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ASSEMBLY OF THE AFRICAN UNION

Fourteenth Ordinary Session

31 January – 2 February 2010

Addis Ababa, Ethiopia

Assembly/AU/8 (XIV)

**REPORT ON THE MINISTERIAL MEETING ON THE ROME STATUTE
OF THE INTERNATIONAL CRIMINAL COURT (ICC)**

[ASSEMBLY/AU/DEC.245 (XIII)]

**INTRODUCTION TO THE REPORT OF THE MINISTERIAL MEETING
ON THE ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT (ICC)**

Introduction

1. Pursuant to Decision Assembly/AU/Dec.245 (XIII), the Ministerial Preparatory Meeting on the Rome Statute of the International Criminal Court (ICC) was held on 6 November 2009, in Addis Ababa, Ethiopia, to prepare for the Review Conference of States Parties scheduled for Kampala, Uganda in May-June 2010. The meeting was open to other Member States in accordance with the above cited Assembly Decision.

2. The Meeting was attended by twenty six (26) of the thirty (30) African States Parties to the Rome Statute namely Benin, Botswana, Burkina Faso, Burundi, Chad, Congo, Democratic Republic of Congo, Djibouti, Gabon, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia. The following non States Parties also attended the meeting: Algeria, Angola, Cameroon, Cote d'Ivoire, Egypt, Equatorial Guinea, Ethiopia, Libyan Arab Jamahiriya, Mauritania, Mozambique, Sahrawi Arab Democratic Republic, The Sudan, Swaziland, Tunisia and Zimbabwe.

3. The Commission had prepared and presented a Concept Note for the Meeting, which comprehensively examined the issues identified by the Assembly in its Decision Assembly /AU/Dec.245 (XIII). The issues examined in the Concept Note included the development of guidelines for the exercise of prosecutorial discretion; the power of the United Nations Security Council to refer cases to ICC; the power of the United Nations Security Council to defer cases for a period of one (1) year; immunities of officials whose states are not parties to the Rome Statute; and other areas of concern to African States, namely proposals relating to the crime of aggression.

4. After the discussions and deliberations, the meeting adopted recommendations for consideration by the Assembly of the Union through the Executive Council, which are set out in the attached Report.

5. The Report of the ministerial meeting, and a report by the Commission on the outcome of the ICC Assembly of States parties held at The Hague in November 2009 are attached hereto as annexes.

Annex I: Report of the ministerial meeting

Annex II: Report of the Commission on the Outcome and deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC held at in The Hague, Netherlands from 16 to 26 November 2009

**Assembly/AU/8 (XIV)
Annex 1**

**REPORT OF THE 2ND MINISTERIAL MEETING ON THE
ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT (ICC)**

**6 November 2009
Addis Ababa, Ethiopia**

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**Ministerial Meeting on the Rome Statute of the ICC
6 November 2009
Addis Ababa, Ethiopia**

**Min/ICC/Legal/Rpt. (II)
Original: English**

**REPORT OF THE 2ND MINISTERIAL MEETING ON THE ROME STATUTE OF
THE INTERNATIONAL CRIMINAL COURT (ICC)**

**6 November 2009
Addis Ababa, Ethiopia**

REPORT OF THE 2ND MINISTERIAL MEETING ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

I. INTRODUCTION

1. Pursuant to Decision Assembly/AU/Dec.245 (XIII), the Ministerial Preparatory Meeting on the Rome Statute of the International Criminal Court (ICC) was held on 6 November 2009, in Addis Ababa, Ethiopia, to prepare for the Review Conference of States Parties scheduled for Kampala, Uganda in May-June 2010.

II. ATTENDANCE

2. The following were in attendance

States Parties: Benin, Botswana, Burkina Faso, Burundi, Chad, Congo, Democratic Republic of Congo, Djibouti, Gabon, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

Non States Parties: Algeria, Angola, Cameroon, Cote d'Ivoire, Egypt, Equatorial Guinea, Ethiopia, Libyan Arab Jamahiriya, Mauritania, Mozambique, Sahrawi Arab Democratic Republic, The Sudan, Swaziland, Tunisia and Zimbabwe.

III. OPENING OF THE MEETING

(a) Remarks by the Chair of the Meeting

3. The Chair of the meeting, Mr. Nel Andries, Deputy Minister of Justice and Constitutional Development, Republic of South Africa stated that he was humbled by the honour bestowed upon the South African delegation to preside over the meeting. He thanked the AU Commission for the preparatory work undertaken and for preparing the Concept Note that facilitated the deliberation of the experts meeting. He also commended the experts for their spirit of collegiality that ensured that the Ministerial meeting had before it recommendations agreed upon by consensus to consider.

4. He reminded the meeting that the earlier meeting of African State Parties to the Rome Statute in June 2009 had highlighted the issues that should be considered in preparation for the Review Conference scheduled for May-June 2010 in Kampala, Uganda.

5. He advised the meeting to be guided by the fundamental principles of the Union that enjoins all Member States to unflinching commitment to fighting impunity in all its forms. He also advised the meeting to be guided by the ideals of the Union of promoting peace, protection of human and people's rights and respect for the rule of law. He

pointed out that the recommendations to be adopted should strengthen the ICC in the delivery of justice to victims of crimes against humanity, war crimes and genocide. He reiterated the Union's commitment to ending impunity on the continent and the respect for the sanctity of human life.

(b) Opening Remarks by the Deputy Chairperson of the Commission

6. In his opening remarks, the Deputy Chairperson of the Commission on behalf of the Chairperson of the Commission welcomed all the Ministers and delegations to the Headquarters of the Union, Addis Ababa. He thanked them for having found time to attend the meeting convened pursuant to a decision of the Assembly of the African Union adopted in Sirte, Libya in July 2009 requesting for a meeting of African States Parties to the Rome Statute but open to other Member States to prepare for the Kampala Review Conference scheduled for May/June 2010.

7. The Deputy Chairperson reminded the meeting of the issues that the Assembly requested the meeting to address. The Deputy Chairperson noted that the meeting provided an opportunity for the African States Parties to undertake stock taking of the Rome Statute of the ICC and come up with proposals for amendments. He requested the participants to reach an agreement on how the proposals would be submitted to the Assembly of State Parties scheduled for 18 to 26 November, 2009 considering that the African Union is not a party to the Rome Statute. He stressed the importance of including the proposals on the agenda for the Assembly of States Parties and thereafter on the agenda of the Review Conference in Kampala.

8. The Deputy Chairperson recalled relevant decisions adopted by the organs of the African Union on the matter. He referred particularly to the decisions adopted by the Peace and Security Council at the Ministerial level in July and September 2008 as endorsed by the Assembly of the Union in February and July 2009. He reminded the meeting of the challenges and problems that the African Union has faced in relation to the proceedings initiated by the ICC against the President of The Sudan and the subsequent request by the AU to the United Nations Security Council to defer the proceedings for one year in accordance with Article 16 of the Rome Statute. However, he noted that the UN Security Council had not yet acted upon the request and had merely taken note of it.

9. In conclusion, the Deputy Chairperson of the Commission expressed the hope that at the end of the meeting, the unflinching commitment and resolve of Africa in the fight against impunity and in promoting democracy, the rule of law and good governance as enshrined in the Constitutive Act will be further strengthened.

IV. ELECTION OF THE BUREAU

10. After consultations, the meeting elected the following Bureau:

- Chair: South Africa (Mr. Nel Andries)
- 1st Vice Chair: Nigeria (Mr. Michael Andoakaa)

- 2nd Vice Chair: Burundi (Mr. Isaïe Ntirizoshira)
- Rapporteur: Tanzania (Dr. Maundi Mohammed)

V. CONSIDERATION AND ADOPTION OF THE DRAFT AGENDA

11. The meeting adopted the following Agenda:

1. Opening Ceremony
 - Welcome Remarks, Statement by the Chairperson, African Union Commission (or his representative)
2. Election of the Bureau
3. Consideration and Adoption of the Draft Agenda
4. Organization of Work
5. Presentation of the Recommendations of Experts' Meeting
6. Adoption of the recommendations
7. Any Other Business
8. Closing Ceremony

VI. ORGANISATION OF WORK

12. The meeting adopted the following working hours:

- Morning: 10h00 – 13h00
- Afternoon: 14h30 – 18h00.

VII. CONSIDERATION OF THE REPORT AND RECOMMENDATIONS OF THE EXPERTS' MEETING

13. After consideration of the report of the Experts and the recommendations contained therein, the Ministerial Meeting adopted the following:

R.1. PROCEDURAL ISSUES: GUIDELINES FOR THE EXERCISE OF PROSECUTORIAL DISCRETION BY THE ICC PROSECUTOR

The Office of the Prosecutor be requested to review the 2009 Regulations and the 2007 Policy Paper regarding the guidelines and code of conduct of the exercise of Prosecutorial powers to include factors of promoting peace and submit them to the Assembly of States Parties in order to ensure more accountability.

R.2: REFERAL OF CASES TO ICC: ARTICLE 13 OF THE ROME STATUTE

Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC should be retained as it is, in view of the fact that it is the organ responsible for the maintenance of international peace and security and has the power to set up ad hoc tribunals.

R.3: DEFERAL OF CASES: ARTICLE 16 OF THE ROME STATUTE

Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year should be amended to allow the General Assembly of the United Nations to exercise such power in cases where the Security Council has failed to take a decision within a specified time frame, in conformity with UN General Assembly Resolution 377(v)/1950 known as “Uniting for Peace Resolution”, as reflected in Annex A.

R.4: IMMUNITIES OF OFFICIALS WHOSE STATES ARE NOT PARTIES TO THE STATUTE: THE RELATIONSHIP BETWEEN ARTICLES 27 AND 98

Articles 27 and 98 of the Rome Statute should be discussed by the Assembly of States Parties under the agenda item “stock taking” in order to obtain clarification on the scope and application of these Articles particularly with regard to non States Parties. In this regard, there is need to clarify whether immunities enjoyed by officials of non states parties under international law have been removed by the Rome Statute or not.

R.5 State Parties should consider having recourse to the provisions of Article 119 of the Statute and Rule 195 of the Rules of Procedure and Evidence of the ICC to settle disputes regarding the implementation of Articles 27 and 98 of the Rome Statute.

R.6: OTHER AREAS OF CONCERN TO AFRICAN STATES: PROPOSALS REGARDING THE CRIME OF AGGRESSION

The concerns raised with regard to the crime of aggression should be taken up within the Assembly of States Parties. In this regard, the Security Council should not be granted exclusive powers to make a determination on whether aggression has been committed or not before the ICC can exercise jurisdiction with respect to the crime of aggression. Where there is a crime of aggression, consideration should be given to granting power also to other competent organs of the United Nations (UN) such as the International Court of Justice (ICJ) or the UN General Assembly to determine the act of aggression.

R7: PROCEDURE FOR SUBMISSION OF THE RECOMMENDATIONS OF THE MEETING TO THE ASSEMBLY OF STATES PARTIES

14. The meeting identified three types of recommendations:

- i) Recommendation 3, which would entail an amendment to Article 16 of the Statute;
- ii) Recommendation 1, which will entail a resolution of the Assembly of States Parties calling for review of the prosecutorial guidelines and submission of the same to the Assembly of States Parties;
- iii) Recommendations 2, 4, 5 and 6, which could be handled within the Assembly of States Parties.

15. With regard to submission of the text of an amendment to the United Nations Secretary General and other recommendations to the Assembly of States Parties as identified in Recommendation 3, the meeting recommended that the States members of the Bureau of the Ministerial meeting, namely, South Africa, Nigeria, Burundi and Tanzania should sponsor the amendment. It was also recommended that the other African States Parties to the Rome Statute should co-sponsor the amendment and indicate such willingness to the AU Commission by the end of the day on 11 November 2009. The coordination for carrying forward the various proposals will be undertaken by the Bureau.

16. In relation to recommendations 1, 2, 4, 5 and 6, the meeting recommended that these be presented to the forthcoming Assembly of States Parties scheduled for November 2009 at The Hague, Netherlands. Furthermore, the African group should consult with other regional groups with a view to securing consensus around the aforementioned recommendations.

VII. ADOPTION OF THE REPORT AND RECOMMENDATIONS

17. The Meeting adopted its recommendations contained therein with amendments.

VIII. ANY OTHER BUSINESS

18. There was no item raised under Any Other Business.

IX. CLOSING CEREMONY

19. In his closing remarks, the Chairperson thanked all delegations for their contributions and for the spirit of cooperation that had enabled the meeting deliver on its mandate. He wished all delegations a safe journey back home.

Annex A

PROPOSAL FOR AMENDMENT TO ARTICLE 16 OF THE ROME STATUTE

Article 16

Deferral of Investigation or Prosecution

- i) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.
- ii) A State with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (i) above.
- iii) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under para 1 consistent with Resolution 377(v) of the UN General Assembly.

**Assembly/AU/8 (XIV)
Annex 2**

**REPORT OF THE COMMISSION ON THE OUTCOME AND
DELIBERATIONS OF THE 8TH SESSION OF THE ASSEMBLY
OF STATES PARTIES TO THE ROME STATUTE OF THE
ICC HELD AT THE HAGUE, NETHERLANDS
FROM 16 TO 26 NOVEMBER 2009**

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**8th Session of the Assembly of States Parties
of the Rome Statute of the ICC
16 – 26 November 2009
The Hague, Netherlands**

**REPORT OF THE COMMISSION ON THE OUTCOME AND
DELIBERATIONS OF THE 8TH SESSION OF THE ASSEMBLY OF
STATES PARTIES TO THE ROME STATUTE OF THE ICC
HELD AT THE HAGUE, NETHERLANDS FROM
16 TO 26 NOVEMBER 2009**

**REPORT OF THE COMMISSION ON THE OUTCOME AND DELIBERATIONS OF
THE 8TH SESSION OF THE ASSEMBLY OF STATES PARTIES TO THE ROME
STATUTE OF THE ICC HELD AT THE HAGUE, NETHERLANDS FROM
16 TO 26 NOVEMBER 2009**

1. The 8th Assembly of States Parties of the ICC was held from 16 to 26 November 2009, in The Hague, Netherlands. It was attended by the following Member States of the African Union:

Parties to the Rome Statute: Benin, Botswana, Burkina Faso, Central African Republic, Chad, Democratic Republic of Congo (DRC), Guinea, Kenya, Lesotho, Mali, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania and Uganda.

Non Parties: Cote d'Ivoire and Zimbabwe.

2. Prior to the consideration of African Union proposals, the African Group within ICC met twice on 19 and 20 November 2009 under the chairmanship of the Ambassador of Kenya in The Hague in order to devise a common strategy to engage other regional groups to support the African proposals.

3. The first meeting was attended by the following African States: Botswana, Burkina Faso, DRC, Kenya, Lesotho, Mali, Morocco, Namibia, Nigeria, Sierra Leone and South Africa.

4. Following the presentation of the background of the AU Ministerial Meeting and the recommendations by the AUC Representative to the Meeting, the South African delegation made a proposal to the effect that there was need for the African Group to define a strategy which would also include meeting with other regional groups; taking the floor during plenary session and bilateral contacts with non African delegations. Three delegations indicated that they had not yet received instructions from their capitals regarding the African proposals. Indeed, one of the delegations explained that the Note Verbal sent early on 11 November 2009 to the UN Secretary General co-sponsoring the AU proposals was a miscommunication. Its Government would send as soon as possible another communication on its position.

5. Due to the lack of consensus on a common strategy, a second meeting was held on 20 November 2009. This meeting was attended by the following African States: Botswana, Kenya, Morocco, Namibia, Nigeria, South Africa and Uganda. Two delegations reiterated their previous positions. In the absence of consensus during this second meeting, the Ambassador of South Africa in The Hague informed the participants that his delegation would limit itself to introducing the African proposals and that the support to the proposals during the plenary session would be the individual responsibility of African States parties.

6. It is in this context that the recommendations adopted by the Second AU Ministerial Meeting on the Rome Statute of the ICC were considered by the 8th ASP.

7. It is to be recalled that the Second AU Ministerial Meeting on ICC held at the AU Headquarters in November 2009, adopted, *inter alia*, an amendment to Article 16 of the Rome Statute for submission to the Kampala Review Conference through the 8th Assembly of States Parties to the Rome Statute of the ICC scheduled from 16 to 26 November 2009, in The Hague, Netherlands. On how the amendment would be submitted, the Ministerial Conference in its Recommendation 7 (paragraph 15 of its report - Annex 1) decided as follows:

- “15. With regard to submission of the text of an amendment to the United Nations Secretary General and other recommendations to the Assembly of States Parties as identified in Recommendation 3, the meeting recommended that the States members of the Bureau of the Ministerial meeting, namely, South Africa, Nigeria, Burundi and Tanzania should sponsor the amendment. It was also recommended that the other African States Parties to the Rome Statute should co-sponsor the amendment and indicate such willingness to the AU Commission by the end of the day on 11 November 2009. The coordination for carrying forward the various proposals will be undertaken by the Bureau.**
- 16. In relation to recommendations 1, 2, 4, 5 and 6, the meeting recommended that these be presented to the forthcoming Assembly of States Parties scheduled for November 2009 at The Hague, Netherlands. Furthermore, the African group should consult with other regional groups with a view to securing consensus around the aforementioned recommendations”.**

Proposal for amendment to Article 16 of the Rome Statute

8. This proposal was submitted to the UN Secretary General by the Permanent Mission of South Africa to the United Nations by a Note Verbal dated 18 November 2009.

9. The delegation of South Africa submitted the proposals to the Assembly of States Parties on behalf of the African States Parties to the Rome Statute which consisted of an amendment to Article 16 of the Rome Statute through the inclusion of the above two paragraphs in order to allow the General Assembly of the UN to defer cases for one year in cases where the Security Council would have failed to take a decision within a specified time frame.

10. Following this presentation, only two African States Parties namely Namibia and Senegal took the floor to support the proposal while thirteen (13) Non-African States took the floor against the proposal. In their submissions opposing the amendment, they considered that there was not enough time to assess the merit of the proposal and that

any discussion would be premature even at the Review Conference scheduled for Kampala in 2010. Concern was expressed that the proposal broadened the scope for political interference with the activity of the Court. It was also noted that the amendment posed many complex issues that needed to be addressed including the relationship between the Organs of the United Nations system. It was argued that accepting the amendments would amount to inserting in the Rome Statute provisions referring to the UN, that were deemed inappropriate. Doubts were raised as to whether the provision would be compatible with the Charter of the United Nations.

11. Additionally, it was stressed that Article 16 constitutes an exception within the Rome Statute system, being a unique solution designed to reflect the special role of the UN Security Council in promoting peace and security. It was recalled that Article 16 was the result of a carefully crafted negotiation in 1998. Accordingly, the view was expressed that an expansion of that provision would not serve the interest of the Court and could not, therefore, be supported by States Parties.

12. Accordingly, the ASP decided that the proposal would be discussed after the Review Conference, at the ninth session of the ASP or at a more appropriate time together with the proposals by Belgium (2 and 3), Mexico, the Netherlands, Trinidad and Tobago and Belize.

Procedural issues: Guidelines for the exercise of prosecutorial discretion by the ICC Prosecutor

13. The second AU Ministerial Meeting on ICC held in November 2009 proposed that *“the Office of the Prosecutor be requested to review the 2009 Regulations and the 2007 Policy Paper regarding the guidelines and code of conduct of the exercise of Prosecutorial powers to include factors of promoting peace and submit them to the Assembly of States Parties in order to ensure more accountability”*.

14. This proposal was submitted by South Africa within the framework of the Omnibus Resolution. It was supported during its consideration by only four (4) African States Parties: South Africa, Namibia, Burkina Faso and Senegal.

15. However, no consensus was reached on this proposal which was amended as follows: *“Notes the consultations held by the Office of the Prosecutor on the prosecutorial Strategy with States, International Organizations and Civil Society and encourages the Office of the Prosecutor to continue to carry out such consultations on its Policy papers and guidelines, and to keep the Assembly of States Parties (ASP) informed in this regard”*.

Immunities of Officials whose States are not parties to the Rome Statute: the relationship between articles 27 and 98

16. The second AU Ministerial Meeting on ICC proposed that Articles 27 and 98 of the Rome Statute should be discussed by the ASP under the agenda item “Stocktaking” in order to obtain clarification on the scope and application of these Articles particularly with regard to non States Parties.

17. This proposal was not discussed by the ASP because there was no agenda item entitled “Stocktaking”. However, it should be noted that some African delegations were of the view that the issue could be raised during the stocktaking exercise of the Review Conference under the topic cooperation.

Proposals regarding the crime of aggression

18. Regarding the crime of aggression, it is to be recalled that the AU Ministerial Meeting on ICC recommended that the Security Council should not be granted exclusive powers to make a determination on whether aggression has been committed or not before the ICC can exercise jurisdiction with respect to the crime of aggression. Where there is a crime of aggression, consideration should be given to granting power also to other competent organs of the United Nations (UN) such as the International Court of Justice (ICJ) or the UN General Assembly to determine the act of aggression.

19. There was no debate on the crime of aggression during the 8th ASP. The Facilitator for the crime of aggression just drew the attention of ASP to the fact that the provisions on the crime of aggression for consideration by the Review Conference had been officially submitted to the UN Secretary General, in his capacity as depository of the Rome Statute, in accordance with article 121 of the Statute. However, he indicated that the discussions on the said crime will continue under the auspices of the New York Working Group of the ICC, so as to bridge the gap on outstanding issues, especially the question of the exercise of jurisdiction.

Stocktaking exercise

20. As decided by the 8th ASP, the Review Conference will conduct a stocktaking of international criminal justice focusing on the following four (4) topics: complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice.

21. The Bureau of ASP will continue the preparations of the stocktaking of international criminal justice with a view to preparing the format of the discussion, preliminary background materials and proposals for outcomes for each topic identified for consideration at the resumed session to be held from 22 to 25 March 2010 in New York.

Establishment of a liaison office for the court to the African Union Headquarters

22. The 8th ASP adopted a proposal on the establishment of a Liaison Office of the International Criminal Court to the African Union in Addis Ababa, Ethiopia.

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