral submissions on behalf of the Union, before the Appeals Chamber in July and September 2018, respectively, highlighting the conflict between State obligations in the Rome Statute of the ICC and under customary international law, particularly as it relates to immunities of State officials.

27. Amb. Negm concluded by informing the meeting that the outcome of the Appeal, which is expected to be delivered before the end of the year 2018, is likely to have far-reaching implications for the AU and its Member States.

28. Following the Legal Counsel's briefing, some delegations commended the exemplary performance by the Commission, in particular, the Legal Counsel and her team, noting that the AU's arguments before the Appeals Chamber of the ICC were clearly and excellently put forward, regardless of the outcome of the Court's decision.

H. ANY OTHER BUSINESS

29. No issues were discussed under this agenda item.

I. CLOSING REMARKS

30. The Chairperson closed the meeting by thanking the Ministers, delegates and all present for their participation and for supporting his chairpersonship of the meeting, noting that it was his first time acting in this capacity.

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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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