

AFRICAN UNION

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

I. INTRODUCTION

1. The Twenty-Seventh Ordinary Session of the Assembly of the African Union held in Kigali, Rwanda from 17 to 18 July 2016 considered the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court. Subsequently, the Assembly adopted Decision Assembly/AU/Dec.616 (XXVII) as follows:

The Assembly,

1. *TAKES NOTE of the recommendations of the Executive Council on the implementation of decisions on the International Criminal Court (ICC);*
2. *REITERATES the following:*
 - i) *The commitment of the African Union and its Member States to the fight against impunity in accordance with the Constitutive Act of the African Union;*
 - ii) *Its previous Decision Assembly/AU/Dec. 547(XXIV) on the progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) adopted by the Twenty-Fourth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, in January 2015, and in particular paragraph 17 (d) which calls for the suspension of proceedings against President Omar Al Bashir of The Sudan and URGES the United Nations Security Council to withdraw the referral case in The Sudan;*
 - iii) *Its previous decision that the Open Ended Ministerial Committee should meet with the United Nations Security Council (UNSC) to engage on all issues that have been consistently raised by the African Union;*
 - iv) *All Member States should comply with the Assembly Decisions on the warrants of arrest issued by the ICC against President Al Bashir of The Sudan and subsequent ICC notifications to the UNSC of so-called non-complying states pursuant to Article 23 (2) of the Constitutive Act of the African Union and Article 98 of the Rome Statute of the ICC;*
 - v) *The request to AU Member States to sign and ratify, as soon as possible, the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights adopted in Malabo (Equatorial Guinea) on 27 June 2014.*
3. *WELCOMES the decision of Trial Chamber of the ICC to terminate the proceedings against the Deputy President of the Republic of Kenya due to*

insufficient evidence adduced by the Prosecutor, which gives credence to its previous Decision Assembly/AU/Dec. 590 (XXVII) that the continued prosecution of the Deputy President is without foundation given the unambiguous absence of incriminatory evidence;

4. *COMMENDS the members of the Open ended Committee of Foreign Ministers (“Open ended Ministerial Committee”) under the chairpersonship of H.E. Dr. Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia for the work done so far; RECOMMENDS that adequate financial resources be provided to the Commission and the open-ended Ministerial Committee to enable follow up activities for the implementation of this Decision.*
5. *TAKES NOTE of the upcoming session of the 15th Assembly of the States Parties of the ICC (ASP) scheduled to take place in November 2016 in The Hague and DECIDES that:*
 - i) At the upcoming 15th ASP in November 2016, African States Parties to the Rome Statute of the ICC should reject the provisional amendment to rule 165 of the Rules of Procedure and Evidence adopted by the judges of the International Criminal Court during their 34th plenary session as this will increase prejudice, may be used to circumvent substantive rights enshrined in the Rome Statute and remove the possibility of the checks and balances in the form of a dissenting opinion;
 - ii) African States Parties to the Rome Statute of the ICC should reject during the consideration and adoption of the draft ICC Action Plan on Arrest Strategies any provision that includes language requiring the UNSC to mandate UN Peacekeeping missions to enforce ICC arrest warrants in Africa because the exercise of arrest is a sovereign power that cannot be delegated to any other authority;
 - iii) The Open Ended Ministerial Committee should:
 - a) Engage the United Nations Security Council as mandated by the Assembly before the January 2017 Ordinary Session of the Assembly of Heads of State and Government and before the upcoming 15th Assembly of States Parties (ASP) in November 2016;
 - b) Implement Decision Assembly/AU/Dec.590 (XXVI) adopted by the 26th Ordinary Session held in Addis Ababa, Ethiopia in January 2016 on the development of a comprehensive strategy including on a collective withdrawal from the ICC to inform the

next action of AU Member States that are also parties to the Rome Statute;

- c) Conclude its work on the review of the ICC's interpretation of its power pursuant to Article 93 of the Rome Statute that allows the latter to impose on the State Parties to forcibly compel unwilling witnesses to testify before the ICC, with a view to rejecting witness compulsion *in toto* and inform the ICC and the next ASP accordingly;
- d) In its engagement with UNSC, the Assembly of State Parties to the Rome Statute and other stakeholders on AU concerns on the activities of the ICC in Africa, convey that the AU member states object to the inclusion of language requiring the UNSC to mandate UN Peacekeeping missions to enforce ICC arrest warrants in Africa;
- e) The Commission, through the AU Mission in Brussels, Belgium, will serve as the secretariat to the Open-ended Ministerial Committee and provide institutional support to the African Group in The Hague, Netherlands to ensure effective coordination of its activities.

6. *REQUESTS the Commission in collaboration with all stakeholders to follow-up on this matter to ensure that the African proposals and concerns are addressed and to report regularly to the Assembly through the Executive Council.*

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

II. SITUATIONS BEFORE THE COURT

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

a) *Preliminary examinations*

- i. Afghanistan
- ii. Burundi
- iii. Colombia
- iv. Nigeria
- v. Gabon
- vi. Guinea

- vii. Iraq/UK
- viii. Palestine
- ix. Registered Vessels of Comoros, Greece and Cambodia
- x. Ukraine

b) Situations under investigation

- i. Democratic Republic of the Congo
- ii. Uganda
- iii. Central African Republic
- iv. Darfur, Sudan
- v. Kenya
- vi. Libya
- vii. Côte d'Ivoire
- viii. Mali
- ix. Central African Republic II
- x. Georgia

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

4. During the period under review, the *Expanded Bureau of the Open-ended Ministerial Committee of Ministers of Foreign Affairs* on the International Criminal Court (“The Committee”) met once at the level of Ministers on 23 September 2016, and at the level of Ambassadors on 13 September 2016, principally to prepare for the meeting between the Ministers and the United Nations Security Council (UNSC).

5. During the meeting at the level of the Ambassadors of 13 September 2016 the two (2) keys issues were discussed, which were the preparations for the meeting between the Ministers and the UNSC and finalization of the draft Withdrawal Strategy and its annexes.

6. In view of the fact that *H.E. DR. Tedros Adhanom Ghebreyesus* is no longer the Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia, as such the newly appointed Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia, H.E. Dr. Workneh Gebeyehu will chair the meetings of the *Open-ended Ministerial Committee*.

a) Meeting between the Open-ended Ministerial Committee and the United Nations Security Council

7. Based on a letter from the President of the United Nations Security Council for the month of May 2016 and the Permanent Representative of the Arab Republic of

Egypt to the United Nations regarding the working visit of the Committee to engage with the United Nations Security Council (“UNSC”) the decision was conveyed that an interactive discussion between the members of the UNSC and the Committee be scheduled for 9 June 2016. However, this interactive session could not take place due to the conflicting schedules of the Ministers.

8. It is in the regard that the former Chairperson of the Open-ended Ministerial Committee, H.E. Dr. Tedros Adhanom Ghebreyesus, requested the African Union Commission to convey the intention of the Open-ended Ministerial Committee to interact with the UNSC in September 2016 in order to take advantage of the presence of Ministers and Ambassadors attending the upcoming 71st Session of the UN General Assembly during the period.

9. The President of the UNSC for the month of September 2016 and Permanent Representative of New Zealand to the UN informed the Commission that an ‘interactive dialogue’ with the Open-ended Ministerial Committee was scheduled for 23 September 2016 on the premises of the AU Permanent Observer Mission to the UN in New York.

10. However, prior to the ‘interactive dialogue’ the members of the Bureau of the Committee, the African members of the UNSC and the two (2) interested countries – Kenya and The Sudan had a preparatory meeting. During the preparatory meeting, it was brought to the attention of the Ministers that the delegations of the members of the UNSC were not represented at the appropriate level, i.e. Deputy Permanent Representative or below. In addition, the Ministers were also informed that the ‘interactive dialogue’ is an informal consultation that would not have official records, conclusions or decisions.

11. In light of the above, the Ministers decided that it would not be in the interest of the African Union to attend an interactive session with the caliber of representatives of the UNSC present and where decisions or conclusion will be reached. In this regard, the former Chairperson of the Committee H.E. Dr. Tedros Adhanom met with the President of the UNSC to inform him of the decision of the Ministers to call off the meeting.

12. During the Ministerial meeting of the Open Ended Ministerial Committee on the ICC that took place on 25 January 2017 on the sidelines of the 30th Ordinary Session of the Executive Council, the Ministers recommended to the Assembly through the Executive Council that no further meeting should be held with the United Nations Security Council as no tangible result will be come out of the exercise due to the recalcitrant position of some members of the UNSC.

b) Draft Withdrawal Strategy and its Annexes

13. In accordance with previous decisions of the Assembly [Assembly/AU/Dec.590 (XXVI) and Assembly/AU/Dec.616 (XXVII)], the draft Withdrawal Strategy (“Strategy”) that was developed by the Commission with the assistance of two (2) independent

researchers¹ was considered by the Open-ended Ministerial Committee at the level of Ambassadors.

14. The Strategy document includes sections on historical background, implications of withdrawal, the concept of collective withdrawal, as well as legal and political approaches or strategies to engagement on the ICC with a view to facilitating the required reforms at the ICC.

15. The draft Strategy is attached hereto annexed to this report.

IV. NOTICE OF WITHDRAWALS BY SOME AFRICAN STATES PARTIES TO THE ROME STATUTE

16. During the reporting period, governments of Burundi, South Africa and The Gambia had communicated the intention of their countries to withdraw from the ICC in accordance with Article 127 of the Rome Statute.

17. The first to indicate its intention to withdraw from the ICC was Burundi, whose parliament with significant support decided to withdraw from the ICC². This was followed by South Africa who announced that the provisions of the Rome Statute as it relates to States Parties treaty obligations were inconsistent with customary international law, which offers diplomatic immunity to sitting Heads of State and Government. The formal letter of notification sent to the UN Secretary General indicated *"the Republic of South Africa has found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the International Criminal Court"*³.

18. In keeping with the position held by the AU, South Africa as part of the reasons for its decision reiterated its commitment to fight impunity and to bring those who commit atrocities and international crimes to justice however, *"in complex and multi-faceted peace negotiations and sensitive post-conflict situations, peace and justice must be viewed as complementary and not mutually exclusive"*⁴.

19. The announcement by the Minister of Information of The Gambia's intention to withdraw as widely reported in the media was premised on the selectivity of cases pursued by the ICC while ignoring crimes allegedly committed by leaders in western countries.

¹ Kamari Clarke, Ph.D., M.S.L and Ermias Kassaye, LLB, MA

² <http://mgafrica.com/article/2016-10-19-burundi-pierre-nkurunziza-signs-law-withdrawing-countrys-icc-membership>

³ C.N.786.2016.TREATIES-XVIII.10, "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court.

⁴ Ibid.

20. The international community particularly keen observers of the ICC will be interested in the deliberations and outcome of the Policy Organs at the present Summit in order to gauge the position of the AU in relation these withdrawals.

21. The Open-ended Ministerial Committee welcomed the sovereign decision of the three (3) African States Parties to submit their notification of withdrawal as pioneer implementers of the withdrawal strategy prior to its adoption. The Ministers recommended that the three (3) member states should be supported by the African Union including those that may intend to submit their notification of withdrawal.

V. OUTCOMES OF THE 15th ASSEMBLY OF STATES PARTIES (ASP) TO THE ROME STATUTE OF THE ICC

a) Segment on “Relationship between Africa and the International Criminal Court”

22. As a result of the notification of the withdrawal by some African States, the President of the ASP, H.E. Mr. Sidiki Kaba of Senegal, proposed the inclusion of a segment on Africa’s relationship with the ICC to provide an opportunity to engage in a constructive dialogue on the relationship. Mr. Kaba emphasized during the segment that the ASP was the appropriate forum to address the challenges in this relationship with a view to seeking solutions.

23. The Bureau of the ASP agreed with the President’s initiative and agreed to hold an open Bureau meeting on 18 November 2016. The open Bureau meeting was moderated by President Kaba and had forty States Parties from all regional groups and two members of civil society taking the floor during the session while the representative of the African Union Commission, Mr. Adewale Lyanda presented some perspectives on behalf of the AU Open-Ended Ministerial Committee on the ICC.

24. The presentation from the representative of the African Union Commission started by reminding the ASP of the role that African States and indeed the African Union played in the establishment of the ICC and reiterating the commitment of the organization to the fight against impunity. He indicated that the concerns of the continent were premised on the predominance of African cases before the ICC, which had created suspicion about prosecutorial discretion and a pattern of only pursuing African cases before the ICC - a reflection of the imbalance in international criminal justice system. He concluded his statement by indicating that recent notifications by some AU member states/African States Parties of their intention to withdraw from the ICC regime, was a clear manifestation of the impatience and frustration by AU member states and that international criminal justice is best served when all stakeholders, however big or small, feel that their voices are being heard, listened to, and their concerns addressed in an open and transparent manner.

25. Following the introductory statements, most States Parties emphasized the importance of dialogue to understand the concerns of African States Parties as well as an opportunity to reflect on an honest critique of the Court and how to improve the transparency of its activities.

26. Some underscored that the ASP was the right platform to discuss the concerns expressed by some States Parties in order to strengthen the Court and by extension the universality of the Rome Statute regime. However, it was emphasized that peace and justice are complementary, as neither can exist in the absence of the other.

27. There was recognition that process of dialogue had commenced are needed to be maintained in order to address the concerns of African States. It was agreed that this dialogue should continue and developed even further in order to come up with possible practical measures for the future of the international and regional criminal justice system.

b) Working group of the Bureau on the implementation of Article 97 of the Rome Statute of the International Criminal Court

28. Following the plenary debate held at the fourteenth session of the ASP in November 2015 on the supplementary agenda item introduced by South Africa, States Parties expressed their willingness to consider, within the framework of the appropriate subsidiary body of the ASP, proposals to develop procedures for the implementation of article 97 of the Rome Statute.

29. Upon presentation of progress report on its activities, the ASP decided that the open-ended working group of the Bureau on the implementation of article 97 should continue exploring all possible means to improve the application of article 97 of the Rome Statute, in particular regarding problems highlighted in the progress report and report on this issue with recommendations to the sixteenth session of the ASP in November 2017.

c) Report of the Working Group on Amendments

30. The AU Assembly of Heads of State and Government at its ordinary session in July 2016 in Kigali, Rwanda had called on African States Parties to reject, at the upcoming 15th ASP in November 2016, the provisional amendment to rule 165 of the Rules of Procedure and Evidence adopted by the Judges of the Court during their 34th plenary session as this will increase prejudice, which may be used to circumvent substantive rights enshrined in the Rome Statute and remove the possibility of the checks and balances in the form of a dissenting opinion.

31. During the consideration of this item at the 15th ASP, some delegations were of the view that the Court should not apply the provisional rule while the matter is still under consideration by the Working Group on Amendments, while others were of view

that the provisional amendments remained applicable pending a decision by the ASP of whether to adopt, amend or reject the amendments. Failing to reach a consensus, the report of the Working Group indicated that *“it was observed that it would not be for the ASP to pronounce itself on this issue as it was for the Court to adjudicate the matter”*.

32. Regarding proposals for amendments to the Rome Statute previously submitted by African States Parties, as no new information was provided these were not considered. The ASP invited the working group to continue with its work in accordance with its mandate and to report to the the sixteenth session of the ASP in November 2017.

d) The Draft Action Plan on Arrest Strategies

33. At the 12th ASP in 2013, a Concept Paper on arrest strategies and a roadmap that had been submitted by Italy were adopted. Both documents had been discussed in The Hague Working Group of the Bureau, within the facilitation on cooperation, and annexed to the report of the Bureau on cooperation.

34. The decision of the ASP aimed at achieving by its 13th session in 2014 an Action plan to operationalize the prospect that requests of the Court for arrest and surrender are expeditiously executed, based on the consideration that the effective exercise of the Court’s jurisdiction depends on the ability to enforce its judicial decisions, so that the presence of the accused at trial is ensured. At its thirteenth session (2014) the Assembly decided to continue working towards a consolidated Action Plan. The Bureau appointed an Italian as Rapporteur on the arrest strategies.

35. The AU Assembly of Heads of State and Government at its ordinary session in July 2016 in Kigali, Rwanda had called on African States Parties to reject, during the consideration and adoption of the draft ICC Action Plan on Arrest Strategies any provision that includes language requiring the UNSC to mandate UN Peacekeeping missions to enforce ICC arrest warrants in Africa because the exercise of arrest is a sovereign power that cannot be delegated to any other authority

36. However, the ASP at its fifteenth session only took note of the draft Action Plan on Arrest Strategies, and urged the Bureau to continue consideration of the recommendations with a view to its adoption, and to report to the sixteenth session of the Assembly in November 2017.

e) Meeting with the African Group

37. The delegation of the African Union Commission led by the Deputy Legal Counsel and Ag. Legal Counsel, Ms. Constanca Gaspar and accompanied by Mr. Adewale Iyanda, Senior Legal Officer, participated in the meetings of the African Group, which took place every morning between 16 and 26 November 2016.

38. The AU delegation provided the members of the African Group with updates and necessary information with a view to facilitating a coordinated articulation of common positions by African States Parties before the ASP and other forums.

39. The African Group requested for greater involvement of the African Union Commission in the work of the Group during the inter-sessional period in order to provide updates on decisions taken by the Policy Organs as well as legal, institutional and technical support. This as they indicated will ensure the decisions of the Assembly and the Executive Council are received by the Group in a timely manner and provide them the opportunity to provide information relevant to the AU, which may inform decisions of the Policy Organs.

VI. UPDATE ON THE SIGNATURE AND RATIFICATION OF THE PROTOCOL ON AMENDMENTS TO THE PROTOCOL OF THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS (MALABO PROTOCOL)

40. During the report period no new signatures were appended or instruments of ratifications were received. Only the following member states have signed the Malabo Protocol: Kenya, Benin, Chad, Congo, Ghana, Guinea-Bissau, Guinea, Sierra Leone, Sao Tome & Principe.

41. During the meeting of the Open-ended Ministerial Committee, the Ministers deplored the low level of signature and ratification of the Malabo Protocol and underscored the need for Foreign Ministers to sign the Malabo Protocol during the current AU Summit in January 2017. The Ministers were of the view that establishment of the African Court with criminal jurisdiction is the strongest panacea to mitigating the involvement of the ICC on the continent based on the principle of subsidiarity.

42. Significant outreach must be conducted to enhance the pace of signature and ratification of the Malabo Protocol. The Commission is planning a number of activities in 2017 as part of its treaty promotion activities to give serious attention to this issue. In this regard, the Government of the Republic of Kenya reiterated its financial support for the operationalization of the African Court of Justice and Human and Peoples' Rights.

VII. OBSERVATIONS

43. During the reporting period, the following observations were noted:

- i) Due to human resource and financial constraints, the African Group in The Hague still lacks the required secretariat and institutional support thereby affecting its effectiveness in coordinating African positions within the ICC;
- ii) The Commission noted the role of the President of the ASP, H.E. Sidiki Kaba in creating the opportunity for African States Parties and the African Union to convey African concerns about the Court but also engage in an

open dialogue among all States Parties, through the convening of a segment on the *Relationship between Africa and the International Criminal Court*, an initiative that was welcomed by States Parties.

- iii) African Group in New York and in particular the African States Parties have not actively engaged in the work of the Working Group of Amendments in New York, hence the African proposals have not been considered since they were initially proposed.
- iv) The notification or announcement of withdrawals by Burundi, South Africa and The Gambia caused a stir at the ICC and international criminal justice community should be welcomed and supported by the African Union.
- v) The slow pace of signature and ratification of the Malabo Protocol is undermining the credibility of the AU and the member states in their commitment to the fight against impunity on the continent as well as a major strategic objective in the relationship with the ICC.

VIII. RECOMMENDATIONS

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

REITERATE:

- R1. The commitment of the African Union and its Member States to fight against impunity in accordance with the Constitutive Act;
- R2. Its previous decisions on the deferral or termination of the proceedings initiated by the ICC against the President of the Sudan in accordance with Article 16 of the Rome Statute;
- R3. Member States should continue to comply with the Assembly Decisions on the warrants of arrest issued by the ICC against President Al Bashir of The Sudan and subsequent ICC notifications to the UNSC of so-called non-complying states pursuant to Article 23 (2) of the Constitutive Act of the African Union and Article 98 of the Rome Statute of the ICC;

EXPRESS:

- R4. Dissatisfaction that the meeting between Open Ended Ministerial Committee ("Committee") and the United Nations Security Council ("Council") was aborted due to the inappropriate representation of the delegations of the Council, an affront to the Ministers of the Committee who were present, which if allowed the meeting did indeed proceed would

have in any event prevented a constructive engagement, in the absence of officials with decision making powers And DECIDES that the Committee discontinue any further engagement with the Council as no tangible result will be come out of the exercise due to the recalcitrant position of some members of the UNSC.

- R5.** Its support and welcomes the sovereign decision of those member states that submitted their intention to withdraw from the ICC and those who may follow suit as part of the withdrawal strategy.
- R5.** Concern at the slow pace of ratification of the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights adopted in Malabo (Equatorial Guinea) on 27 June 2014 and Call on Member States to sign during the current AU Summit of January 2017 and ratify, as soon as possible.

TAKE NOTE OF:

- R6.** The sovereign action taken by Burundi, South Africa and The Gambia regarding their notification of withdrawal from the ICC and CALLS on relevant structures and stakeholders of the ICC especially the Assembly of States Parties, the Court and the United Nations Security Council to engage in constructive, open and transparent dialogue on all issues of concern to the African Union in order to prevent a further deterioration of the relationship between the ICC and the AU member states;
- R7.** The initiative by the President of the Assembly of States Parties, H.E. Sidiki Kaba for creating the enabling environment for a constructive dialogue on Africa's concerns with the ICC as a catalysts for further open and transparent engagement on all issues including those related to the linkages between peace and justice;
- R8.** ADOPTS the ICC Withdrawal Strategy with its Annexes.

REQUEST:

- R11.** The Group of African States Parties in New York in collaboration with the Commission to actively participate in the deliberations of the Working Group on Amendments to ensure that African proposals are adequately considered and addressed;
- R11.** The Commission to support the AU Mission in Brussels in fulfilling its responsibility in providing secretariat support to the African Group in Brussels;

- R12.** The Commission to report on the implementation of this decision through the Open Ended Ministerial Committee to the Assembly through the Executive Council.

Rapport Interimaire de la Commission sur la Mise en Oeuvre des Décisions de la Conference de l'Union Africaine sur la Cour Pénale Internationale

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