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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-Fifth Ordinary Session of the Assembly of the African Union held in Johannesburg, South Africa from 14 to 15 June 2015 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.586 (XXV) as follows:

The Assembly,

TAKES NOTE of the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court;

RECALLS Decision Assembly/AU/Dec.547 (XXIV) and in particular paragraphs;

- i) 17. (d) that requested the ICC to terminate or suspend the proceedings against Deputy President William Samoei Ruto of Kenya until the African concerns and proposals for amendments of the Rome Statute of the ICC are considered; and*
- ii) 17 (e) that requested the suspension of proceedings against President Omar Al Bashir and to urge the UN Security Council to withdraw the referral case in the Sudan.*

COMMENDS efforts of the African Union Commission in the implementation of the Decision Assembly/AU/Dec.547(XXIV);

RECOMMENDS the formation of an Open-ended Ministerial Committee of Ministers of Foreign Affairs;

REQUESTS the African Union Commission to continue implementing the Decision and in particular to write to the United Nations Security Council:

- i) Informing of the African Union Heads of State and Government Decision of January 2015 and also requesting that decision be implemented;*
- ii) Informing that the Committee of Ministers of Foreign Affairs intends to meet the UNSC to discuss and follow up on the matter.*

REQUESTS that the African Union Commission join in the Application under Rule 68 by the Prosecutor of ICC against the Deputy President of the Republic of Kenya as an interested party for purposes of placing before the Court all the relevant material arising out of the negotiations;

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.

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

3. In implementation of the above-mentioned Decision, an *Open-ended Ministerial Committee of Ministers of Foreign Affairs* on ICC (“The *Open-ended Ministerial Committee*”) was set up. At its inaugural meeting that took place in New York at the Africa Union Permanent Observer Mission to the United Nations on 27 September 2015, the Ministers appointed the following Ministers of Foreign Affairs to steer its activities:

- i) Chairperson -*H.E. DR. Tedros Adhanom Ghebreyesus*, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia;
- ii) Vice-Chairperson -*H.E. Alain Aimé Nyamitwe*, Minister of Foreign Affairs of the Republic of Burundi;
- iii) Vice-Chairperson -*H.E. Mankeur Ndiaye*, Minister of Foreign Affairs of the Republic of Senegal.

4. In undertaking its work, the Open-ended Ministerial Committee met three (3) times at the level of Ministers in New York - 27 September 2015; New Delhi – 30 October 2015; and The Hague – 17 November 2015; and once at the level of Ambassadors on 23 October 2015 in Addis Ababa.

5. The Open-ended Ministerial Committee noted its mandate to be twofold: to ensure that the decisions of the Assembly on ICC are implemented and strategize with a view to ensuring the suspension of the proceedings against President Omar Al Bashir and withdrawal of the referral case in The Sudan by the UN Security Council as well as the termination or suspension of the proceedings against Deputy President William Samoei Ruto of Kenya by the Court or the UN Security Council, respectively.

6. In order to ensure the effectiveness of its engagement, the members of the Committee decided to set up the following structures:

- i) Committee of Experts at the Level of Permanent Representatives and Senior Officials – to prepare for the meetings of the Ministers and engage on other matters as may be requested by the Ministers;

- ii) Informal High-level Panel of Experts - to advise the Open-ended Ministerial Committee on technical matters based on their expertise in international criminal justice and the ICC as well as to inquire into the relationship between the ICC and AU member States – e.g. How the ICC conduct investigations, application of the complementarity principle and the impact of ICC cases on States.

7. Some of the conclusions reached by the Open ended Committee include the need to:

- i) Engage with the African Group in The Hague and all relevant structures within the ICC on all issues of concern to the continent as expressed in the decisions of the Assembly and other Organs of the Union
- ii) Engage with the African Group in New York and the African Members of the United Nations Security Council to develop a strategy for placing the deferral requests on the agenda of the UNSC;
- iii) Engage with Members of United Nations Security Council and particularly the Permanent Members on the deferral requests as well as other concerns of the African Union on its relationship with International Criminal Court (ICC);
- iv) Expand the membership of the Bureau to ensure regional representation (Northern, Central, Eastern, Western and Southern Africa);
- v) Develop a work plan and budget for the activities of the Committee;
- vi) Develop a comprehensive strategy for the speedy operationalization and funding for the African Court of Justice on Human and Peoples' Rights in conformity with the decision of the Assembly on the ICC and Africa.

8. During the reporting period, the Committee undertook the following consultations:

17 Consultations during the 14th ASP - ICC at The Hague, Netherlands – 17 to 19 November 2015

I. Meeting with the African Group

9. On 17 November 2015, the Open-ended Ministerial Committee led by its Chairperson, *H.E. DR. Tedros Adhanom Ghebreyesus* met with the African Group chaired by the Ambassador of Tunisia in The Hague, *H.E. Mr. Mohamed Karim Ben Becher* in the presence of the Ministers of Foreign Affairs of Kenya and South Africa, the Minister of Defence of Kenya, the Attorney General of South Africa, the Solicitor General

of Kenya, African Ambassadors and a representative from the African Union Commission, Mr. Adewale Iyanda - a Legal Officer.

10. The Chair of the Africa Group after welcoming all participants and informing on other sundry matters invited the Chairperson of the Open-ended Ministerial Committee to address the Group. H.E. Dr. Ghebreyesus commenced his presentation by giving a brief background and mandate of the Committee. He conveyed to the Group the following:

- i) The mandate of the Committee was to ensure the implementation of the decisions of the Assembly as it relates to the suspension of the proceedings against President Omar Al Bashir and withdrawal of the referral case in The Sudan by the UN Security Council as well as the termination or suspension of the proceedings against Deputy President William Samoei Ruto of Kenya by the Court or the UN Security Council, respectively;
- ii) Recalled the unnecessary uproar over the visit of President Omar Al Bashir of the Sudan to South Africa to attend the 25th Ordinary Session of the Assembly;
- iii) Committee decided to coordinate its efforts with the African Groups in Hague, NY and the African members of the UNSC;
- iv) It is important that Africa continues to speak with one voice;
- v) Africa is being treated unfairly at the ICC and all agreed to fight it to address this problem

11. In her intervention, the H.E. Ms. Amina C. Mohamed, Cabinet Secretary, Foreign Affairs of Kenya informed the African Group:

- i) In 2013, a committee of Ministers met with the African Group in The Hague and although with the support of the latter concrete results were achieved not all issues with the ICC had been resolved;
- ii) African States signed up to the ICC process with the expectation that there would be space to debate and subject the practice of the ICC structures to the test of relevance and appropriateness;
- iii) Extremely disappointed that some practices of the Court fall below the required standards;
- iv) The need for the ASP to reaffirm the non-retroactive application of the rule to situations commenced before the 27 November 2013;

- v) The Independent Oversight Mechanism of the ICC is yet to be operationalized as its absence has undermined the ASP's oversight over the Court, hence the need for an ad hoc mechanism to audit the Prosecutors' witness identification and recruitment processes in the case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang;
- vi) There is a need for African State Parties to reject the proposed adoption of draft Action Plan on Arrest Strategies that will be discussed at the current session.

12. In his intervention, the Minister of Justice and Correctional Services of South Africa, H.E. Michael Masutha,

- i) Africa must be informed by its history in order to deal with current circumstances;
- ii) Thought ICC will respect sovereignty and national institutions but this does not seem to be the case;
- iii) ICC should not be the first point of call but the last resort;
- iv) Africa has never condoned impunity that is why no coup leader is allowed to sit at AU Summits;
- v) Referred to the letter signed by President, Prosecutor and Registrar of the Court (ICC) opposing the inclusion of the items proposed by Kenya and South Africa in the agenda of the 14th ASP;
- vi) saying the issues proposed by Kenya not be put on the agenda;
- vii) Counting on Africa Group when the items proposed by South Africa and Kenya are placed on the agenda and not placed as any other business.

13. After the interventions, the following comments and observations were made by the various delegations:

- i) Since the Bureau will be considering the additional items submitted by Kenya and South Africa, it is important that African members of the Bureau support their inclusion on the agenda of the 14th ASP as they were submitted within the stipulated time frame;
- ii) Statements of each African State Party should mention the concerns raised by the African Union;

- iii) African State Parties should ensure that in all meetings of working groups during the 14th ASP, they also raise and support the issues raised by the African Union as well as express support for the items proposed by Kenya and South Africa;
- iv) Arrest strategy discussions – concept note on agenda item cooperation – developed purely, only, solely by countries from Europe and should have had a token representative from Africa;
- v) The draft Action Plan on Arrest Strategies, which empowers non-state parties to make arrest in our countries and promoting with the UN Security Council to include in the mandate of peacekeeping operations assistance in the enforcement of ICC arrest warrants, will not only amount to surrendering our sovereignty but undermine the neutrality of UN peacekeeping missions;

14. At the end of the deliberations, it was agreed that:

- i) African State Parties will work to ensure that the issues consistently raised by African Union and the proposals by Kenya and South Africa are supported and clearly articulated at the 14th ASP;
- ii) The adoption of the draft action plan on arrest strategies should be deferred;
- iii) A request be made and supported by the African members of the Bureau of the ASP to allow the Chairperson of the Open ended Ministerial Committee to deliver a statement during the General Debate on behalf of the African Union.

II. Meeting with the President of the Assembly of State Parties of the ICC

15. The Open ended Committee met with the President of the Assembly of State Parties, H.E. Sidiki Kaba, Minister of Justice and Keeper of the Seal of the Republic of Senegal on 18 November 2015 on the sidelines of the 14th ASP.

16. The Chairperson of the Committee, *H.E. DR. Tedros Adhanom Ghebreyesus* gave a brief introduction on the establishment and mandate of the Committee in accordance with the decision of the Assembly, particularly the current effort of the Committee to engage with the different structures of the ICC to express the concerns of the African Union on the workings of the ICC.

17. The President of the ASP thanked the Ministers for meeting with him and reiterated his gratitude to the African Union for supporting his candidature. He recalled the main priorities of his term by underscoring the need to enhance the relationship between Africa and the Court. He concluded his remarks by briefing the Committee on the outcome of the Bureau meeting, which decided to accept the request by the African

Group to allow the Chairperson of the Open ended Committee to deliver a statement on behalf of the African Union during the General Debate as well as the decision of the Bureau to include the additional items of South Africa and Kenya, which will be discussed at a High level general debate rather than a Panel discussion as proposed by some members of the Bureau.

18. The meeting concluded with the Ministers thanking the President of the ASP for his support and in ensuring that all the requests that had been tabled by the African Group has been included in the agenda of the ASP.

III. Meeting with the ICC Prosecutor

19. On 19 November 2015 on the sidelines of the 14th ASP, the Open ended Committee met with the ICC Prosecutor, Mrs. Fatou Bensouda and her delegation, which included the Deputy Prosecutor, the Head of International Cooperation Section and the Senior Special to the Prosecutor. The Chairperson of the Open ended Committee, *H.E. DR. Tedros Ghebreyesus* gave a brief background to the establishment and mandate of the Committee, particularly highlighting the concerns regarding the cases in the Sudan and Kenya.

20. *Dr. Ghebreyesus* referred to terrorism on the continent and how if not abated could become a global problem. Other members of the Committee highlighted the following:

- i) The continent and in particular the East African region is vulnerable to terrorism and other security threats and as such there is need to have the leaders focused on these challenges rather than distracted with incessant cases before the Court;
- ii) The priority of African leaders is to keep their countries together, as it takes a lot to build and keep a country together but takes a little to destroy it;
- iii) Without peace there is no security and no justice;
- iv) Wondering whether there is still need for African States to be part of the ICC especially when the concerns consistently raised by the continent are not addressed;
- v) The request to the ASP on the additional items proposed by some Africa States Parties was to ensure that the Court, its systems and processes are improved;
- vi) The ICC should consider building necessary capacity in States and support regional mechanisms so that the former does not become a court of first instance but a court of last resort as envisaged in the Rome Statute;

- vii) The continent will not be silent to the indiscretions of the Court as silence is the maid servant of impunity and the root of oppression;
- viii) One of the additional items on the agenda of the 14th ASP is calling for the Prosecutor to be investigated but the witness procurement process in the Kenyan situation in order to ascertain what exactly transpired;
- ix) The items proposed by South Africa for inclusion in the agenda of the 14th ASP arose out of issues relating to the last AU summit wherein in accordance with International law, it had certain obligations which included providing full diplomatic immunity for all participants attending the Summit;
- x) South Africa made efforts to engage with the ICC regarding the attendance of the President of Sudan at the AU Summit based on the understanding that reading of the Rome Statute allows States Parties to uphold their international obligations as envisaged by the architects of the Rome Statute hence the inclusion of Articles 97 and 98 in the final text;
- xi) Concerned that the Prosecutor proceeded to Court on a matter that in their understanding required a political consultative process rather than a legal one;
- xii) The ASP needs to provide clear guidelines on what appears to be a possible conflict between Articles 27 and 98 obligations of the Rome Statute and as such finding a right balance between these competing obligations;
- xiii) International justice does begins and end with the ICC as it is not the only mechanism that provides access to justice for victims of international crimes;
- xiv) ICC is not the only priority on the continent;
- xv) A report on the outcome of the 14th ASP will be submitted to the African Union Assembly and it may determine how the AU and its member states will relate to the ICC in future.

21. In her remarks and those of her delegation, the Office of the Prosecutor highlighted the following:

- i) Recalled that in a meeting with the African Union delegation during the 12th ASP in 2013, she indicated that there was need to keep channel of communication open with the Court;

- ii) The decisions of the African Union does not help the precarious situation without first having recourse to discussing the such matters between the two organizations;
- iii) The Office of the Prosecutor relies on the legal framework adopted by States Parties and which guides their work;
- iv) As Prosecutor she does not take the responsibilities entrusted to her lightly and as such always strives to conduct their work based on the rule of law, in a fair, independent, impartial and transparent manner but always devoid of politics;
- v) The Prosecutor have tried to remain transparent and welcomed anyone to discuss issues of concern as long as it is not a matter that would require her to reveal sensitive information that is before the Court;
- vi) Just like the African Union, the UN Security Council does not respond to requests from the Court;
- vii) In critiquing the Court, especially as it relates to the notion that the ICC is only targeting Africans, it important to understand the limitations of the jurisdiction of the ICC in relation to situations in other countries;
- viii) The independence of the Court must always be guarded and no one can tell who to be investigated;
- ix) Even where there is a referral of a situation by the UN Security Council to the Court, the Office of the Prosecutor still applies the same scrutiny as it does in other situations especially when evidentiary requirements are met;
- x) Aware that the friction between the ICC and the AU is as a result of the ongoing cases involving the President of Sudan and the Deputy President of Kenya;
- xi) Respects the position of the African Union as a political body but the Prosecutor is leading an office that inherited these cases based on evidence and the law;
- xii) The grouse the African Union has against the UN Security Council is misdirected at the ICC;
- xiii) The Office of the Prosecutor has opened preliminary investigations in Palestine, Afghanistan and other places despite objections from some State Parties and other powerful interests;

- xiv) The Prosecutor has been accused of solely focusing on the law and evidence in commencing an investigation or prosecution but there will be little credibility left in the office if they were to do otherwise;
- xv) Looking for political solutions to resolve some of the issues before the Court may not help the situation but allow justice to run its course;
- xvi) As the Office of the Prosecutor does not participate in the deliberations of the ASP, at no time did the Prosecutor make any representations to any delegation that it if adopted it would seek to apply the rule retroactively;
- xvii) The Office of the Prosecutor has no objection to the agenda items proposed by Kenya and South Africa and are not lobbying against those proposals.

22. At the end of the discussions, it was agreed to keep the channels of communication open.

a) *Consultations between the AU Legal Counsel and Senior Officials of the ICC*

23. The Legal Counsel, Prof. Vincent O. Nmehielle on the sidelines of the 14th ASP also held consultations with the President of the ASP, H.E. Sidiki Kaba and the ICC Prosecutor, Mrs. Fatou Bensouda. The discussions focused on technical issues related to issues of concern raised in various decisions of the African Union and how those issues could be addressed within the legal framework and architecture of the ICC system.

24. The meetings concluded with the understating that there is need to keep an open channel of communication with a view to facilitate the resolutions issues before they get of control.

b) *Consultations at the United Nations*

25. Preparations have been made to enable Open-ended Ministerial Committee to meet with the UN Security Council in accordance with the decision Assembly/AU/Dec. 586 (XXV) adopted in Johannesburg, South Africa in June 2015.

III. DECLARATION OF THE SPECIALIZED TECHNICAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

26. During the reporting period the First Extraordinary Session of the Specialized Technical Committee (STC) on Justice and Legal Affairs took place from 12 to 13

November 2015 at the AU Headquarters of the African Union in Addis Ababa, Ethiopia. The STC is composed of Ministers of Justice and/or Attorneys General, Keepers of the Seal, Ministers responsible for Human Rights and Ministers responsible for Constitutionalism and Rule of Law of AU Member States.

27. At the end of the deliberations, the Ministers adopted a declaration on the ICC, of which the operative paragraphs reflected below:

“HEREBY DECLARE:

- (i) Our concern regarding the application by the Prosecutor based on the amended Rule 68 of the Rule of Procedure and Evidence in the Kenyan case of Prosecutor v. William Samoi Ruto and Joshua Arap Sang and state that it is not in line with proper legal interpretation;*
- (ii) Our support for Kenya’s request for the 14th Assembly of States Parties session scheduled for 18-26th November 2015 at the Hague to review the amended Rule 68, as its retroactive application has serious adverse implications for the rights of accused persons to fair trial;*
- (iii) Our support for the proposal by South Africa for a supplementary agenda item on the application and implementation of Articles 97 and 98 of the Rome Statute of the ICC at the said 14th Session of the Assembly of State Parties;*
- (iv) Our support for the request by The Sudan and based on the decisions of the AU Assembly urging the United Nations Security Council to withdraw the referred case against President Omar Al Bashir;*
- (v) Our encouragement of AU Member States to speedily sign and ratify the Protocol on Amendments to the Statute of the African Court of Justice and Human Rights in accordance with the Assembly Decision (Assembly /AU/Dec. 547(XXIV) in Addis Ababa, Ethiopia in January 2015 that, inter alia, called for operationalization of the exercise of the jurisdiction of the African Court of Justice and Human Rights to try international crimes; and*
- (vi) Our support for the principles deriving from national law and international Customary Law which grants immunity to sitting Heads of State and other such senior officials during their tenure in office in accordance with AU Assembly Decisions in this regard.”*

28. The Assembly is invited to take note of the resolution of the STC on Justice and Legal Affairs.

IV. AFRICAN UNION REQUEST TO SUBMIT *AMICUS CURIAE* OBSERVATIONS PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE ON THE RULE 68 AMENDMENTS AT THE 12TH ASP

29. In the implementation of last Assembly Decision [Assembly/AU/Dec. 586 (XXV)], the Office of the Legal Counsel through an external Counsel engaged for this purpose, filed a Rule 103 (1), *amicus curiae* observations before the Appeals Chamber of the ICC. The Assembly decision requested the Commission to join the proceedings “for the purposes of placing before the Court all the relevant material arising out of the negotiations of Rule 68 of the *Rules of Procedure and Evidence* (“RPE”) during the 12th Session of the Assembly of States Parties (“ASP”) in November 2013.

30. The application was filed pursuant to the appeal of Deputy President William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber granting the *Prosecutor’s request to admit prior recorded testimony* of witnesses who were no longer available, who had since recanted the said evidence or who had testified before the Court that they lied or were coached regarding what they averred in their recorded written statements.

31. However, the decision of the Trial Chamber seems to run contrary to the understanding reached during the negotiations at the 12th ASP and which was aptly captured in the Progress Report of the Commission on the Implementation of the Decisions of the Assembly of the African Union on the International Criminal Court [Doc.Assembly/AU/13(XXII) of January 2014]: “[...] *that the amendments to Rule 68 would have no retroactive effect pursuant to Article 51 (4) of the Rome Statute and that there would be no attempt to apply the amended rule in the trials underway before the Court and in particular the trials relating to the situation in the Republic of Kenya*”.

32. On 12 October 2015, the Appeals Chamber granted the Commission’s request to file written observations on the application of Rule 68, which was subsequently filed on 19 October 2015; and on 26 October 2015 the Prosecutor filed her response to the Commissions submissions.

33. As at the time of writing the report, the Court had not delivered its judgment on the appeal.

V. OUTCOMES OF THE 14TH ASSEMBLY OF STATES PARTIES (ASP) TO THE ROME STATUTE OF THE ICC

34. The 14th Session of ASP took place in The Hague, Netherlands from 20 to 28 November 2013. The African Union was composed of H.E. Dr. Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia the Chairperson along with members of the Open-ended Ministerial Committee, the Legal Counsel and a staff of the Office of the Legal Counsel.

35. The relevant debates, deliberations and conclusions are summarized below.

A. Request by the African Union to deliver a Statement during the General Debate¹

36. On 18 February 2015, the first day of the Conference, the Chairperson of the African Group, H.E. Mr. Mohamed Karim Ben Becher, Ambassador of Tunisia informed the Plenary of the request of the African Union to deliver a statement during the General Debate. Since the request included the AU statement being delivered by the Minister of a non-State Party, the Chairperson of the ASP decided to refer the matter to the Bureau for consideration. This was particularly of interest in light of the privilege extended only to Ministers of States Parties, to deliver their statements before any other non-State Party, Inter Governmental Organization or Non-Governmental Organization.

37. In an unprecedented decision, the Bureau with the support of the African members, agreed to the African Group's request for the Foreign Minister of Ethiopia and Chairperson of the Ministerial Committee to deliver a statement on behalf of the AU. In a terse message to the ASP, the Minister:

"[...] Reiterated the African Union's unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the continent, in conformity with its Constitutive Act [...]"

[That] the fight against impunity constitutes a fundamental principle in the basic law of the African Union, and is part of our shared values of the Union to which all our Member States have committed themselves. As such, this principle is well articulated and pursued within the Union at several occasions and is not negotiable

[That] Africa is on the right direction and deserves the support of the international community in its fight against terrorism that is shaking global peace and stability. Intimidating African leaders will serve no purpose than derailing their attentions and efforts in their fight against the scourges of terrorism [...]"

B. Supplementary items requested for inclusion in the agenda of the 14th ASP

¹ The list of speakers can be found on the ICC website: https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ICC-ASP14-GenDeb-Speakers_List.pdf

38. Three (2) requests for inclusion of supplementary items on the agenda of the 14th ASP were submitted by South Africa and Kenya as follows:

i) South Africa: On the application and implementation of Article 97 and Article 98 of the Rome Statute.

39. Under this agenda item, South Africa sought for a decision from the 14th ASP that clear rules and procedures be developed on the application of Article 97 requests by States Parties to the Court for consultations to resolve problems that they may experience which may impede or prevent the execution of cooperation requests by the Court, and that an interpretation be done of the nature and scope of Article 98 and its relationship with Article 27.

40. In the explanatory memorandum submitted by South Africa², it indicated that acting on the possibility that President Al Bashir of Sudan may attend the AU Summit, the Registrar of the International Criminal Court submitted a Note Verbale reminding it of its obligation to cooperate with the Court in the arrest of President Al Bashir and also of its obligations to consult the Court should it face any difficulties in implementing the request for cooperation. The Government responded by requesting to consult the Court in terms of Article 97 of the Statute. Article 97 provides that where a State Party receives a request for cooperation to which it identifies problems which may impede or prevent the execution of the request, the State shall consult with the Court in order to resolve the matter.

41. However, the Prosecutor made an urgent request to the Court for clarity regarding the status of the Article 97 consultations, without any prior warning or notice of that request to the Government. In response to this request, Pre-Trial Chamber II issued the Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Al Bashir. In its decision, the Pre-Trial Chamber held that there was no un-clarity regarding the applicable law and that South Africa was under the obligation to arrest President Al-Bashir and surrender him to the Court and that the Article 97 consultations have therefore ended.

42. Unfortunately, the request from the Prosecutor resulted in Article 97 consultations being turned into a legal process with the potential to discourage States Parties from using this tool designed to create an open channel of communication and diplomatic dialogue.

43. In respect to the application and interpretation of Article 98, the duty to arrest and surrender a sitting Head of State, an exception can be found in Article 98 of the Statute, which provides that "the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its

² ICC-ASP/14/35

obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third for the waiver of the immunity."

44. South Africa submitted that it was important for State Parties to discuss how Article 98 should be interpreted. The exception under Article 98 is based on the recognition that while Article 27 may imply a waiver of immunities between States Parties, such a waiver would not apply to the relationship between States Parties and non-State Parties like Sudan and as such the clear terms of Article 98 are part of the Statute, and cannot be ignored and that a full understanding of the nature and scope of Article 98 and its relationship with Article 27 should be developed.

45. At the end of the deliberations, the 14th ASP agreed as follows:

Article 97: Within the framework of appropriate subsidiary body of the ASP, proposals to develop procedures for the implementation of Article 97.

Articles 27/98: Although some State Parties raised concerns on the basis that the matter was already before the Court, interested States Parties were permitted to refer the matter to the ASP Bureau for further consideration.

ii) **Kenya:**

a) ***Reaffirmation of the application and implementation of amendments to the Rules of Procedure and Evidence introduced at the 12th ASP:***

46. Kenya requested that the legislative intent of rule 68 be placed before the 14th ASP for discussion and that a decision be taken to reaffirm the non-retroactive application of the rule to situations commenced before the 27 November 2013. Kenya also requested the President of the Assembly thereafter convey the decision of the 14th session on rule 68 to the President of the Court.

47. The request by Kenya was predicated on the basis that the 12th ASP in amending Rule 68 was mindful of Article 51(4) of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused.

48. During the high-level debate, the representatives of South Africa and Uganda including some Latin American countries supported the proposal by Kenya and reference was made to the Progress Report of the Commission on the Implementation of the Decisions of the Assembly of the African Union on the International Criminal Court [Doc.Assembly/AU/13(XXII)] submitted to the Twenty-Second Ordinary Session of the Assembly in January 2014, which clearly reflected the understanding reached at the 12th

ASP taking into account the concerns raised by African States Parties that the amendments shall not be applied retroactively and that the Rule 68 as amended is without prejudice to the rights of accused, victims and witnesses as well as their participation in the proceedings.

49. Due to the divergent views expressed by States Parties on the proposal, the matter was referred to the Bureau for consideration. At the end of intense and sometimes heated deliberations in the Bureau that included representatives of Kenya, the 14th ASP in its report adopted the following “[...] *recalled its resolution ICC-ASP/12/Res.7, dated 27 November 2013 which amended rule 68 of the Rules of Procedure and Evidence, which entered into force on the above date, and consistent with the Rome Statute reaffirmed its understanding that the amended rule 68 shall not be applied retroactively*”³.

b) *Appointment of an Ad-hoc independent mechanism to audit the Prosecutors' witness identification and recruitment processes*⁴

50. In its explanatory memorandum, Kenya indicated that it was deeply concerned that the Independent Oversight Mechanism was yet to be operationalized as its absence undermined the ASP's oversight over the Court. In light of the emerging credible concerns on witness procurement in the Kenyan cases highlighted in the petition by 190 members of Parliament of the Republic of Kenya, Kenya urged the ASP to appoint an ad hoc mechanism of 5 independent jurists (one from each diplomatic grouping and a chair) to audit the Prosecutors' witness identification and recruitment processes in the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case Number ICC-01/09-01/11, in order to establish and determine the veracity of allegations of irregular procuring and coaching of witnesses in the case within six months. The President of the Assembly was urged to convey the ASP's decision to establish an audit process/mechanism to the President of the Court for further action.

51. Following the debate on this item, the 14th ASP “*emphasized the importance and urgency of having a fully operational Independent Oversight Mechanism and requested the Bureau to follow the process thereon*”.

C. Report of the Working Group on Amendments – Proposed amendments to Articles 16 and 27

52. During the reporting period the working group on amendments to the Rome Statute had not made any progress regarding the proposed amendments on Articles 16

³ ICC-ASP/14/L.1

⁴ ICC-ASP/14/35/Add.2

and 27 submitted by South Africa and Kenya, respectively on behalf of the African Union.

53. However, the 14th ASP on the recommendation of the working group adopted the amendments to Article 124 by deleting its provisions from the Rome Statute. The amendment is subject to ratification or acceptance and shall enter into force in accordance with article 121 (4) of the Rome Statute.

D. Election of the members of the Board of Directors of the Trust Fund for Victims

54. The ASP established a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, as well as a Board of Directors of the Trust Fund. The ASP at its session was electing members of the Board of Directors for a three-year term, to commence on 1 December 2015, to fill the vacancies arising upon the conclusion of the terms of office of the five current members of the Board on 30 November 2015.

55. At the close of the nomination period, on 25 August 2015, seven candidates had been nominated based on the distribution of seats as follows: (a) African States, one seat; (b) Asian States, one seat; (c) Eastern European States, one seat; (d) Group of Latin American and Caribbean States, one seat; and (e) Western European and Other States, one seat.

56. However, as only the African States failed to submit a consensus candidate, the following candidates were subjected to elections by the ASP on the last day of the Conference:

- i) BULA-BULA, Sayeman (Democratic Republic of the Congo) - Male
- ii) KOITE Doumbia, Mama (Mali) - Female
- iii) BLAAK SOW, Mirjam (Uganda) – Female

57. Unfortunately, despite the repeated attempts by the African Group to resolve the impasse over the three (3) candidates prior to the elections, the Countries concerned maintained the positions and there was no other choice but to subject the candidates to a vote at the plenary.

58. At the end of second round of voting, the candidate from Mali, Mama Doumbia Koite was declared the winner and duly elected to the Board of Directors to fill the one (1) seat of the African region for a three (3) year term commencing **1 December 2015**.

E. The draft Action Plan on Arrest Strategies

59. 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.

60. 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 in 2014, the ASP decided to continue working towards a consolidated Action Plan.

61. The objective of draft Action Plan on Arrest Strategies is to ensure that appropriate strategies are undertaken and actions performed, so that individuals subject to the arrest warrants of the Court are arrested and surrendered.

62. However, in view of the objection by African States Parties particularly as it relates language being included in UN peacekeeping mandates to assist in the enforcement of ICC arrest warrants, taking into account that most peacekeeping missions are in Africa and most arrest warrants are issued against Africans, the 14th ASP decided only to take note of the draft Action Plan on Arrest Strategies and referred its recommendations to the Bureau for further consideration with a view to its adoption at the 15th ASP in 2016.

VI. INVESTIGATIONS, PROSECUTIONS AND PRELIMINARY EXAMINATIONS BY THE ICC⁵

63. Since its establishment, 23 cases in 9 situations have been brought before the ICC.

64. The Office of the Prosecutor is currently conducting preliminary examinations in a number of situations including Afghanistan, Colombia, Georgia, Guinea, Iraq, Nigeria, Palestine and Ukraine.

VII. OBSERVATIONS

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

- i) The African Group in The Hague lacks secretariat and institutional support thereby affecting its effectiveness in coordinating African positions within the ICC;
- ii) The candidatures within the ICC system, with the exception of the position of the Prosecutor and Bureau of the ASP are not submitted to the AU Ministerial Committee on Candidatures within the International System,

⁵ https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

thereby creating rancor within the African Group in The Hague and their inability of the African region to submit consensus candidates;

- iii) The Commission noted the role of the President of the ASP, H.E. Sidiki Kaba in ensuring that all proposals that were put forward by the African Group, Kenya and South Africa were accepted by the Bureau and included on the agenda of the 14th ASP.

I. RECOMMENDATIONS

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

- R1. *Reiterate the commitment of the African Union and its Member States to fight against impunity in accordance with the Constitutive Act;*
- R2. *Reiterate its previous Decisions adopted on ICC;*
- R3. *Reiterate its previous decisions for the deferral of the proceedings initiated by the ICC against the President of the Sudan and the Deputy President of Kenya in accordance with Article 16 of the Rome Statute which allows the UNSC to defer cases for one year;*
- R4. *Commend the Republic of South Africa for complying with the Decisions of the Assembly on non-cooperation with for the arrest and surrender of the President of the Sudan and decide that by receiving President Bashir, the Republic of South Africa was implementing various AU Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir and is consistent with its obligations under international law;*
- R5. *Express its deep concern regarding the wisdom of the continued prosecution of the case of Vice President Ruto;*
- R6. *Express its appreciation to the President of the Assembly of States Parties, H.E. Sidiki Kaba, that in spite of perceived resistance by some State Parties, the issues and concerns of the African Union and its member states were allowed to be articulated at the 14th ASP;*
- R7. *To refer the draft ICC Action Plan on Arrest Strategies to the Peace and Security Council for consideration and to make recommendations to the next AU Summit in June/July 2016;*
- R8. *There is an imperative need for all African States Parties to ensure that they adhere and articulate commonly agreed positions in line with their obligations under the constitutive Act of the African Union;*

- R9. *Adequate resources are provided to the Commission through the Office of the Legal Counsel to support the work of the 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 in pursuing all political, legal, and strategic avenues in addressing AU's concerns before the UN and the ICC;*
- R11. *The Group of African States Parties in New York and The Hague as well as the African Members of the Bureau of the Assembly of the States Parties to the Rome Statute of the ICC should follow-up on the implementation of various Decisions of the Assembly on ICC, in collaboration with the Commission and ensure that the African proposals and concerns are properly considered/addressed by the ASP and report to the Assembly through the Commission on actions taken;*
- R12. *Reiterates its call on all AU Member States to sign and ratify, as soon as possible, the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights adopted in Malabo (Equatorial Guinea) on 27 June 2014*
- R13. *Reiterate its decision on the need for all Member States to comply with the Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir of The Sudan pursuant to Article 23 (2) of the Constitutive Act and Article 98 of the Rome Statute of the ICC;*
- R14. *Decide that the AU Mission in Brussels should provide secretariat and institutional support to the African Group in The Hague in order to ensure effective coordination of its activities;*
- R15. *The Commission in collaboration with all stakeholders should follow-up on this matter with a view to ensuring that the African proposals and concerns are considered and addressed at the next ASP in 2016 and to report regularly to the Assembly through the Executive Council.*

2016

Progress report of the commission on the implementation of the decisions of the assembly of the African union on the international criminal court

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