

**AFRICAN UNION**

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**ASSEMBLY OF THE UNION**  
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**Assembly/AU/3(XXXII)**  
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**REPORT OF H.E. MOUSSA FAKI MAHAMAT, CHAIRPERSON**  
**OF THE COMMISSION, ON THE IMPLEMENTATION OF THE**  
**INSTITUTIONAL REFORM OF THE AU**

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THE COMMISSION, ON THE IMPLEMENTATION OF  
THE INSTITUTIONAL REFORM OF THE AU**

**I. BACKGROUND**

1. This Report provides an overview of progress made in the implementation of Assembly Decision Assembly/AU/Dec.635(XXVIII) and a summary of the reform implementation proposals to be discussed during the July 2018 AU Assembly of Heads of State and Government.

2. The January 2017 AU Assembly Decision, Assembly/AU/Dec.635(XXVIII), on *the Institutional Reform of the African Union (AU)* sets out a comprehensive AU reform agenda. It is aimed at fundamentally re-positioning the organization to meet the evolving needs of its Member States and the continent and identifies the following core reform priorities:

- Focus on key priorities with continental scope;
- Realign African Union institutions in order to deliver against those priorities;
- Connect the African Union to its citizens;
- Manage the business of the African Union efficiently and effectively at both the political and operational levels;
- Finance the African Union sustainably and with the full ownership of the Member States.

3. The Assembly Decision on reform provides a framework for the transformation of the African Union into an effective and efficient organisation that delivers for African citizens. Based on this framework detailed implementation proposals are being developed.

4. The reform decision took into account previous reform proposals, most notably the 2007 Adedeji Audit, which made extensive and far-reaching recommendations on how to improve the overall effectiveness of the Union. Unfortunately, most of these were never implemented.

**II. MANDATE, IMPLEMENTATION APPROACH AND PRINCIPLES**

5. Based on the previous implementation challenges, and the strategic importance of the reform agenda, the AU Assembly took the decision to oversee the reform process. The reform decision designated President Paul Kagame to supervise the implementation process. It was also determined that he would work with two other Heads of State, the 2016 Chair of the Union, President Idriss Deby, and the 2017 Chair of the Union, President Alpha Condé.

6. The Assembly also requested President Kagame to report on progress made in implementing Decision Assembly/AU/Dec.635 (XXIX) at each Ordinary Session of the Assembly.

7. During the January 2018 Summit, the AU Assembly decided that as part of the process of deepening consultations around the reform implementation process, the Reform Troika, should be expanded to the Bureau of the Assembly of the Union. The Assembly also decided to establish a group of fifteen (15) Ministers of Foreign Affairs, three per region to play an advisory role to the reform process.

8. This group was later expanded to become a group of twenty (20), Ministers of Foreign Affairs, four per region. We are still waiting for all the regions to provide the additional nominations.

### **III. REFORM IMPLEMENTATION PROPOSALS TO BE CONSIDERED BY THE 32<sup>nd</sup> ORDINARY SESSION OF THE AU ASSEMBLY OF HEADS OF STATE & GOVERNMENT**

9. In line with the July 2017 AU Assembly Decision 635, the following reform updates and proposals will be discussed during the February 2019 Summit:

#### **a) *AU Organs***

- i) Update on the African Union Commission
- ii) Proposal on the Delegation of Authorities to the Commission pursuant to para 28 of Assembly Decision Ext/Assembly/AU/Dec.1(XI)
- iii) Update on the AU Development Agency/New Partnership for Africa's Development (NEPAD)
- iv) Update on the Pan-African Parliament (PAP);
- v) Update on the Judicial and Quasi-Judicial Organs;

#### **b) *Financing the Union***

- i) Options for the revised Scale of Assessment for the Regular Budget and the Peace Fund

## AFRICAN UNION COMMISSION

### I. THE PANEL OF EMINENT AFRICANS

10. During the 11<sup>th</sup> Extraordinary Session of the Assembly of the African Union (AU) held from 17 to 18 November 2018, the AU Assembly decided: *To establish a Panel of Eminent Africans, composed of five (5) eminent personalities, one per region, to oversee the pre-selection of candidatures of the senior leadership of the Commission.*

11. The Assembly further requested: *Member States to propose their regional nominations for the Panel of Eminent Africans to the Commission by January 2019. The Commission shall present such nominations to the 32<sup>nd</sup> Ordinary Session of the Assembly from 10 to 11 February 2019 in Addis Ababa, Ethiopia.*

12. In this regard, on 21 January 2019, the AUC sent out a Note Verbale to all Regional Deans copied to all Member States with a deadline of 5 February 2019. We expect to be able to announce the names of the members of this Panel during the February Summit.

13. The AU Commission has so far received the following nominations:

- Central Africa:
- East Africa:
- North Africa:
- West Africa:
- Southern Africa:

### II. RESTRUCTURING OF THE AU COMMISSION

14. During the November Extraordinary Summit, the AU Assembly also requested the Chairperson of the Commission *to submit, through the established procedures, a detailed leaner departmental structure, together with its financial implications, for consideration by the 35<sup>th</sup> Ordinary Session of the Executive Council scheduled from 27 to 28 June 2019 in Niamey, Niger.*

15. In this regard, the AU Commission prepared terms of reference for the restructuring process and published an open tender on 25 January 2019 inviting bids from consulting firms across Africa to support the preparation of restructuring proposals. The proposals will be submitted to the Executive Council through the PRC.

#### *Transition from the Current Commission to the New Commission*

16. A number of key issues have arisen with respect to managing the transition process and ensuring continuity with respect to programmes and service delivery. These include:

- a) How to address immediate capacity challenges particularly within the service departments?
- b) How to deliver approved and time-limited projects that require the recruitment of new short term project staff given the moratorium imposed under Executive Council Decision Ext./EX.CL/Dec.1(XX) para 19?
- c) How to implement Executive Council Decision Ext/EX.CL/Dec1(XX) para 21, directing the Commission to urgently fill vacant regular positions by June/July 2019, taking into account that the new departmental structure will only be adopted during the June 2019 Executive Council Session?

**17.** Taking into account the principle of ensuring overall business continuity within the Commission the transition will be based on the following approach:

**18.** The new senior leadership structure, is expected to be in place by 2021. This does not, however, mean that the operationalization of the entire new departmental structure will have to wait until January 2021. Once the Executive Council adopts the new structure of the AU Commission in June 2019, a phased implementation plan will be proposed starting with the service departments of the Commission.

**19.** To address the immediate capacity constraints within service departments, prior to the adoption of the new structure in June 2019, the recruitment of unfilled and already approved regular posts within service departments will be prioritised.

**20.** To ensure the timely delivery of approved projects that require the recruitment of short-term project staff for implementation, exemptions to be made on a case by case basis are requested from the current moratorium on the new recruitment of short term staff. The recruitment of project staff will be done in strict conformity with the Staff Rules and Regulations.

**21.** With respect to the recruitment of unfilled regular posts, the principle is that this should primarily be done on the basis of the new structure to be adopted by the Executive Council in June 2019. This is to avoid wastage of resources by recruiting posts that may not be in conformity with the new structure. Exceptions will be made where it is clear that the recruitment of a post is unlikely to be affected by the adoption of a new structure.

**22.** The proposal to be presented for the new structure will also include a clear staffing plan, covering both professional and locally recruited staff, and any existing staffing irregularities based on non-conformity with the Staff Rules and Regulations will be addressed during the transition period.

*The Delegation of Authority to the Commission in matters relating to the internal management of the Commission*

23. During the 11th Extraordinary Summit of the Assembly of the African Union, the Assembly, para 28 of Assembly Decision Ext/Assembly/AU/Dec.1(XI), decided as follows:

**FURTHER REQUESTS** the Chairperson of the Commission *to submit through the Executive Council, at its February 2019 Ordinary Session, specific proposals on delegation of authority to the Commission in matters pertaining to the internal management of the Commission, in order to ensure greater flexibility and responsiveness in the pursuit of the mandate of the Commission;*

24. Proposals were prepared within the context of the ongoing reform of the Commission which sought to answer two key questions:

- a) Are there any specific powers or authorities that need to be delegated to the Commission to enhance the internal functioning of the Commission?
- b) Are there any contradictions in the legal texts with respect to the functions or responsibilities of the Commission in relation to other entities or Organs that affect the smooth functioning of the Commission and Organs of the Union?

25. The Report was considered by the PRC on 31 January 2019. The meeting concluded that further discussions were required on the proposals presented and recommended that this matter be deferred for the time being.

## AU DEVELOPMENT AGENCY/NEPAD

**26.** Assembly Decision 691 of July 2018 inter-alia established AUDA-NEPAD and its governance structures, and requested the Chairperson of the Commission and the Chief Executive Officer of the NPCA to undertake the necessary measures for the implementation of the decision pertaining to the finalization of the mandate. The decision further requested for the submission of the statute and the revised rules of procedure of the AUDA Governance Structures to the Policy Organs at the February 2019 Summit. It would be recalled that the mandate for AUDANEPAD was formally adopted at the Extraordinary Session of the Assembly in November 2018 through Ext/Assembly/AU/Dec.1(X).

**27.** With regard to the statute and rules of procedure, the Commission worked closely with AUDANEPAD and came up with a draft that was further reviewed and enriched by the 60<sup>th</sup> meeting of the NEPAD Steering Committee that took place in Dakar, Senegal from 21-22 January, 2019, attended by the Chair of the PRC Sub-Committee on NEPAD. During the consultations, some “grey areas” emerged that need further clarification, namely (i) the nature of the Agency, i.e. the definition of a “technical body” as outlined in Decision 691, and whether this pertains to an AU Organ and the variances in the translation of the mandate, where the French translation is not aligned to the English translation, i.e. “*advanced knowledge-based advisory support*” (ENG) and “*jouer un rôle consultatif dans le développement de l’économie du savoir*” (FR), whereas the French text should read, “fournir des services de consultation spécialisés basés sur une expertise...”

**28.** The draft Statute and Rules of Procedure would need to be considered by the Specialized Technical Committee (STC) on Justice and Legal Affairs, following which they will be submitted to the Policy Organs for consideration and adoption. The timeline of February 2019 stipulated in decision 691 could not be met due to the extensive consultative process that has to be undertaken.

**29.** As a way forward, it is proposed that the Assembly calls for an Extraordinary Session of the Specialized Technical Committee (STC) on Justice and Legal Affairs, to meet before the Coordination Summit in June/July 2019, and to delegate authority to the Executive Council to adopt the AUDA-NEPAD Statute and revised Rules of Procedure for the AUDA governance structures during the June/July Coordination Summit.

## FINANCING THE UNION

### SCALE OF ASSESSMENT FOR THE REGULAR BUDGET AND THE PEACE FUND (2020-2022)

**30.** The January 2017 Decision Assembly/AU/Dec.635(XXVIII) called for the current scale of contributions to be revised based on the principles of ability to pay, solidarity, and equitable burden-sharing, to avoid risk concentration in order to ensure timely and predictable payment of all Member State assessed contributions to the African Union.

**31.** 48% of the AU's budget is dependent on the contributions of only 5 Member States. This presents clear risks to the stability of the budget. It is for this reason, that the AU High Representative for Financing the Union proposed in August 2017 the introduction of 'caps' and 'minima' to the existing scale of assessment in order to improve overall burden-sharing and reduce risk. This proposal was endorsed by the meeting of AU Ministers of Finance in August 2017 in their meeting report and Communique.

**32.** Following the consideration of various options and scenarios, the 26-28 November 2018 Joint Sitting of the Ministerial Committee on the Scale of Assessment and Contributions and the Committee of Fifteen Finance Ministers (F15) Experts proposed three options that could be used by competent policy organs to facilitate discussions on the reformulation of the Scale of Assessment. The following criteria were adopted while preparing the three options:

- a) The importance of the capacity to pay as a criterion, based on GNI adjusted for external debt and low per capita income due to large population;
- b) The need to incorporate all the principles stipulated in Assembly Decision Assembly/AU/Dec. 635(XXVIII): ability to pay, solidarity, and equitable burden-sharing, to avoid risk concentration in reformulating the new scale of assessment;
- c) Introducing "caps" and "minima" is crucial to guarantee budget ownership and to reduce risk concentration;
- d) During the scale cycle, no country shall pay less than \$350,000 or more than \$35,000,000 (Ratio 1:100) as a contribution for the regular budget and peace fund combined;
- e) For Tier 2 and Tier 3 Member States, no country shall pay less than its capacity to pay;
- f) For Tier 2 (T2) and Tier 3 (T3) Member States, no country shall pay 4% or more;
- g) The need to acknowledge that some Members States had, in the spirit of solidarity, made additional payments over and above their assessed scale



to cover the AU's budget gap from 2016 -2019, i.e. Ethiopia, Kenya, Cote d'Ivoire and Chad.

**33.** The three options are as follows:

- a) Option 1: Tier 1(T1) with 45.354 percent; T2 with 31.975 percent; T3 with 22.671 percent. A minimum base amount of \$350,000 was pegged for the lowest paying contributor;
- b) Option 2: T1 with 46.295 percent; T2 with 31.654 percent; and T3 22.142 percent subjected to the same levels of minima as in Option 1 (4a above)
- c) Option 3: T1 with 44 percent; T2 with 33.937 percent; and T3 with 22.059 percent.

**34.** On 17 January 2019 a Joint Sitting of the Permanent Representatives Committee, including experts from the capital and the F15 technical experts took place at the AU Headquarters. The January 2019 Joint Sitting adopted the Report of the November 2018 Joint Sitting.

**35.** The January 2019 Joint Sitting agreed that the basis for determining the scale of assessment for the Peace Fund should be the Assembly Decision Assembly/AU/Dec.605 (XXVII). Thus, the \$400 million Peace Fund endowment should be distributed equally among the five (5) AU regions. This means each region would raise \$80m. In this regard, the Joint Sitting proposed the following options for the scale to be applied within each AU region:

- a) The scale of assessment applicable to the regular budget should be applied to the Peace Fund as well; and
- b) The total regional GNI be calculated and the proportion of the total regional GNI for each Member State be used to distribute the US\$80 million allocated to each region.

**36.** Member States agreed that these five options (paragraphs 4 and 6) should provide the basis for agreeing on a recommendation for the assessment of Member States contributions to the Peace Fund.

**37.** The 5 February Joint Sitting of the Ministerial Committee on Contributions and the F15 agreed on a consensus recommendation for the Regular Budget as follows: T1 with 45.151 percent; T2 with 32.749 percent; and T3 22.100 percent subjected to the same levels of minima as in Option 1 (4a above).

**38.** The Joint Sitting did not make any recommendation on the scale of assessment to be applied to the Peace Fund as had been requested by the Assembly.

**Assembly/AU/3(XXXII)**  
Annex 1

**ANNEX 1**

**SUBMISSIONS AND PROPOSALS FROM THE AU ORGANS**

A Retreat of the PRC and the AU Organs was scheduled to take place before the February Summit. The retreat was intended to look into reform issues related to the PAP and the judicial and quasi-judicial organs. The Retreat has been re-scheduled until after the Summit.

In the meantime, reform submissions and proposals were received from the following AU Organs:

- The African Court on Human and Peoples' Rights (AfCHPR);
- The African Committee of Experts on the Rights and Welfare of the Child (ACERWC);
- The Pan-African Parliament (PAP)
- The Anti-Corruption Board

## **AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

### **I. BACKGROUND**

1. In October 2018, on the request of the Head of the Reform Unit, the Court submitted reform proposals to the African Union Reform Unit for consideration during the 11th Extraordinary Summit of the African Union Assembly scheduled for 17 to 18 November 2018. During the said Summit, the reform proposals for AU Organs, including the African Court, were deferred to the January/February 2019 Summit. Organs were therefore requested to make further submission or amend their submissions, if they so wish.

2. During its 51<sup>st</sup> Ordinary Session held in November 2018 in Tunis, Tunisia, the Court reconsidered its earlier submissions and made amendments accordingly.

3. The following reform proposals flowing from that discussion seek to ensure that the Court is properly positioned to make meaningful contributions to the realisation of the objectives of the African Union, in particular, through the effective protection of human rights, strengthening of the rule of law and good governance, and promotion of a culture of human rights on the continent.

4. The reforms proposed relate to the universal ratification of the Protocol establishing the Court, establishment of a legal aid fund, setting up of a monitoring and implementation framework, Term of Office of Judges and operationalization of the Court of Justice of the African Union.

### **II. UNIVERSAL RATIFICATION OF THE PROTOCOL AND DEPOSIT OF ARTICLE 34(6) DECLARATION**

5. Twenty years after the adoption of the Protocol establishing the African Court, only 30 States have ratified it and only 8 have made the declaration under Article 34(6) allowing individuals and NGOs to file cases to the Court directly. For the Court to play its role constructively and contribute to the realisation of the Union's objectives, all Member States of the Union should ratify the Protocol and also ensure direct access to the Court by making the Article 34(6) Declaration. By doing this, the Court will have a continental coverage and the ability to protect human and peoples' rights across the continent.

6. It is for these reasons that it is necessary for the African Union to put in place mechanisms to ensure:

- a) That States ratify the Protocol and make the declaration at the same time, or
- b) That the requirement for the declaration be dispensed with, so that ratification of the Protocol signifies recognition of the competence of the Court to receive cases from individuals and NGOs.

### ***Financial Implications***

7. There are no financial implications envisaged.

### III. ESTABLISHMENT OF CHAMBERS

8. Taking the following elements into account:

- a) The volume of cases received so far;
- b) The number of States (30 out of 55) that have ratified the Protocol on the one hand, and the number of States (8) that have made the declaration, on the other; and
- c) The uniqueness of the jurisdiction (human rights) of the Court:

9. The Court is of the view that improvement of the work of the Court and its rationalization are essential. To this end, the Court proposes that 3 chambers, each composed of at least 3 judges, or two chambers each composed of 5 judges, be established and empowered to render judgments on behalf of the Court.

10. The Plenary of 11 Judges with the current quorum of 7 judges will be the full court or an extraordinary Chamber that will meet on referral from one of the chambers or when a position of principle is to be adopted.

11. This system exists in the European Court of Human Rights where 5 chambers composed of 5 judges, constitute the ordinary trial courts, whereas the Grand Chamber composed of only 17 judges, including the President, the Vice-President, the Presidents of Chambers and judges chosen by lot, intervene only on referral from a chamber and on request for advisory opinion submitted to it.

12. This arrangement will expedite the disposal of cases by the Court.

13. If the above measures are taken, it will no longer be necessary to invoke Article 15 of the Protocol to have judges work on a fulltime basis.

14. However, regarding the quorum provided under Article 23 of the Protocol, there will be need to amend the Protocol to allow the Court some flexibility in determining the quorum in a manner that will expedite consideration of matters before it".

#### ***Financial Implications***

15. There are no financial implications envisaged.

### IV. OPERATIONALISE THE LEGAL AID FUND

16. Most of the cases the Court has received so far are from indigent applicants, some of whom have requested for legal assistance, and in the majority of the others, the Court has adjudged they require legal assistance. Both the Protocol and the Rules of Court make provision for the need to provide legal assistance where the cause of

justice so requires. The Court believes that legal assistance will enhance access to justice and the protection of human rights on the continent.

17. The Assembly has already adopted a Statute for the Establishment of a Legal Aid Fund for AU Human Rights Organs, and it is important that this Fund be operationalized to enable indigent applicants benefit from the scheme. The AU also needs to put in seed money to operationalise the Fund.

### ***Financial Implications***

18. In terms of the Statute Establishing the Legal Aid Fund for African Union Human Rights Organs, the fund will be financed through voluntary contributions from Member States and other stakeholders. The Court is seeking an initial reasonable deposit as seed money from the AU to kick-start the Fund. An amount of USD\$100,000 is proposed.

## **V. COMPLIANCE WITH COURT JUDGEMENTS**

19. One of the challenges to the effectiveness of the Court is the non-compliance with its judgments. There is no point in rendering judgments if they are not complied with. This erodes citizen's confidence in the Court and in the judicial system as a whole.

20. To date, the Court has rendered 99 decisions, including 27 judgments on the merits in which it has found violations of human rights and made appropriate orders and 24 orders for interim measures. Among them, only 2 Judgments have been complied with fully, while some have been complied with partially. Some States have categorically refused to comply with the Judgments and orders of the Court. Regarding Orders for interim measures, the Court has received reports with respect to compliance in about 7 orders, while in respect of the others, the States have either ignored the orders or clearly indicated their refusal to comply.

21. This lack of compliance may be, among other reasons, as a result of the non-existent of a concrete monitoring system. Article 31 of the Protocol mandates the Court to report '...in particular, the cases wherein which a State has not complied with the Court's judgment'.

22. The lack of a monitoring system deprives the Executive Council from effectively monitoring execution of the judgments of the Court on behalf of the Assembly as required under Article 29(2) of the Protocol. There is therefore the need to put in place a proper monitoring and compliance framework for the implementation of the judgments of the Court.

23. During its Ordinary Session in Nouakchott, Mauritania, the Executive Council requested the Court, in collaboration with the Commission and the AUC, to undertake an in-depth study on the setting up of a concrete Monitoring and Implementation Framework. The Court is working closely with the AUC on the said study which will be presented to the PRC in January 2019.

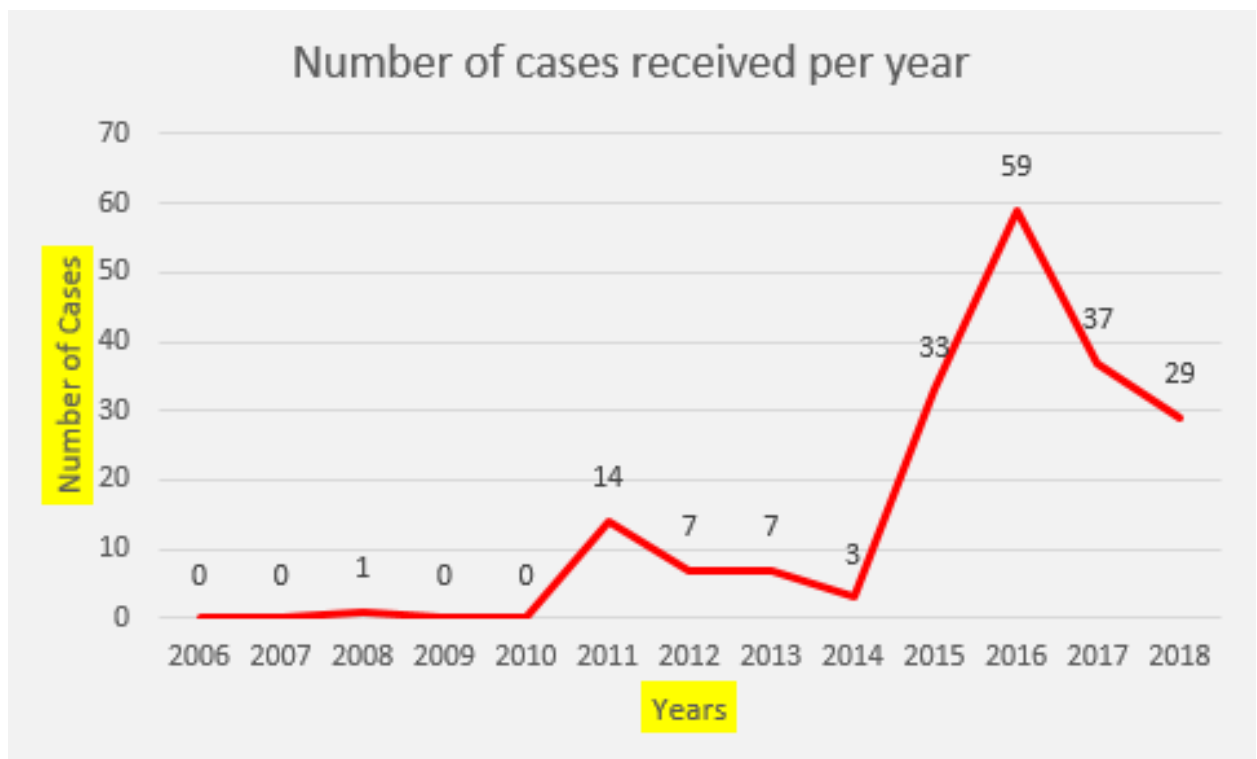
***Financial Implications***

24. This will require the establishment of a Monitoring Unit within the Registry of the Court.

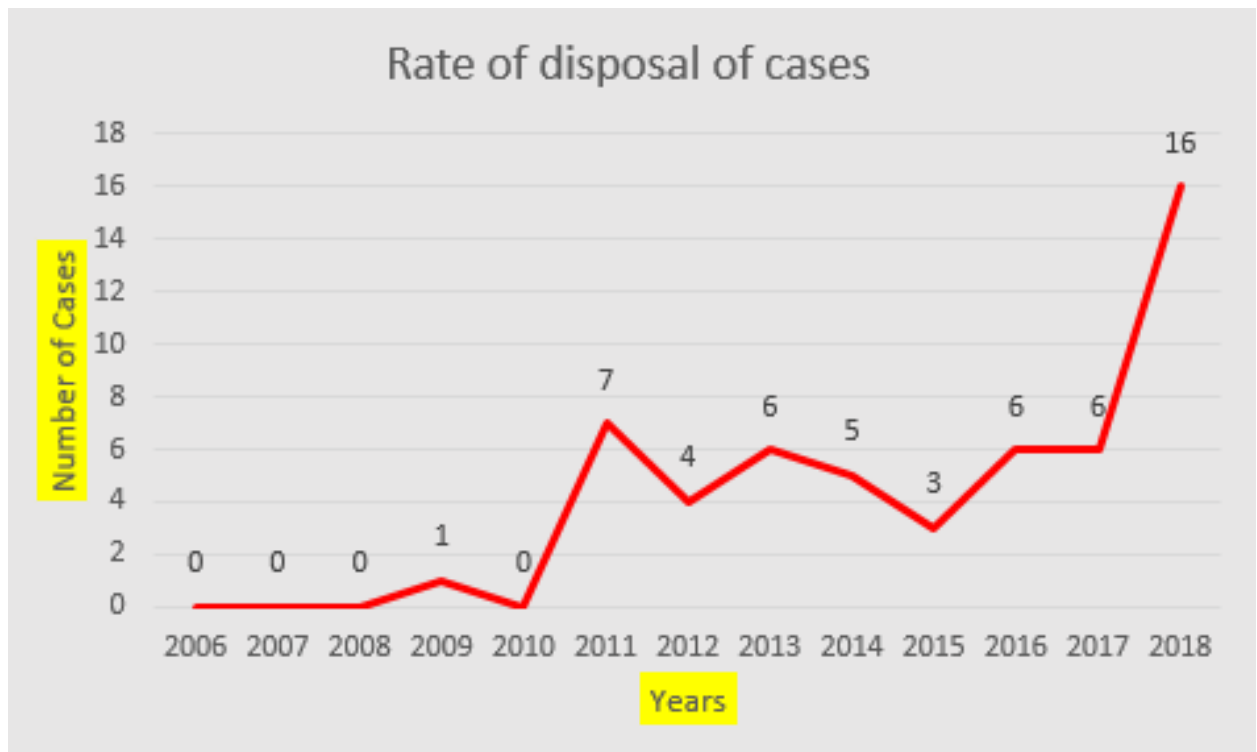
**VI. TERM OF OFFICE OF JUDGES**

25. Initially, the Court had recommended that Judges be appointed to work on a full time basis, and the term of office be for one term of 9 years, non-renewable. However, after having analysed the trend of cases received and rate of disposal of cases, the Court is on the view that it is not the appropriate time to change the current setup.

26. Since its establishment in 2006, the Court has seen an increased in the number of cases received from 1, between 2006 to 2009, to 190, between 2010 and 2018. In 2016 alone, the Court received a total of 59 cases. However, since then, the Court is experiencing a drop in the number of cases received, with 37 in 2017 and 29 as at November 2018. See Graphs below.



27. At the same time, there has been an improvement in the rate of disposal of cases before the Court, and with the imminent installation of an e-case management system, it is likely that the rate of disposal will improve even further and the Court will be able to finalise more cases within the shortest possible time.



28. In the circumstance, the Court does not think it is the right time to appoint Judges to work on a full time basis.

29. In any case, when the workload increases to a level that warrants all or some of the Judges to work on a full time basis, the Court will inform the Assembly for the latter to resort to Article 15(4) of the Protocol.

30. However, the Court maintains the proposal that Judges be appointed for a single term in keeping with the international trend.

31. The *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol)* for instance provides that “the Judges shall be elected for a single, non-renewable term of 9 years”. The Judges of the International Criminal Court serve nine-year terms and are not eligible for re-election. At the ECOWAS Community Court, judges are elected for a four-year, non-renewable term. At the East African Court of Justice, Judges serve for a maximum of seven years. Judges of the International Court of Justice however serve a nine-year renewable term.



32. The Court is thus proposing one term of 9 years, staggered in such a way that all the current judges do not leave at the same time, in order to ensure continuity. This proposal could be implemented incrementally, starting with the next election of Judges.

### ***Financial Implications***

33. There are no financial implications envisaged.

## **VII. OPERATIONALIZATION OF THE COURT OF JUSTICE OF THE AFRICAN UNION**

34. The Constitutive Act of the African Union provides for the establishment of a Court of Justice of the African Union. The Court of Justice was intended to be the "principal judicial organ" of the African Union with authority to, among others, rule on disputes over interpretation of AU treaties. A protocol to set up the Court of Justice was adopted on 11 July 2003 and entered into force on 11 February 2009. It currently has 18 ratifications.

35. The Court has, however, never been operationalised because on 1 July 2008, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights (Sharm el Sheikh Protocol or Merged Protocol) which merged the African Court on Human and Peoples' Rights and the Court of Justice of the African Union to form a new court: the African Court of Justice and Human Rights (ACJHR). Under Article 2 of the Statute, the ACJHR "shall be the main judicial organ of the African Union". The Protocol has been ratified, as at November 2018, by only 6 countries.

36. In the meantime, on 27 June 2014, the Assembly adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (commonly referred to as the Malabo Protocol) granting the ACJHR criminal jurisdiction. The Malabo Protocol thus bring together all the protocols under one instrument. As at November 2018, this Protocol had been signed by 11 countries with no ratification.

37. In essence, there are 4 Protocols relating to the establishment of a judicial organ on the continent, all of which need to be ratified at one point or the other. These are the Ouagadougou Protocol, the Protocol on the Court of Justice, the Merged Protocol and the Malabo Protocol.

38. This multiplicity of Protocols has created confusion among States on which Protocol should be ratified. This confusion was noted by the Reform Unit and expressed to the Executive Council Extraordinary Summit of November 2018.

39. In view of the above and to streamline the judicial institutions of the African Union, it is recommended that the Court of Justice of the African Union whose

constitutive instrument has entered into force, be operationalised. This can be done by endowing the current African Court on Human and Peoples' Rights with the mandate of the Court of Justice. It is important to note that Judges of the African Court are drawn from various backgrounds, including experts in international human rights, Public International Law and International organisations.

***Financial Implications***

40. To be determined.

**VIII. CONCLUSION**

41. It should be noted that for these proposed reforms to be effective, there has to be a corresponding restructuring of the Registry of the Court to ensure that the tools necessary to effect these reforms are in place.

## THE AFRICAN COMMISSION ON HUMAN & PEOPLE'S RIGHTS

### 1. Urgent need to build the headquarters in Banjul

42. Since it was established in 1987, the African Commission on Human and Peoples' Rights (ACHPR) has been without headquarters of its own. The Secretariat, which is the permanent structure, is still housed in unbecoming premises rented by the Republic of The Gambia. These buildings do not meet the requirements and standards, either from the structural or security perspective, for preserving the confidentiality of complaints levelled against States, in accordance with Article 59 of the African Charter on Human and Peoples' Rights, until when the ACHPR Report is considered by the Assembly of Heads of State and Government.

43. Thus, because they have no offices, the Honourable Members of the Commission have always held their statutory and other meetings with State Representatives and partners in hotel rooms.

44. It is therefore imperative to definitively resolve the issue of erecting functional buildings to serve as headquarters.

### 2. On Recruitment of staff to fill vacancies and to support ACHPR's work.

45. One of the most serious challenges the ACHPR faces, as it pursues its mandate, is that its Secretariat is understaffed. The scope and importance of the ACHPR's work to promote and protect human rights in the 54 State Parties to the African Charter on Human and Peoples' Rights require more human resources than the current level assigned to it. For example, there are only 9 legal assistants for the 11 Members of the Commission. There are no competent departments to deal with administrative matters and logistics. There is no programmes officer, neither is there an officer in charge of project planning, evaluation and strategic monitoring. The Finance Section has 2 employees who handle all travel/mission, procurement and human resource issues in keeping with auditing standards. Similarly, there are only two employees in the Documentation and Information Section, while there is only one employee in the Mails Section and who is one of the key workers processing correspondence relating to case files under examination. The Language Section has only one interpreter/translator out of the four approved in the organization chart. Ordinarily, to ensure regular and flawless communication between the staff and Members of the Commission, as well as between the Members of the Commission themselves, these documents need to be systematically translated every day into French, English and Portuguese. In addition, a complaints/communications division should be established considering the numerous cases handled by the ACHPR, some of which should be forwarded to the African Court. This situation of chronic understaffing means that when a staff member falls ill or goes on leave, there is a negative impact on the activity and performance of the Secretariat.

46. It is necessary to examine the current ACHPR structure without delay, so that the subsequent review will align its functions and needs to ensure greater efficiency.

### 3. On the need for autonomy in recruitment

47. It should be emphasized that the ACHPR, from the time of its establishment in November 1987, has not been authorized to recruit staff for its secretariat, as the entire procedure, no matter the level, should be carried out by the services in charge of human resource management services at the African Union Commission (AUC). This is unlike the African Court on Human and Peoples' Rights (AfCHPR), which directly recruits its own staff. These two bodies have the same powers and responsibilities and, moreover, it should be noted that it is the AfCHPR which complements the mandate of the African Commission and not the contrary, as provided for in the last paragraph of the Preamble of the Protocol to the African Charter on the creation of an African Court on Human and Peoples' Rights, which states: "***Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights***".

48. This absence of internal autonomy causes considerable delays by the Human Resource Management Division of the AUC in recruiting staff for positions provided for in the structure adopted by the African Union. Thus, to date, the Secretariat of the ACHPR lacks twenty-one (21) of the forty-six (46) regular staff approved for its structure.

49. This situation also hampers the Commission in properly discharging its mandate to promote and protect human rights and has a negative impact that extends to recruitments within the framework of partner support activities. For example, the ACHPR is lagging behind in the hiring of experts and might miss opportunities under the current European Union's Pan-African (PANAF) Programme, unlike other bodies supported by the same programme, namely the African Court and the Pan-African Parliament which recruit directly. The PANAF Programme, which began in 2017, will end in 2019 without the Commission being able to benefit from the expertise of the staff provided for in the contract. The long-term solution proposed for this problem would be to approve the ACHPR's request to recruit independently. This will also be consistent with, among others, Decision **Assembly/AU/Dec.200(XI)** of the Assembly of Heads of State and Government of the African Union requesting the AUC to take steps to regularize the status of the ACHPR as an organ of the AU. In the meantime, the AUC must urgently recruit staff to fill vacancies in the ACHPR structure, in accordance with the relevant Decisions of the Executive Council.

50. It is important for the ACHPR to have full autonomy, in compliance with AU regulations and procedures, to handle the necessary internal recruitments.

#### **4. On the urgent need to harmonize emoluments**

**51.** The Honourable Members of the Commission, who also serve as rapporteurs and members of Working Groups perform their duties on a part-time basis. They, unlike the Honourable Judges, carry out most of their thematic missions and mandates during the period between sessions, but are not paid any allowances. This holds true for allowances in respect of their protective mandate, transitional allowances and pension.

**52.** A number of Executive Council Decisions have requested the African Union Commission (AUC) to harmonize the remuneration of African Union elected officials. Specifically, Decisions EX.CL/Dec.974 (XXXI) and Ext/EX.CL/Dec. 1 (XIII) request the African Union Commission to submit a proposal to harmonize the remuneration of the elected officials of African Union organs for consideration and adoption.

**53.** To that end, several meetings have been held and have made recommendations, though there has been no concrete decision to date. It is therefore imperative to definitively address this unfair state of affairs, which has dragged on for several years.

#### **5. On the need to establish a Committee of the Executive Council to monitor the implementation by State Parties of ACHPR Decisions and Recommendations.**

**54.** Following the consideration of periodic Reports that States submit to the ACHPR, in accordance with the provisions of Article 62 of the African Charter and Article 26 of the Maputo Protocol, the ACHPR formulates recommendations to these States to address identified areas of concern. And after consideration of complaints/communications from individuals and NGOs, the ACHPR renders decisions on cases against respondent States. Most of these recommendations and decisions are not implemented, despite the awareness raising missions and seminars that have been organized for this purpose. Within the ACHPR, however, there is no monitoring mechanism, and even if there was one, it would not have had any enforcement powers.

**55.** The Executive Council had, in the past, adopted a Decision providing for the establishment of a Committee to follow up on Decisions and Recommendations made to States.

#### **6. The need for a full-time Chairperson for purposes of good governance**

**56.** The Bureau, which is composed of 2 Members of the Commission working on a part-time basis, is responsible for directing the work of the ACHPR and ensuring the integrity thereof. It must also handle numerous requests from the Secretariat, the State Parties, the African Union and other partners, often with a sense of immediacy, and in certain cases, offer guidance on various subjects and perform distant coordination of the activities of Special Mechanisms.

**57.** The AUC has made efforts to confirm and clarify the manager's role of the ACHPR Chairperson over the Secretariat, with the aim of resolving recurrent administrative issues. The ACHPR has reviewed and adopted an organizational chart reflecting levels of authority that optimize governance within the Secretariat, and this requires the full-time presence in Banjul of its most senior official.

**58.** In accordance with Decision Assembly/AU/Dec.200 (XI) and within the framework of the restructuring of the African Union Organs, the ACHPR requests that the issue of a full-time Chairperson be resolved, as is the case with the African Court which has a similar mandate.

## THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (ACERWC) AN ITS SECRETARIAT

### I. BACKGROUND

**59.** The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted on 11 July 1990 and came into force on 29 November 1999. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was established in July 2001 pursuant to articles 32-45 of the Charter. Article 42 mandated the Committee to promote and protect the rights and welfare of the child enshrined in the Charter, as well as to monitor the implementation of the Charter. The article enumerates the functions of the ACERWC:

- a) To promote and protect the rights enshrined in the Charter particularly;
- b) Collect and document information, commission inter disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child and where necessary give its views and make recommendations to Government;
- c) Formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;
- d) Cooperate with other African, International and Regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child;
- e) To monitor the implementation and ensure protection of the rights enshrined in the Charter;
- f) To interpret the provisions of the Charter at the request of a state party, an institution of the OAU/AU or any other person or institution recognized by OAU/AU;
- g) To perform such other tasks as may be entrusted to it by the Assembly of Heads of State and Government, Secretary General of the OAU and any other organ of OAU.

**60.** Following the 2003 Decision of the Executive Council (EX/CL/Dec.49(III)), which called up on the establishment of the Secretariat of the ACERWC, the African Union Commission, in 2007, officially created the Secretariat and appointed a Secretary for the Committee in accordance with Article 40. The Secretariat has the following mandate:

- a) To co-ordinate the work of the ACERWC;

- b) To maintain effective links between the Committee and Member States;
- c) To ensure effective partnership between the Committee and the Stakeholders;
- d) To mobilize resources and raise awareness for the Committee's activities

**61.** With a view of protecting and promoting children's rights, the Committee has been undertaking a number of activities in the past. These include:

- a) **Ratification of the African Children's Charter:** Since its operation in 2001, the ACERWC has been engaging various Member States to ratify the African Children's Charter. Hence, as of November 2018, 48 Countries have ratified the Charter;
- b) **State Party Reporting:** In accordance with its mandate to consider State Party reports, the ACERWC has received initial and periodic reports on the status of implementation of the Charter in more than 40 State Parties;
- c) Concluding observations: after consideration of State Party and Complementary Reports, the ACERWC issues Concluding Observations and Recommendations to State Parties based on their report to highlight the achievements and propose recommendations for implementation mechanisms of the Charter in areas where the Committee believes the existence of gaps in implementation of the Charter. Accordingly, the Committee, as of November 2018, has issued 38 concluding observations and recommendations;
- d) **Communications:** Pursuant to article 44 of the African Children's Charter, the ACERWC received and rendered its Decisions on 10 Communications;
- e) **Fact finding, follow up and investigations missions:** Pursuant to its mandate given in article 45 of the African Children's Charter, the ACERWC has undertaken various missions with a view to monitor implementations of its Decisions and investigate alleged child rights violations in Member States; and has reported on its findings to the Executive Council;
- f) General Comments: In accordance with its mandate given under article 42 of the Charter, and with the aim to interpret the elements of the provisions of the Charter, the ACERWC has developed General Comments on various selected articles of the African Children's Charter;
- g) **Development of a long-term agenda for Children's Rights in Africa:** To supplement para 53 of Agenda 2063 which states 'African children shall be empowered through the full implementation of the African Charter on the Rights of the Child', the ACERWC has developed a framework document



called 'Africa's Agenda for Children: Fostering an Africa fit for its Children'. This Agenda is accordingly adopted by the Executive Council as Africa's Agenda on Children's Rights;

- h) **Research and studies:** The ACERWC has also commissioned continental studies on various areas of children's rights.

**62.** In undertaking these and other activities, with all the opportunities and achievements, the ACERWC has been facing various forms of challenges to effectively undertake its mandate to protect and promote children's rights in Africa as aspired in the African Children's Charter. The incapability of the Committee to fully employ its effort in carrying out its functions keeps the violations of children's rights to persist.

**63.** It is particularly notable that the ACERWC is facing serious capacity challenges, due to limited presence of technical staff at the Secretariat, which is hindering the Committee from effectively discharging on its mandate and ensure that children's rights and wellbeing are mainstreamed in the AU activities.

**64.** Generally, and within the context of the AU Reform, the ACERWC is facing the following challenges:

- a) **Limited autonomy** and independence of the ACERWC which can partly be linked to the location of its secretariat in the African Union compound;
- b) Insufficient **financial resource** to carry out its mandate remains the primary challenge facing the Committee. When the Committee has to rely on external partners to fund regular sessions and undertake missions there is a risk that its independence and autonomy may be compromised;
- c) Insufficient **technical capacity** in the Secretariat and the part time nature of the assignment of members reduces the speed at which the Committee can address pending reports and Communications;
- d) **Lack of ownership of the African Children's Charter** at Member States' level. While the Committee may be relatively successful in its advocacy, implementation is often hampered by lack of political will of the Member States.

**65.** Thus, through the current Reform process, the ACERWC hopes these challenges will be addressed so that it can enhance and strengthens its efforts to continue to work on improving its functioning and ability to discharge its mandate and engage productively in monitoring and protecting children's rights in Africa. To build on and consolidate achievements and further address outstanding challenges, the ACERWC seeks to continue undertaking activities that would further enhance the ACERWC's resources and capacity to implement, improving the links between the ACERWC and other AU bodies and mechanisms with human rights mandates, in the implementation of the Charter.

66. Taking into consideration the above facts, the ACERWC hereby submits this explanatory note, and the attached draft Decisions, which encapsulates the observations and contributions of the ACERWC.

## **II. ISSUES FOR CONSIDERATION IN THE REFORM PROCESS**

### **A. Restructuring the Secretariat of the ACERWC**

67. The Secretariat is currently domiciled within the Department of Social Affairs of the African Union Commission. The Committee is supported by a Secretariat headed by a Secretary and at time of writing includes 2 additional regular and 2 short term staff, 2 youth volunteers and 2 seconded staff. The efforts of the Committee to effectively discharge its mandate have been hampered by serious lack of human, financial and material resources.

68. The need for restructuring of the Secretariat staff is justified by various reasons including the possible relocation of the Secretariat; the increased activities of the Committee and the need for harmonized structure across the Organs of AUC.

#### **i) Relocation of the Secretariat from the AUC Premises**

69. The Executive Council in its decision EX CL /Dec. 712(XXI) requested the Commission to “*continue consultations with the PRC with regard to the financial implications of moving the Secretariat of the Committee outside the headquarters and register the offer made by Burkina Faso to host this Secretariat*”. Additional four (4) Member States - Lesotho, Botswana, Kenya and Sudan later expressed interest in hosting the Secretariat. Following series of consultation, the Executive Council, through its Decision: EX.CL/Dec.1010(XXXIII) in July 2018 accepted the offer from the Kingdom of Lesotho and decided the Kingdom of Lesotho to host the Secretariat of ACERWC. The Executive Council also requested the Commission (i) To finalize the Host Agreement with the Kingdom of Lesotho, in accordance with the AU Rules and Regulations; and (ii) to revise the structure of the Secretariat of the ACERWC and to prepare a comprehensive report on the financial needs of the Secretariat of the ACERWC through the relevant Sub-Committees and report to the Ordinary Session of the Executive Council scheduled in February 2019.

#### **ii) The increasing activities of the ACERWC**

70. For the Committee to effectively deliver on its mandate, it requires a strong, well-staffed and competent Secretariat. As the Committee has now started to receive and consider State Party reports and communications (complaints), the need for strengthening the Secretariat, in terms of financial, human and material resource, is very critical. This could be inferred from the Decision of the Executive Council-Decision on the African Committee of Experts on the Rights and Welfare of the Child

Doc.EX.CL/797(XXIII), which requests the Commission to undertake an assessment on financing and human resource needed by the Committee with a view to adequately equipping the Committee to discharge its mandates effectively as envisaged in the African Charter. It would be impossible for the ACERWC to effectively discharge its functions and deliver on its mandate with the very limited number of staff that the Secretariat currently has. Indeed, the Committee has been trying to mobilize resources to have more seconded staff with a view to slightly mitigating the challenge.

### **iii) The need for harmonised structures across AU Organs**

**71.** In addition, it is the Committee's submission that the structure of the ACERWC should be revised to ensure the existence of a harmonized structure across the Organs of AU. It has generally been acknowledged that the various Organs and Units in the AUC system are encouraged to have a harmonized structure. As part of the African Human Rights System, the ACERWC submits its structure to be bench marked from the new structure of the African Commission on Human and Peoples' Rights (ACHPR), which follows the Decision EX.CL/Dec.476(XIV). Therefore, it should be duly noted that, if adopted, the new structure and the suggested position would help the Secretariat, and hence the Committee, to interact and cooperate with other human rights mechanisms in more effective and meaningful manner. This justifies, for instance, the Committee's recommendations in terms of having a more senior Secretary, more professional and administrative staff, operationalization of the offices of the special rapporteurs within the Committee.

**72.** Besides, as mentioned above, the ACERWC has the mandate to promote and protect children's rights in Africa. Considering the functions and activities of the ACERWC, it is noted that, apart from the fact that the Committee is entrusted specifically to deal with the rights of children, its mandate is the same with that of the Commission. In line with this, it is noted that the current nomenclature gives a wrong impression that the ACERWC is just an expert group and not an Organ of the Union. It is on this basis that the Committee submits a changing on its name from the current ACERWC to 'African Commission on the rights of the Child (ACRC); which would also be important particularly to ensure the existence of a harmonized structure across the Organs of AU.

## **B. Establishing an Enabling Environment for the ACERWC to Fully Discharge its Mandate as an Organ of the Union**

**73.** Despite its establishment as an Organ of the Union, the ACERWC has been facing various forms of challenges which are hindering the Committee from fully exercising its mandate as other Organs of the Union. These challenges mainly relate with lack of financial resources and limited enforcement of its Decisions and recommendations by Member States.

### **i) Lack of Financial Resources**

**74.** The ACERWC budget was part of the DSA's overall budget until 2015, but since then has its own budget allocation from the AU with 5% annual increment. The AU is funding 100% of the operational budget while almost 100% of the program budget is covered by partners. Due to this strained financial situation, the ACERWC could not fully employ its effort in discharging its rich mandate as outlined in the African Children's Charter.

**75.** The Committee notes, there positive developments lately with the decision of the Assembly of the African Union<sup>1</sup> to finance the African Union Operational, Program and Peace Support Operations budgets starting 2017. This decision is crucial for the sustainability of the ACERWC. However, the problem with actual implementation of programs would likely remain a challenge if the implementation of the Decisions takes more time than what is proposed. Hence, to address this challenge, the Committee suggests that there should be an assessment of the financial need, both for operational and program budgets, of the ACERWC in light of the ongoing relocation process and the eventual increase of staffing and activities of the Committee.

**ii) Limited Enforcement of the Committee's Decisions and Recommendations**

**76.** ACERWC has the mandate to receive and consider State Party reports on the status of the implementation of the Children's Charter. After considering State Party reports it issues concluding observations and recommends measures that States Parties may take to improve implementation of the Children's Charter. In accordance with Article 44, ACERWC also has the mandate to consider complaints against States Parties of alleged violations of the Children's Charter. If it finds a violation it will issue recommendations for the State Party to comply with in order to rectify the violation. Under Article 45 ACERWC may also undertake investigations in African countries, followed by recommendations to the State Party on the measures it should take in relation to the issue under investigation.

**77.** The ACERWC notes that its recommendations and decisions arising out of these aspects of its mandate can lead to better implementation of the Children's Charter only if States implement them. Monitoring State compliance with the decisions and recommendations of ACERWC is therefore key to the full realization of children's rights. Despite this fact, the ACERWC is facing challenges due to non-implementation of States with its decisions and recommendations. Various reasons contribute to this non-compliance, including:

- i) Lack of legislative and institutional frameworks that can facilitate the implementation of the decisions of ACERWC;

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<sup>1</sup> Assembly/AU/Dec.605-620 (XXVII), Assembly/AU/Decl.1- 3(XXVII) DECISIONS AND DECLARATIONS by ASSEMBLY OF THE UNION Twenty-Seventh Ordinary Session 17 – 18 July 2016 Kigali, RWANDA. The AU Heads of Member States decided to institute and implement a 0.2 percent levy on all eligible imported goods into the Continent to finance the African Union Operational, Program and Peace Support Operations Budgets starting from the year 2017.

- ii) Lack of political will from States to implement the decisions of ACERWC;
- iii) Lack of budgetary allocation to implement the decisions and recommendations of ACERWC- Recommendations and decisions require budgetary allocation for their realization;
- iv) Lack of collaboration among Government Organs and other stakeholders- Decisions and recommendations require an “owner” entrusted to implement them at national level. When State Parties receive ACERWC recommendations and decisions they seldom communicate the recommendations to the organ responsible for implementing them, or assign an organ for their implementation. This generates a situation where no national organ is accountable for their implementation;
- v) Lack of effective and functional monitoring- In order to ensure the implementation of its recommendations and decisions, the ACERWC undertakes follow-up missions to countries that have received recommendations and decisions. However, the missions are not undertaken timely mainly due to lack of funding for such activities. With respect to the recommendations provided after investigative missions, there is no follow-up, both at the Committee and AU Policy Organs level, to monitor compliance with such recommendations.

**78.** The Committee further notes that there is a perceived lack of finality in the decisions and recommendations of the ACERWC as states do not consider them as being legally binding. In this regard, the Committee would like to reiterate the ongoing discussion on the possibility of amending article 5 of the Protocol on the establishment of the African Court with a view to include the ACERWC as an AU Organ which can directly access the Court. The question on why the ACERWC should be granted an access before the AfCHPR can be explained from two angles: one legal and the other practical.

**79.** Legally, the African Court is established to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights, which is also a human rights organ of the AU with a quasi-judicial mandate. The Court, unlike the Committee or the Commission, has the mandate to pronounce a binding decision on cases as indicated in the Establishment Protocol which highlights that the Court renders final decision. However, the Committee only gives recommendations; and even if State Parties have the obligation to enforce the decisions of the Committee, the perceptions that the decisions are considered to be recommendations results in low compliance rate. Hence, the Committee will benefit from the binding nature of the decisions of the Court in a similar way the Commission does.

**80.** The system of the Court also provides a strong tone for the enforcement of decisions. Article 30 of the Court’s Protocol stipulates that States have the obligation to implement the decisions of the Court and to even guarantee the execution of decisions.

Furthermore, the Court, under article 31, is required to submit report to the Executive Council of the AU particularly instances of non-compliance of States with its judgments. In cases where there is non-compliance of decisions, there is a possibility for the AU to impose sanctions on State that fail to comply pursuant to article 23(2) of the Constitutive Act of the AU. The obligation to comply with decisions and the mechanism of reporting to the Executive Council is provided in the Protocol itself, hence this creates a strong and explicit follow-up system as opposed to that of the Committee which provides this reporting obligations through its subsidiarity instruments.

**81.** Practically, denying the Committee access to the Court while similar organs, like the African Commission on Humana and Peoples' Rights, and other intergovernmental organizations are given access, would send a message that children in Africa are given a relegated protection of their rights. If the establishment of the Court is to complement the human rights system that exists in the Continent with a view to bring enhanced enforcement of decisions, the Committee's inability to access the Court partially defeats the ultimate purpose the Court has been created for. It would also undermine the mandate and works of the Committee creating a perception that the Committee is less important. Hence, it becomes necessary that the Committee, just like other human rights organs should be given access to the Court for the ultimate reason the Court has been created for, which is enforcement of decisions.

**82.** With a view to address the above-mentioned challenges, the ACERWC recommends for the establishment of a joint mechanism within the structure of the PRC which monitors the implementation of the Committee's Decisions, and to include the ACERWC as one of the Organs which could be able to access the African Court.

### **III. CONCLUSION**

**83.** Considering the above explanatory note its analysis, the ACERWC submits the following draft Decisions for the Assembly's further consideration and approval.

## PAN-AFRICAN PARLIAMENT

### I. BACKGROUND

**84.** At the July 2018 African Union (AU) Summit, the Assembly adopted decision Assembly/AU/Dec.635(XXVIII) and the progress report on the reform implementation proposals concerning all AU organs, including the Pan-African Parliament (PAP). The progress report particularly explored the situation of PAP and formulated five recommendations outlining a need for: a roadmap on the transition towards the expanded mandate of PAP; a results framework for PAP; clarification and alignment of the roles and functions of the Bureau of PAP and the Secretariat; and coordinating with the African Union Commission (AUC) in terms of PAP engagement in common African positions.

**85.** The PAP Explanatory Note submitted for consideration at the 17 to 18 November 2018 Extraordinary Summit attracted a lot of interest and questions from the Permanent representatives Committee (PRC). This prompted the Pan-African Parliament to convene a meeting of a Task Force within its Ad Hoc Committee on the AU Institutional Reforms to consolidate and revisit all PAP submissions to the reform process, in view of the retreat of the organs and institutions of the African Union, which is planned for end of January 2018, ahead of the February 2019 AU Summit.

**86.** This Explanatory Note, which encapsulates the observations and contributions of the Pan-African Parliament, is intended to provide additional information in support and supplement of the proposals made by the Institutional Reforms Unit. The proposals formulated in this submission are aimed at ensuring that the Pan-African Parliament is repositioned and sufficiently empowered to achieve its purpose of enabling, supporting and overseeing of African economic integration and development, as contemplated by the African Union founding fathers, and articulated both in the Constitutive Act of the African Union, the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament (PAP Protocol) and the Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament (New PAP Protocol).

**87.** The said proposals are clustered into the four core areas considered as critical in the process of strengthening the Pan-African Parliament in the context of the AU reform process. Those focal areas are the following:

- a) Operationalizing and harnessing the current budgetary mandate of PAP for effective financing of the African Union;
- b) Managing the business of the African Union efficiently and effectively at both political and operational levels;
- c) Full legislative of the Pan-African Parliament critical for an efficient and effective African Union;

d) Connecting the African Union to its citizens.

## **II. OPERATIONALISING & HARNESSING THE CURRENT BUDGETARY MANDATE OF PAP FOR EFFECTIVE FINANCING OF THE UNION**

**88.** Article 11 (2) of the current PAP Protocol (echoed by Art. 8 (2)(b) of the new PAP Protocol), vests PAP with power to “discuss its budget and the budget of the Union and to make recommendations thereon prior to its approval by the Assembly.” This provision was complemented by Article 4 (g) of the PAP Rules of Procedure, which stipulates that “the Parliament shall consider and discuss the budget of the African Union and make relevant recommendations before approval by the Assembly”.

**89.** This provision of the current Protocol, first establishes budgetary oversight as one of the essential tasks of the Pan-African Parliament, designed to enhance sound management of the Union's finances, and secondly, affords Parliamentarians, who represent the people, the opportunity to be involved in the budget process at both the national and continental levels, especially as a good portion of the AU budget will rely on contributions from Member States.

**90.** The Report of the AU Institutional Reforms Unit rightly states that exercising the budgetary power of PAP will help improve and monitor the efficiency and regularity of Member States' contributions, as well as the adoption of national laws which play a decisive role in the financing of the Union. In addition, as an organ representing the peoples of Africa, per Article 2 (2) of the PAP Protocol, the implementation of the Parliament's budgetary power will contribute to enhancing the transparency and legitimacy of the budget process of the Union.

**91.** For the fourteen years of the existence of the PAP, the above mentioned provision of the current PAP Protocol has not been operationalized. The main reason is the fact that the AU budget formulation process and schedule do not accommodate mandatory submission of the AU budget to the PAP for review and recommendation prior to its adoption by the Assembly. The PAP submits that its budgetary power, which is already provided for under African Union applicable law, only requires a *modus operandi* to enable a workable and effective mechanism of collaboration between all organs that have a role to play in the AU budget making process.

**92.** This can be achieved by harmonizing the Rules of Procedure of the various decision-making organs that deal with the Union's budget and accommodating the intervention of PAP in the Union's budget process, in accordance with the above-mentioned provisions of the PAP Protocol. This is a purely practical aspect of the reform that should not really be contingent on the issue of expertise, which the policy organs should help the PAP to quickly resolve, including through the strengthening of the institutional and technical capacities of PAP. It also has to do with drawing on the recognized know-how of PAP parliamentarians, who are already well-versed with techniques of budget drafting and oversight at the domestic level. Also, when necessary, internal expertise can always be supplemented by external expertise.



**93.** Operationalizing the budgetary power of the PAP would also enable the African Union to align itself with the best comparative parliamentary law and practice, which clearly reveals that budgetary power is inherent to any parliament, whether national or supranational. With regard to supranational parliaments, the European Parliament<sup>2</sup>, the ECOWAS Parliament<sup>3</sup>, the CEMAC Parliament<sup>4</sup>, and the East African Legislative Assembly<sup>5</sup>, to name but a few, already freely hold and exercise this power. In fact, the CEMAC Parliament, exercises by virtue of Article 14 of its founding treaty the power of democratic oversight over the other organs, and participates in the budget-making process of the Community with an obligation on the President of the Commission to present to Parliament, the draft budget and the Commission's programme of action.

**94.** In the same vein, Article 9 of the Additional Act on Enhancing the Powers of the ECOWAS Parliament provides for a mandatory consultation of the Parliament on the Community budget. The AU and PAP could therefore to the extent possible, learn from these best practices and therefore enable PAP to exercise powers that are similar to those of other regional parliaments in line with rule of law principles. Similarity and comparability of powers between the PAP and its sub-regional counterparts would promote an effective and efficient interaction and cross-pollination, which will undoubtedly contribute to African integration efforts.

**95.** The budgetary power of PAP thus falls within the spirit of the Kigali Decision on Financing of the Union (Assembly/AU/Dec.605 (XXVII)). It capitalizes on the budgetary role of PAP and its unique relationship with national parliaments, which, under all the constitutions of AU Member States, do hold budgetary powers. This would make for promoting and monitoring actual and timely contributions by Member States and ensuring the adoption of relevant national legislation on the financing of the Union. The role of PAP in this process will complement and reinforce the role of other AU organs such as the Committee of Ten Ministers of Finance, with which clear modalities for interaction ought to be set.

**96.** PAP is of the view that the need for full implementation of its budgetary powers provides an opportunity to assert and operationalize the relevance of its mandate, as part of the Union's budget financing and formulation process, as well as oversight for its implementation.

## Recommendations

- i) A policy decision mandating the Commission to submit the draft AU Budget to the PAP for its consideration and recommendation prior to its adoption by

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<sup>2</sup> Cf Article 314 of the Treaty on the Functioning of the European Union

<sup>3</sup> Cf Art. 7 (b) Additional Act on Enhancing the powers of the ECOWAS Parliament

<sup>4</sup> Cf Art. 14 of the CEMAC Convention

<sup>5</sup> Cf Article 49 of the ECCAS Treaty

the Executive Council, as provided for under Article 11 (2) of the 2001 PAP Protocol.

- ii) A policy decision to review and harmonize the statutory calendars of the PAP and those of the policy organs, to ensure that all relevant AU organs play exercise their power in the AU financing and budgeting process.
- iii) A policy decision to strengthen the PAP structure and its human resources in line with its budgetary power.

### **III. EFFICIENT AND EFFECTIVE MANAGEMENT OF THE BUSINESS OF THE AFRICAN UNION AT THE POLITICAL AND OPERATIONAL LEVELS**

**97.** The business of the African Union can be effective and efficient if, each organ and institution is enabled to fully exercise the functions within its remit, under the rule of law, and, also, if institutional interactions, including checks and balances, relations and invitations among the various organs and institutions are all operating well. The Rules of Procedure for the various organs and institutions would have to be harmonised in such a way that they make provision for the modalities of collaboration and cooperation with fellow organs and institutions. This harmonization will also help to determine the conditions in which PAP can be seized by other organs of the Union for the purpose of exercising its consultative and budgetary power.

**98.** The need to enhance the process of election of the Chairperson of the AU Commission by a “robust, merit-based, and transparent selection process” is spelt out in Decision Assembly/AU/Dec.635(XXVIII) on the Outcome of the Retreat of the Assembly of the African Union on Institutional Reform of the African Union. PAP is of the view that the African Union would stand to gain if, after election in the Assembly, the candidate-elect to the position of Chairperson of the African Union Commission were to present and defend their programmes to the Pan-African Parliament, the organ which represents the people of the continent. This would lay the grounds for an effective oversight, which the continental Parliament is expected to exercise vis-a-vis the executive organs of the Union, and also enable the PAP to design its legislative activities in support and furtherance of the AU programmes as presented by the Chairperson of the AU Commission.

**99.** Reflections on efficient and effective management of the AU business also provides an opportunity to rethink the cumulative exercise of the parliamentary mandate of PAP, with the national one, which currently has its basis in the provisions of Articles 4 and 5 of the PAP Protocol. Indeed, a combined reading of the two articles points to the fact that each State is represented in the Pan-African Parliament by five members who are elected or appointed by their respective national parliaments or any other legislative body of the Member States, from among their members. Article 5 (3) determines that “the duration of the term of office all Pan-African parliamentarians is tied to their membership to their parliament or any other national legislative organ”.

**100.** The challenge has been that, until the entry into force of the new PAP Protocol, dual membership will continue to apply, with negative consequences on the functioning of Parliament. In fact, PAP has been experiencing instability due to the constant renewal of its members, following regular elections in African countries, which often cause 10% to 20% of departures in between sessions.

**101.** In May 2018, for example, almost one- third of the members left PAP, following elections in their respective countries. This situation does not guarantee sustainability of the institutional memory from the parliamentary expertise standpoint; hence the need to fix the duration of the mandate of PAP Members and explore if, pending the entry into force of the new PAP Protocol, the PAP and national parliamentary memberships can be delinked.

### **Recommendations**

- i) A policy decision that, at the first PAP Ordinary Session following the election of a Chairperson of the African Union Commission, the latter shall present and defend their programme to the Pan-African Parliament as an organ representing the peoples of Africa, which will lay the grounds for checks and balances between the two organs.
- ii) The reform process should result in the review and harmonization of the PAP Rules of Procedure and those of the AU policy organs, to operationalize the institutional collaboration and interactions as well as the checks and balances between the Legislative and Executive Organs of the African Union.
- iii) The reform process should make it possible to fix the duration of the mandate of PAP parliamentarians and examine the feasibility of their release from their national mandate, with a view to guaranteeing the stability and sustainability of the institutional memory, from the parliamentary expertise standpoint.

### **IV. FULL LEGISLATIVE POWER OF THE PAP**

**102.** The adoption of the new PAP Protocol of June 2014 (Malabo Protocol) had given a glimmer of hope on the possibility for the Pan-African Parliament to exercise its legislative, representational and supervisory power. However, four years on, the new Protocol, which requires twenty-eight ratifications from Member States to enter into force, has been signed by only nineteen countries and ratified by eleven,<sup>6</sup> despite the relevant provisions of Article 2(3) of the current Protocol which states that the ultimate goal of the Pan-African Parliament is to eventually become an institution with full legislative powers and members elected by direct universal suffrage. If 14 years on, the Pan-African Parliament is still in this transition period because of the slow pace of

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<sup>6</sup> State of ratification as at 27 November 2018, which, up to the time of the drifting of this Note, has remained unchanged.

ratification of the Protocol by the Member States, the current reform of the organs of the African Union offers an opportunity to explore possible solutions.

**103.** The importance of those ratifications are even more significant as the business of the African Union at both the political and operational levels requires a Parliament with full legislative powers to formulate laws in the areas that are proposed or approved by the Assembly, and exercise effective oversight function over other AU organs and institutions, as provided for in the current and new PAP Protocol.

**104.** The PAP submits that the current AU institutional reform provides a golden opportunity for its assumption of full legislative power, which could be exercised gradually, starting with non-controversial areas of continental interest, as may be proposed or approved by the Assembly, with a view to accelerating continental economic integration and development. Some of these areas are immigration and free trade, climate change and natural resource management, food security and nutrition, fight against terrorism, to cite but a few.

**105.** Further, the Parliament's full legislative function could also initially be exercised in the areas which, by their very nature, do not directly touch on, threaten or affect the sovereignty of the Member States. Those areas include the AU internal institutional rules and regulations, which indeed, constitute AU internal institutional laws. PAP should also be enabled to play a meaningful role in the AU treaty-making process, as provided for under Article 8 (2)(h) of the new PAP Protocol. By way of comparison, the European Parliament also plays a major role in treaty-making of EU treaties.

**106.** Empowering PAP to assume and exercise full legislative function would indeed require reviewing the Parliament's structure and staffing needs, as well as the status and conditions of service for the staff and Members of Parliaments. It has been observed that the current AU rules and regulations have gaps in respect of the category and corresponding treatment of the Members and staff of the Pan-African Parliament, which the reform process could address.

## **Recommendations**

- i) The reform process should ensure assumption by PAP of full legislative power, which could be exercised gradually in areas approved or proposed by the Assembly and in respect of AU-internal rules and regulations.
- ii) The African Union should ensure a speedy assumption by PAP of full legislative power, which could be exercised, not only in areas approved or proposed by the Assembly, but also in respect of African Union internal rules and regulations.
- iii) The structure and staffing needs of PAP, as well as the status and conditions of service for both staff and Members of Parliament, should be reviewed in line with those of comparable institutions, and the Members of Pan-African Parliament should be accorded the status and treatment similar

to what is afforded to “other elected officials” under the applicable AU rules and regulations.

- iv) PAP should report to the Assembly, and if this is to be delegated it should be to the Executive Council.

## **V. CONNECTING THE AU TO ITS CITIZENS**

**107.** PAP appreciates the deliberate efforts to effectively connect the African Union to national and regional Parliaments and to citizens, including civil society and the private sector and also to engage these key stakeholders on the African Union reform process. PAP also supports the resolve of AU Member States to make the African passport available to all eligible citizens as quickly as possible, in line with the Assembly Decision Assembly/AU/Dec.607(XXVII) adopted in Kigali, Rwanda in July 2016 and commits to deploy its mandate to working with national Parliaments for adoption, adaptation or harmonisation of national legal and policy frameworks for domestic implementation of the African passport decision.

**108.** As an organ established to ensure an effective participation of the African people in the development and economic integration of the continent (Art. 17 (1) of the Constitutive Act of the African Union), PAP is the better placed, in terms of its mandate, to be the entry point and connection interface between the African Union and its citizens and to promote the programmes and objectives of the AU in the constituencies of Member States. However, the limited budget provided to PAP has not enabled it to fully deploy its representation mandate as set out in the current legal and institutional framework. It is hoped that the current reform will empower PAP to access adequate budget allocations to enable it to strengthen and escalate its ties with and accessibility by AU citizens.

**109.** In addition, the opportunity for institutional reform should enable PAP to fully and independently exercise its mandate in promoting democratic principles and popular participation, consolidation of democratic institutions and culture, and good governance in Africa as well. Just like all its Member States, the African Union has subscribed to the principle of the rule of law and separation of powers, which, for instance, calls for Parliament to be given the opportunity to examine a factual or legal situation without interference from the Executive.

**110.** This is the case with election observer missions, for which the Pan-African Parliament should be granted the latitude to plan and conduct its observer missions, independently of those conducted by the African Union Commission. However, it would be necessary to determine the modalities of publication of the PAP election observer mission report, to ensure a rational and institutional balance with the conclusions emanating from the missions conducted by the executive organ of the Union.

**111.** The PAP election observer mission reports could be submitted to the Assembly with a set of recommendations, after its consideration and adoption in Plenary. By way

of comparison, this is what happens at the European Union where election observer missions are mainly conducted by the European Parliament, as they constitute a European Union mechanism for democratic scrutiny of the Member States.

## Recommendations

- i) The proposed institutional reform should reaffirm and strengthen the representation mandate of PAP and empower it to be an effective entry point and connection interface between the African Union and its citizens.
- ii) The African Union electoral observer missions should be led by the Pan-African Parliament, with technical support from the African Union Commission, to enable PAP to exercise its oversight and advisory role on issues relating to elections, democracy and good governance on the continent, and formulate recommendations to the Assembly. The reports and recommendations emanating from these election observation missions should be considered and adopted in Plenary and submitted to the Assembly or Executive Council prior to their publication.
- iii) The proposed institutional reform should enable PAP to obtain adequate budgetary resources to support its legislative operations, its outreach and access to African citizens.

## VI. CONCLUSION

**112.** The AU Assembly Decision Assembly/AU/Dec.635 (XXVIII) on the Institutional Reform of the African Union offers a unique opportunity for the African Union and its legislative organ, the Pan-African Parliament, to achieve the dream of the founding fathers of the African Union of a united and integrated African continent. This dream cannot be achieved without strengthening the powers of the Pan-African Parliament whose mission is to be one of the major pillars of economic development and integration of the continent.

**113.** This report sums up the key contributions by PAP for a strengthened Pan-African Parliament within a strengthened African Union institutional architecture, with a set of thirteen recommendations.

**114.** The recommendations formulated are the following:

- (a) On Operationalizing and harnessing the current budgetary mandate of PAP for effective financing of the African Union**
  - i) A policy decision mandating the Commission to submit the draft AU Budget to the PAP for its consideration and recommendation prior to its adoption by the Executive Council, as provided for under Article 11 (2) of the 2001 PAP Protocol.

- ii) A policy decision to review and harmonize the statutory calendars of the PAP and those of the policy organs, to ensure that all relevant AU organs play exercise their power in the AU financing and budgeting process.
- iii) A policy decision to strengthen the PAP structure and its human resources in line with its budgetary power.

**(b) Managing the business of the African Union efficiently and effectively at both political and operational levels**

- i) A policy decision that, at the first PAP Ordinary Session following the election of the new Chairperson of the African Union Commission, the latter shall present and defend their programme to the Pan-African Parliament as an organ representing the peoples of Africa, which will lay the grounds for checks and balances between the two organs.
- ii) The reform process should result in the review and harmonization of the PAP Rules of Procedure and those of the AU policy organs, to operationalize the institutional collaboration and interactions as well as the checks and balances between the Legislative and Executive Organs of the African Union.
- iii) The reform process should make it possible to fix the duration of the mandate of PAP parliamentarians and explore the feasibility of their release from their national mandate, with a view to guaranteeing the stability and sustainability of the institutional memory, from the parliamentary expertise standpoint.

**(c) Full legislative of the Pan-African Parliament critical for an efficient and effective African Union**

- i) The reform process should ensure assumption by PAP of full legislative power, which could be exercised gradually in areas approved or proposed by the Assembly and in respect of AU-internal rules and regulations.
- ii) The African Union should ensure a speedy assumption by PAP of full legislative power, which could be exercised, not only in areas approved or proposed by the Assembly, but also in respect of African Union internal rules and regulations.
- iii) The structure and staffing needs of PAP, as well as the status and conditions of service for both staff and Members of Parliament, should be reviewed in line with those of comparable institutions, and the Members of Pan-African Parliament should be accorded the status

and treatment similar to what is afforded to “other elected officials” under the applicable AU rules and regulations.

- iv) PAP should report to the Assembly, and if this is to be delegated it should be to the Executive Council.



## **Proposals for Reform of the AUABC**

### **1. Change of name of the Board (Article 22.1 AUCC)**

**115.** In accordance with the Decision of the Executive Council taken at its 32nd Ordinary Session and reflected in the Concept Note for Project 2018 and the African Union Advisory Board on Corruption (AU ABC) Strategic Plan, the Council recommends that its name be changed from "African Union Advisory Board on Corruption" to "African Union Advisory Board against Corruption".

### **2. Amendment of the Board's Term of Office (Article 22.4 AUCC)**

**116.** The Board recommends that its term of office be aligned with that of the other bodies and that it be increased from the current 2 years to 6 years. This would be in line with the recommendations contained in Decision EX.CL/651 (XVIII)

### **3. Strengthening the structural and organizational capacities of the Board and its Secretariat**

- a) The Board recommends that, in accordance with Decisions EX.CL/DEC.570 (XVII), EX.CL/DEC.668 (XX) and EX.CL/860 (XXV), the technical, financial and human capacities of its Secretariat be reinforced so that it can carry out its mission successfully;
- b) In order to ensure proper administration of the Secretariat and optimal management of resources, the Board recommends that the Chairperson reside at the location of the Secretariat seat in order to fully perform his or her functions. (See Decision EX.CL/DEC.891 (XXVII).

### **4. Extension of the Board's powers (Articles 4, 9, 22.5.e AUCC)**

**117.** Referring to the Nouakchott Declaration (Decl.1(XXX1)), the Board recommends that its powers be broadened to take into account the following:

- a) The problem of illicit financial flows (Article 4);
- b) Access to information, particularly during an election period ( Article 9);
- c) Information relating to natural resources and its analysis (Article 22.5.e)

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2019-02-10

# Report of H.E. Moussa Faki Mahamat, Chairperson of the Commission, on the Implementation of the Institutional Reform of the AU

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