

AFRICAN UNION

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UNIÃO AFRICANA

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Addis Ababa, ETHIOPIA P.O. Box 3243 Telephone: +251-115-517 700 Fax: +251-115517844  
Website: [www.au.int](http://www.au.int)

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Original: English

**RESTRICTED CIRCULATION**

*Draft 2*  
**WITHDRAWAL STRATEGY DOCUMENT**

**Version 12.01.2017**

## A. HISTORICAL AND POLITICAL CONTEXT

1. In the first decades of its formation, the International Criminal Court has been riddled with disagreement and struggles over its perceived legitimacy and institutional power. The thirty-four African states that ratified the Rome Statute in 1998 initially embraced the rule of law movement as an extension of their commitments to Africa's emancipatory future. The violence that unfolded in Africa in the 1980s and 1990s played an important role in compelling their moral conscience to act. It instigated feelings of indignity and anger that were tied to the inaction of the international community during the Rwandan genocide, the injustice of South African apartheid, and the results of the long anti-colonial struggles against European imperialism. With these realities in mind, the various leaders in these states initially saw the ICC as a beacon of emancipation—a solution for their continent's injustices.
2. However, from the cases of alleged African warlords to the indictments of African leaders, the predominance of African subjects of international criminal justice has created suspicion about prosecutorial justice. Growing numbers of African stakeholders have begun to see these patterns of only pursuing African cases being reflective of selectivity and inequality. These accusations of selectivity have led to progressively worsening relationships between the ICC and the AU.
3. Many arguments have been made regarding the systemic imbalance in international decision-making processes. The inherent politics of such processes result in unreliable application of the rule of law. In this regard, the decisions of the United Nations Security Council (UNSC) are made on the basis of the interests of its Permanent Members rather than the legal and justice requirements. Needless to say, these interests are not always in line with those of Africa, thereby leading to a perception of a double standard against African States. In this regard, questions about which states are under the ICC's jurisdiction and the processes of selectivity of case as well as the role of the United Nations Security Council (UNSC) and its referral and deferral mechanism under Article 16 of the Rome Statute raise questions about perceived fairness of the international justice system as a whole.
4. In consideration of the systematic disadvantage African nations face when it comes to the decision of the UNSC, the effect of being legally bounded by a decision of UNSC to a Statute that a country have not even ratified is not acceptable. The case of Sudan, with the indictment of President Omar Al Bashir, has illustrated this seeming inequality. As a result of the selectivity of African cases before the ICC at subsequent HOSG summits, Assembly decisions continued to call for solidarity among AU member states in their opposition to the proceedings launched against Al Bashir, and to call on the UNSC to defer the ICC's prosecutions against Al Bashir, Kenyatta, and Ruto under Article 16 of the Rome Statute.

## B. ESTABLISHMENT OF THE OPEN ENDED MINISTERIAL COMMITTEE

5. The Open Ended Committee of Ministers of Foreign Affairs on the International Criminal Court (*The Open Ended Ministerial Committee*)<sup>1</sup> was established pursuant to Decision Assembly/AU/Dec. 586 (XXV) adopted by the Assembly during its Twenty Fifth Ordinary Session held in Johannesburg, South Africa in June 2015 in order to develop strategies to implement the various decisions of the Assembly relating to the International Criminal Court (ICC) and in particular follow up the AU's request for the suspension of the proceedings against President Omar Al Bashir or withdrawal of the referral by the UNSC, termination or suspension of the proceedings against Deputy President William Samoei Ruto of Kenya and engage with relevant stakeholders until AU concerns and proposals relating to the ICC are addressed.

6. Furthermore, in accordance with decision Assembly/AU/Dec.590(XXVI) adopted by the Assembly adopted in January 2016, the Assembly requested the Open Ended Ministerial Committee to, among others, develop a comprehensive strategy including collective withdrawal from the ICC to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council.

## C. OBJECTIVE OF THE STRATEGY

7. The Policy Organs of the Union have been seized with issues relating to the ICC since 2009, when the Assembly called on the United Nations Security Council (UNSC) to defer the proceedings initiated against a sitting Head of State and Government. The relationship between the AU, its member states, the ICC, the UNSC has since evolved due to the manner in which the ICC is perceived to have exercised its mandate in relation to Africa.

8. It is in this regard that the AU Policy Organs have issued a number of decisions, the most recent of which the Assembly called on the Open ended Ministerial Committee to develop a withdrawal strategy to be considered by member states and particularly African States Parties to the Rome Statute, as a sovereign exercise. The intended outcome of the implementation of the various decisions of the AU Policy Organs is to:

- a) Ensure that international justice is conducted in a fair and transparent manner devoid of any perception of double standards;
- b) Institution of legal and administrative reforms of the ICC;
- c) Enhance the regionalization of international criminal law;
- d) Encourage the adoption of African Solutions for African problems;
- e) Preserve the dignity, sovereignty and integrity of Member States.

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<sup>1</sup> **COMPOSITION:** As at April 2016, the members of the Open ended Ministerial Committee are as follows:

Algeria, Angola, Burundi, Chad, Congo, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Equatorial Guinea, Kenya, Libya, Madagascar, Mali, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Sudan, Sudan, Somalia, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.

**The Bureau is as follows:** Ethiopia (Chair); Burundi (Central); Algeria (North); Nigeria (West); South Africa (South); and Uganda (East)

9. In the absence of achieving the above listed outcomes, this Withdrawal Strategy aims to provide member states with a holistic approach, analysis and implications of initiating the withdrawal provision under the Rome Statute in accordance with the constitutional provisions of individual African States Parties. In this regard, annexed to this strategy is a mapping of constitutional provisions of African States Parties as it relates to withdrawal from a treaty.

#### D. IMPLICATIONS OF WITHDRAWAL

10. State withdrawals from the Rome Statute follow the provisions of the Vienna Convention on the Law of Treaties, Article 42(2) which state that, *“The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty ...”* The proposed AU withdrawal from the Rome Statute can be implemented on a state by state basis by using Article 127 of the Statute. The article deals exclusively with the terms of withdrawal and hence affirms the sovereign right of a state to withdraw from the Rome Treaty for the ICC. As with any other treaty, the terms still bind a state to its existing obligations under the ICC. The withdrawal from the ICC by African member states can be taken under the recognition that it has to be executed by individual member states according to their constitutional provisions. As varied as the states are, so are the legal requirements needed to make the withdrawal happen. The political decision taken notwithstanding, those member states with ICC investigations or cases underway would still be liable to fulfil their obligations under the treaty in relation to those cases or investigations.

11. The next section details the terms of an Article 127 withdrawal and also highlights the terms for withdrawal under Article 121.

##### *Article 127 Withdrawal*

*1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.*

*2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.*

Article 121  
Amendments

*6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.*

12. The above two articles in the Rome Statute address the issue of withdrawal for state parties. While Article 127 deals with withdrawal by a state party in a broader context, Article 121 (6) deals with withdrawal in a narrow set of circumstances in relation to treaty amendments. The withdrawal question raised by African member states would fall on Article 127, which is open ended in its execution.

13. Article 127(1) of the ICC Statute provides that 'A State Party may, by written notification addressed to the Secretary General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.' Thus, a withdrawal evoked on the basis of Article 127 entails a waiting period of one year for the notification to take effect, unless a later date is specified. According to subsection (2), the obligations by state parties that commenced before the notification of withdrawal must be respected, even though a state party decides to withdraw and submits the notification of withdrawal. This includes matters that were instituted before the withdrawal became effective. The state would also be obligated to make payments on any accrued financial obligations. Furthermore, the duty to cooperate will not cease to apply, even after withdrawal for cases that started before the withdrawal. The obligation to cooperate with the court on cases that are under consideration by the court relates to all cases instituted by the ICC, even after a withdrawal notification has been submitted.

14. A withdrawal that is evoked on the basis of Article 121 (6), would have been initiated by a state which does not accept an amendment that has been adopted under Article 121(4) and may withdraw from the Statute at any time within one year after entry force of such amendment. This provision is an exception from the general right to withdraw, under Article 127(1), which takes effect only after one year of the notification. Withdrawals under Article 121(6) take effect immediately. In the current situation faced by African member states, this clause is not likely to be considered as there is no amendment that is a point of contention by African ASPs.

### ***A Possible Waiver of the One-Year Notification Period in Article 127(1)?***

15. Article 127(1) of the ICC Statute provides that 'A State Party may, by written notification addressed to the Secretary General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.' Thus, one year following the provision of notification of withdrawal, a country would cease to be a State Party to the ICC Statute and be free of obligations under the treaty, subject to the limitations set out in Article 127(2). Before turning to Article 127(2), it must be mentioned that the ICC Statute contains an exception to the one-year notice period, contained in Article 121(6), which reads:

*If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph [121(4)], any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.*

16. While Article 121(6) provides for the possibility of immediate withdrawal, waiving the one-year notification period requirement in Article 127(1), it applies to circumstances where an amendment has been accepted by a certain proportion of member states, allowing states who have not consented to the amendment to denounce the ICC Statute.

### ***Ongoing Obligations under Article 127(2)***

17. States Parties withdrawing from the ICC must abide not only by the one-year notification period, but also by the conditions for withdrawal set out in Article 127(2), which provides:

*A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any **financial obligations** which may have been accrued. Its withdrawal shall not affect any **cooperation with the Court in connection with criminal investigations and proceedings** in relation to which the withdrawing State had a duty to cooperate and were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way **the continued consideration of any matter which was already under consideration by the Court** prior to the date on which the withdrawal became effective.*

18. The first sentence of Article 127(2) 'sets out the general principle that obligations on the State that exist at the time of withdrawal remain in force, and are unaffected.' However, Article 127(2) continues by setting out three specific types of obligations:

- a. Financial obligations, which may have been accrued will consist of regular assessments imposed upon States Parties by the Assembly of States Parties, in accordance with article 115(a)';

- b. cooperation with the Court in connection with ongoing criminal investigations and proceedings; and
- c. Consideration by the Court of any matter which was already under consideration.

## E. COLLECTIVE WITHDRAWAL

19. Collective withdrawal 'by a smaller number of treaty parties may indicate an attempt to shift from an old equilibrium that benefits some states and disadvantages others to a new equilibrium with different distributional consequences.'<sup>2</sup> States can sometimes band together to challenge international legal rules they perceive as unfair and objugate international institutions that enforce those rules. The collectiveness of the action has the potential to 'radically reconfigure existing forms of international cooperation.'<sup>3</sup> Withdrawal from a treaty "can give a denouncing state additional voice, either by increasing its leverage to reshape the treaty to more accurately reflect its interests or those of its domestic constituencies, or by establishing a rival legal norm or institution together with other like-minded states.'<sup>4</sup>

20. However, the examples above support Helfer's conclusion that '[d]enunciation and withdrawal are ... fundamentally unilateral acts.'<sup>5</sup> And even where states have banded together to propose different legal alternatives to the dominant regimes, they have done so unilaterally by invoking the notice procedures established in the various treaties they were denouncing. Moreover, courts and other adjudicative bodies continued to hear cases and disputes, and holding denouncing states to their treaty obligations during the requisite notice periods – and sometimes even beyond. Finally, individual consequences of withdrawal are just as much political as they are legal.

21. Further research on the idea of collective withdrawal, a concept that has not yet been recognized by international law, is required in order to seek out additional guidance regarding the potential emergence of a new norm of customary international law.

22. However, in the past few months, various African states have pursued individual withdrawals from the ICC. The announcement on 18 October 2016 of Burundi's withdrawal, followed by South Africa's withdrawal on 25 October 2016 and the notice of withdrawal from The Gambia have all reflected treaty withdrawal action that is in keeping with the provisions outlined in the Rome Statute and in keeping with international law – though, there remain questions about some of the national procedures and their order (Such as for South Africa). All three states have cited various reasons for the decision to withdraw from the Rome Statute.

23. Burundi was the first state to formally announce that it will withdraw from the ICC with a decree from its parliament. The government began proceedings following the April 2016 opening of an ICC preliminary investigation of violence in Burundi.

24. Following the Burundi decision, South Africa declared its intentions to withdraw by publically announcing that the Rome Statute for the ICC's treaty obligations were inconsistent with customary international law, which offers diplomatic immunity to sitting heads of state. The formal letter of notification sent to the UN Secretary General outlined that "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,"<sup>2</sup>. In explaining their withdrawal they have further stated that they would be committed to fighting impunity, stating "The Republic of South Africa is committed to fight impunity and to bring those who commit atrocities and international crimes to justice and, as a founding member of the African Union, promotes international human rights and the peaceful resolution of conflicts on the African continent,.....in complex and multi- faceted peace negotiations and sensitive post-conflict situations, peace and justice must be viewed as complementary and not mutually exclusive"<sup>3</sup>.

25. The Gambia was the third country to communicate its intention to withdraw from the ICC. Gambia's announcement of withdrawal was made by its Minister of Information. The reason given for the withdrawal was centered on what was seen as the ICC's selectivity practices. As noted, the Minister announced that the ICC was being used for "the persecution of Africans and especially their leaders while ignoring crimes committed by the West....there are many Western countries, at least 30, that have committed heinous war crimes against independent sovereign states and their citizens since the creation of the ICC and not a single Western war criminal has been indicted,"<sup>4</sup>.

26. These three withdrawals aptly capture the legal, political and emotive fervor central to African state withdrawals underway. It is to be noted that Sierra Leone, Ivory Coast, Zambia, Nigeria, Malawi, Senegal, and Botswana were among the African states that countered the October 2016 withdrawal notifications by South Africa, The Gambia and Burundi by pledging continued support of the ICC.

## F. THE STRATEGY

27. At the January 2016 Summit (Assembly/AU/Dec.590 (XXVI), the lack of progress with the amendments of the Rome Statute led to the request for the withdrawal strategy. In this regard, the Open ended Ministerial Committee at one of its meetings proposed among others: i) need for continental and country level ownership of the international criminal justice through the strengthening national and regional judicial systems; ii) importance of engaging with the UN Security Council and clearly communicating that no referrals of particular situations on the African continent should be made without deference to

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<sup>2</sup> Helfer, *Exiting Treaties*, *supra* note at 1646.

<sup>3</sup> Helfer, *Terminating Treaties*, *supra* note at 645.

<sup>4</sup> Helfer, *Exiting Treaties*, *supra* note at 1588.

<sup>5</sup> *Ibid* at 1582.

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<sup>2</sup> 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

<sup>3</sup> *Ibid*.

<sup>4</sup> <http://www.aljazeera.com/news/2016/10/gambia-withdraws-international-criminal-court-161026041436188.html>



Assembly of the Union; and iii) need for a robust strategy to enhance the ratification of the Malabo Protocol expanding the jurisdiction of the African Court of Justice and Human and Peoples' Rights to include international crimes; and iv) inclusion of conditions and timelines for withdrawal.

28. Key to the strategy laid out by the Open-ended Ministerial Committee was the delivery of justice in a fair and equitable manner that allows for the regionalization of International Criminal Law to flourish in the continent. Echoing the mantra of African solution for African problems, this strategy proposes two (2) broad approaches: (i) Legal and Institutional Strategies; and (ii) Political Strategies/Engagements.

***i. Legal and Institutional Strategies***

***a) Amendments to the Rome Statute***

29. Proposed amendments to the Rome Statute have been submitted to the Working Group on Amendments by African State Parties, some of which were submitted on behalf of the African Union based on decisions of the Assembly and others by individual African States Parties. Nonetheless all these proposals form the basis for the preconditions highlighted in paragraph 23 above.

30. These proposals are:

| <b>Member State</b> | <b>Proposed amendments</b>  | <b>Explanation</b>  | <b>Status</b> |
|---------------------|---|---|---------------|
| South Africa        | <p><i>Article 16</i></p> <p>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 the 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.</p> <p><b>2) A State with jurisdiction over a situation before the Court may request the UNSC</b></p> | <p>African States Parties to the Rome Statute held a meeting from 3-6 November 2009 in Addis Abba chaired by South Africa, at which it was decided to propose an amendment to the Rome Statute in respect of Article 16 of the Statute.</p> <p>The reason for the proposal is to address a situation where the UNSC is unable to decide on a deferral request, such be transferred to the UNGA for a decision.</p> <p>This was evidenced in the refusal of the UNSC to address or respond to the deferral request of the AU in relation to case against President of the Sudan.</p> | Pending       |

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|       | <p>to defer the matter before the Court as provided for in (1) above.</p> <p>3) 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 paragraph 1 consistent with Resolution 377 (v) of the UN General Assembly.</p>   |  |         |
| Kenya | <p><i>Preamble - Complementarity</i></p> <p><b>"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.</b></p>   | <p>The Preamble of the Rome Statute provides "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,"</p> <p>In accordance with African Union resolutions, the amendment is proposed to allow recognition of regional judicial mechanisms</p>   | Pending |
|       | <p><i>Article 63 - Trial in the Presence of the accused</i></p> <p><b>"Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology</b></p> | <p>Under the Rome Statute, article 63(2) envisages a trial in absence of the Accused in exceptional circumstances. The Rome Statute does not define the term exceptional circumstances and neither are there case laws to guide the Court on the same.</p> <p>Article 63(2) further provides other caveats in granting such trials in circumstances where other reasonable alternatives have provided to be inadequate and for a strictly required duration.</p> |         |

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|  | <p>or through representation of Counsel.</p> <p>(2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.</p> <p>(3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial.”</p> |   |                |
|  | <p><i>Article 27 - Irrelevance of official capacity</i></p> <p>“[...] Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.”</p>   | <p>While being a Head of State or Government such will not exempt them from criminal liability for international crimes allegedly perpetrated, prosecution should not be instituted until the Head of State or Government or anyone entitled to act as such, has left office – in accordance with domestic and customary international law.</p> | <p>Pending</p> |
|  | <p><i>Article 70 - Offences against Administration of Justice</i></p> <p>“The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person:”</p>  | <p>This particular article presumes that such offences save for 70(1) (f) can be committed only against the Court. This article should be amended to include offences by the Court Officials so that it's clear that either party to the proceedings can approach the Court when 2 such offences are committed.</p>                             |                |
|  | <p><i>Article 112 - Implementation of</i></p>   | <p>Article 112 (4) Assembly of States</p>   |                |

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|  | <p><i>IOM</i></p> <p><b>The Independent Oversight Mechanism (IOM) be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court.</b></p> | <p>Parties shall establish such subsidiary bodies as may be necessary including Independent Oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy. This includes the conduct of officers/procedure/code of ethics in the office of the prosecutor. The Office of the Prosecutor has historically opposed the scope of authority of the IOM. Under Article 42 (1) and (2) the Prosecutor has power to act independently as a separate organ of the Court with full authority over the management and administration of the office. There is a conflict of powers between the OTP and the IOM that is continuously present in the ASP.</p> |  |
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**b) Reform of the UNSC**

31. The Rome Statute, under Article 13 (2), states that, "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." The power vested in the UNSC is controversial as it confers power to countries to refer cases to the prosecutor that have not submitted to the jurisdiction of the Rome statute themselves.

32. The problem is further complicated when the referral is made for a sitting Head of State. This was the case in 2005, when under Resolution 1593 the UN Security Council referred the situation in Darfur to the Prosecutor of the ICC. The referral of President Omar Al-Bashir of Sudan, was rejected by the Khartoum government and through successive AU Assembly decisions, the AU had requested a deferral of the case.<sup>6</sup> However, the continuous refusal of the UNSC to defer the case involving President Al-Bashir has prompted the South African amendment for the United Nations General Assembly to entertain the request of deferral if the UNSC does not respond to a deferral request within six months of being notified of it, as per Resolution 377 (V), Para. 1 of 1950. The request not only asks for a reshaping of how the referral system works, but it calls for the UN system to play a role in addressing a structurally unequal problem.

<sup>6</sup> Assembly/AU/Dec.221 (XII), Para. 3; Assembly/AU/Dec.270 (XIV) Para. 10;

**c) Enhance African representation in the ICC in order to ensure that the continent contributes effectively to the evolution of the Court's jurisprudence**

33. Africa being the largest bloc within the ICC, it is incumbent that number of staff represented within the different Organs, Departments and Offices of the Court should proportionally come from the continent. As part of the engagements of the Open ended Ministerial Committee and even the African States Parties, this point should be clearly articulated in all relevant platforms.

**d) Strengthening of national legal and judicial mechanisms**

34. In order to limit the intervention of the ICC, there is need to strengthen the legal regulatory frameworks and judicial mechanisms in AU member states to try international crimes. These may include developing continental, regional and national strategies such as model national laws, capacity building programmes (i.e. training, experience exchange programmes, etc.).

**e) Ratification of the Protocol on the Amendments on the Statute of the African Court of Justice and Human Rights**

35. In addition to strengthening national and regional mechanisms, member states should endeavor to ratify and domesticate the **Protocol on the Amendments on the Statute of the African Court of Justice and Human Rights** in order to enhance principle of complementarity in order to reduce the deference to the ICC, which furthers the mantra of African solution to African problems.

36. The strategy may include identification of regional champions that will work toward driving ratification by member states<sup>7</sup>. As of January 2017, the Malabo Protocol has been signed by Nine (9) member states, namely: Kenya, Benin, Chad, Congo, Ghana, Guinea-Bissau, Guinea, Sierra Leone, Sao Tome & Principe. The expansion of the jurisdiction of the court as outlined in the Malabo Protocol would allow the crimes listed in Rome Statute to be prosecuted on the African continent. This also aligns with the amendment to the Rome Statute proposed by Kenya, which aims to have regional judicial mechanisms to exercise complementary mandates to the ICC.

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<sup>7</sup> Conclusions of the Meeting of the Open Ended Committee of Ministers of Foreign Affairs on the International Criminal Court at the Level of Permanent Representatives

**ii. Political Approach/Engagements**

37. Running in parallel to the Legal and institutional approach, the AU through the Open Ended Ministerial Committee and other relevant structures such as African Groups, African Members of the UNSC should engage with stakeholders relevant to the ICC processes.

38. Some of the key stakeholders and the issues to be addressed to them may include:

| <b>S/N</b> | <b>Entity</b>                   | <b>Issues</b>   | <b>Key Expected Outcome</b>   |
|------------|---------------------------------|---|---|
| 1.         | United Nations Security Council | Suspension/deferral or withdrawal of proceedings against President Omar Al-Bashir of the Sudan  | Withdrawal of the Referral of the situation in the Sudan by the UNSC  |
|            |                                 | Highlight the referral of a sitting Head of State whose country is not Party to the Rome Statute and the unresolved international discourse as it relates to immunities |   |
|            |                                 | In future, no referral of a situation on the continent should be made without deference to Assembly of the Union  |   |
|            |                                 | Non-inclusion of execution of ICC arrest warrants in UN mandated Peacekeeping missions  |   |
|            |                                 | The need to acknowledge and respond to issues from continental and regional mechanisms  |   |
|            |                                 | The need to take into cognisance the interrelatedness of peace and justice and the importance of sequencing   |   |
| 2.         | Assembly of State Parties       | All pending proposed amendments to the Rome Statute and the Rules of Procedure and Evidence (i.e. Rule 165 of RPE)  | Conditions for African State Parties not to withdraw should be tied to the reforms proposed by Africa. <i>Timeline for reform should be clearly agreed upon</i> |
|            |                                 | The need to take into cognisance the interrelatedness of peace  |   |

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|    |   | and justice and the importance of sequencing  |  |
|    |   | Reduction of the powers of the Prosecutor including other reform initiatives  |  |
|    |   | Non-inclusion of execution of ICC arrest warrants in UN mandated Peacekeeping missions  |  |
| 3. | P-5 in the UNSC                             | The need to acknowledge and respond to issues from continental and regional mechanisms  | To obtain assurances that none of the P5 will veto a resolution to support the UAU request for deferral of proceedings against the President of the Sudan  |
|    |   | To get their support as members of the P-5 but also influential members of the International community in order to gain additional support from the members of the UNSC |  |
| 4. | China and Russia (separate from the P-5)    | As countries that are normally supportive, to influence the P5 and the UNSC as whole in support of AU/African positions   | As above   |
| 5. | African Groups (new York and The Hague)     | On all issues   | To ensure African States speak with one voice in New York and The Hague<br>To facilitate endorsement of proposed amendments to the Rome Statute by the Working Group on Amendments based in New York and subsequently the ASP. |
| 6. | President of the Assembly of States Parties | On all issues   | Advance AU positions before the ASP  |
| 7. | Prosecutor of the ICC                       | On all issues   | Terminate the proceedings against the President of the Sudan   |

## **Annexures**

1. Analysis of African States Parties' Constitutional Provisions relating to ratification of and withdrawal from Treaties
2. Background information on the ICC and the Open ended Committee