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STATEMENT

BY

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SOLICITOR GENERAL**

DURING THE

**10TH SESSION OF THE
ASSEMBLY OF STATES PARTIES
TO THE ROME STATUTE**

INTERNATIONAL CRIMINAL COURT

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Madam President,

Let me begin by congratulating you on your election to the high responsibility of President of the Assembly of States Parties. Your tenure promises to be an important one for the ICC and its organs, more specifically the Judicial Divisions and the Office of the Prosecutor. Kenya hopes to continue to work with you and your office in the same spirit of purposeful enterprise and pursuit of common vision, as it has with your predecessors in the past. In this regard, Madam President, Kenya is aware that in taking up your new responsibilities, the platform upon which you stand owes much to the commitment and exemplary work of past Presidents. My delegation therefore, would like to pay special tribute to your immediate predecessor, Ambassador Christian Wenaweser. Ambassador Wenaweser has been an astute, engaged, prudent, determined and inclusive President. We held him in high regard, because we believed the qualities he possessed were important for the leadership of our Assembly. We thank Ambassador Wenaweser for his good work and stewardship during his tenure and wish him well in his future endeavors.

Madam President, it is also of great significance that the African Union endorsed candidate, Ms Fatou Bensouda, has been elected as the new Prosecutor. Kenya welcomes her elevation to these new responsibilities. Madam Bensouda has proven her worth as deputy prosecutor and our expectation is, as Chief Prosecutor, she will bring her skill, political astuteness, professional acumen and purposeful determination to bear on the challenges of her office in a manner that not only achieves rapid and fair prosecutorial outcomes but also justice for both the victims and the suspects. This delegation believes that Madam Bensouda takes on an assignment that is at the sharp end of the international effort to promote human rights while fighting the scourge of impunity. It is truly on her shoulders that much of the credibility and work of further legitimizing the ICC will fall. But, Madam President, this delegation is concerned that too much of the expectations around ICC credibility and legitimacy are tied to the Office of the Prosecutor. Kenya believes that the other organs of the ICC including the Presidency of the Court, the Judicial Divisions and the Registrar have to carry an equitable burden and responsibility of legitimizing and giving popular credibility to the ICC. This onerous and important task cannot be left to the OTP alone.

Madam President,

Like you, Madam Bensouda will have a legacy and reputation to build on. During the term of her predecessor, the OTP has staked out its role and responsibilities. In doing so, it has turned out to be the lightning rod of the ICC. It has taken on a determined and strong character. In the person of Mr. Ocampo, it found a resolute prosecutor, ready and willing to face up to the challenge of building an institution of international justice and repute while weathering the storm of controversy and unpredictability that comes with such a responsibility. As is well known, Mr. Ocampo has been a significant part of Kenya's history over the past 4 years. And while the jury is still out, both figuratively and literally on those most momentous of experiences for Kenyans, we nonetheless wish Mr. Ocampo well in his future endeavors and thank him for his services to the ICC and the international community in general.

Madam President,

This delegation has been a member of the Bureau of the Assembly of States Parties for the past 3 years. Kenya is proud of its contribution and work in the Bureau. We remained active, engaged, vocal, positively supportive as well as constructively critical. Kenya took its role, membership and responsibility in the Bureau seriously. As we come to the end of our term in the Bureau and in light of the momentous nature of this 10th Session of Assembly of States Parties, Kenya would like to share some lessons it has learnt and express some views that have emerged while serving on the Bureau as well as its experience as a State Party and a situation country:

First: On Complementarity:

- i) Kenya attaches great importance to the role of the International Criminal Court in serving the ends of justice and combating impunity. However, there is need to recognize and respect the primary responsibility and function of national jurisdictions in all cases and uphold the position that extra-territorial jurisdiction should only be invoked where national jurisdictions meet the threshold of unwillingness and inability to prosecute. We should proceed cautiously in the application of the principle of complementarity.

Second: On the Article 13, 15ter and 16 of the Statute

- i) Kenya believes in the rule of law at the national and international level and considers the Rome Statute an instrument for further entrenching the rule of law and fighting impunity. We therefore encourage States, who are not parties to the Statute and particularly those within the Security Council, who are entrusted with the role of making referrals under Article 13 and 15 ter and deferrals under Article 16 of the Statute, to become States Parties so that they are also bound by the same principles over which they wish to adjudicate and pronounce themselves within the UN Security Council. The moral imperative of this ought to be self-evident and the jurisprudential contradiction of not signing up to the Statute also ought to be clear. In fighting and promoting the rule of law at the international level, we should not substitute impunity at national level with impunity and high handedness at the international level by selective and prejudicial application of the principles and Articles of the Rome Statute, especially by non-signatory actors.

Third: On the ICC relations with Africa

7 of Africa's 54 nations are "situation countries". This represents a small minority of African States of all the work of the ICC to date. The circumstantial complexities in these States that one might associate with the involvement of ICC are not exclusive to these seven nations, not even to Africa. But these are conditions that this Assembly and the ICC as a whole should never lose sight of, if international justice is to be promoted and maintained and the ICC is to function justly and fairly. Kenya's experience

with the ICC and the OTP in particular, suggests the following; (1) That the mode of engagement of the ICC/OTP with situations in non-functional democracies should not and must not be equated with engagement with functional democracies, albeit with weak and evolving political and judicial institutions. Doing so is a grave error. (2) That in the face of competitive competition for power in a complex political scenario, the sourcing, collection, analysis and use of evidence should not only be rigorous but represent the full spectrum of political, non-governmental and ethnic forces at play in the political theater. Furthermore, State evidence should and, indeed, must receive equal credence to all other evidence brought to bear on the prosecution as well as the adjudication.

Kenya's example is a small but important part of the development of the work of the ICC. Other situations may provide starker choices and challenges. But in all cases, blaming Africa and Africans for having brought upon themselves the wrath of the ICC, as it were, is, in the face of the historical complexity of development and governance in most African countries, a classic example of the mentality of "blaming the victim". We should all resist the temptation to do so.

What Africa needs is a forthright, transparent, inclusive, unbiased, non-prejudicial and level headed engagement with the ICC. Not pity or reprimand in equal measure depending on the situation, but a balance between application of justice, fair treatment of the suspects while pursuing quick and effective retribution for victims. The ICC will have to come good on their relationship with Africa; because inevitably Africa is destined to get strong and better institutions and Africa will rise. So it is not a question of whether Africa will survive the ICC, but rather whether the ICC will survive Africa.

Fourth: On the Financial situation of the Court

The financial matters of the ICC are of fundamental importance. Not only do they have a bearing on the daily operations of the Court but also on the long-term success of the Court. A holistic dispensation of justice within the ICC requires that the Court be adequately funded to execute its mandate effectively including areas such as investigations, legal aid and staff remuneration and welfare. For this reason, the resources availed for the work of the ICC should be commensurate to the demands placed on it and this calls on us all to take into account the provisions of Article 115 of the Rome Statute.

Kenya wishes the Court well and remains a staunch supporter of the Court. Kenya wants, indeed, needs the ICC to succeed. Kenya believes that the Court has staked out an important role for itself in helping the world in the

fight against impunity for perpetrators of the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

We are fully paid up on our assessed contributions and continue to cooperate and engage with the court to prove it.

I thank you Madam President.