

STATEMENT

BY

H.E MR. LAWRENCE LENAYAPA, CBS

**AMBASSADOR OF THE REPUBLIC OF KENYA TO THE KINGDOM
OF THE NETHERLANDS**

**DURING THE GENERAL DEBATE OF THE 18TH SESSION
OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE
DECEMBER 2-7, 2019, THE HAGUE, THE NETHERLANDS**

Mr. President,

Excellencies,

Ladies and Gentlemen,

It is an honor to address this gathering of the Assembly of State Parties to the Rome Statute. Let me begin by appreciating the stewardship of the President of the Assembly and all who have worked tirelessly to make this session possible. It is the hope of the delegation of Kenya that the deliberations of this Assembly will catalyze renewal and concerted commitment to the true essence of international criminal justice by all States Parties and provide a rallying call to end impunity not just in Africa, as is often spotlighted, but in all theatres where widespread and senseless killings are intentionally perpetrated.

Mr. President,

Kenya has taken note of the Prosecutor's Statement on *External Expert Review & Lessons Drawn From the Kenya Situation*. The report has confirmed the views widely held by Kenya that there was a problem with identification and collection of evidence, identification of suspects, manipulation of witnesses and improper influence by intermediaries. We appreciate that the reviewers raised concerns with the operations of the Jurisdiction, Complementarity & Cooperation Division (JCCD) in the Kenyan cases especially in relation to the situational analysis determination that crimes within this court's jurisdiction had been perpetrated in the country in 2007/8. Based on these findings it would appear that the grounds under which Kenya was declared a situation country were weak and lacked substance. Kenya is deeply concerned with the conclusion that the Office of the Prosecutor adopted a target based as opposed to an evidence

driven approach in bringing charges against the accused. Given the observations made by the external experts, in the spirit of transparency and full disclosure, we call upon the Prosecutor to release the report in its entirety so that State Parties may interrogate the same as part of the review of the Court to be undertaken next year.

Mr. President,

Kenya welcomes the steps taken by the current Prosecutor to address allegations of misconduct against staff of the Office of the Prosecutor highlighted by European media houses and appreciates the proposals to consider expanding the powers of the Independent Oversight Mechanism (IOM) to enable it investigate the conduct of former elected officials and staff. However, we reiterate our previous call upon the Office of the Prosecutor to refer these allegations to an external impartial and neutral entity for an open and transparent audit.

Mr. President,

Kenya is not misinformed in asserting that the integrity of the the Rome system of international criminal law will rise or fall depending on the manner in which the exercise of prosecutorial power is discharged. Kenya calls upon the Committee on Election of the Prosecutor to be transparent and scrupulous in facilitating the nomination and election of the new holder of the office of the Prosecutor. It behoves the membership of this committee to therefore disregard any non-material consideration in making its recommendations on the choice of Prosecutor. In particular, any external pressure and influence from any quarters bearing on the Committee's decision must be disregarded.

Mr. President,

Cooperation with the Court is a central obligation of every state party to the Statute. Kenya has discharged this obligation consistently during the pendency of situations

touching on the country. It has *inter alia* granted unfettered access into Kenya and within its territory to the former and current Prosecutor of the ICC, staff members of their Office, Registry Officials, Defense Counsel, Victims' Counsel and their respective investigators. In addition, the Government allowed the establishment of an ICC field Office to enhance cooperation and assistance regarding the Kenyan situation. Service of process including witness summons have been executed without let or hindrance.

Kenyan courts in exercise of supervisory role has made judicial determinations with regard to arrest and surrender of Kenyan citizens accused of offences under Article 70 of the Statute. As a consequence, Kenya is of the view that article 70 proceedings provide an opportunity for positive complementarity where matters before the court can be referred to the state party for trial if the state can demonstrate willingness and ability to prosecute. Kenya is in an exceptionally good position to meet its positive complementarity obligations that may arise in this regard.

Further, Kenya aligns itself with the African Union position that a Head of State enjoys immunity from prosecution *rationae personae* based on customary international law. This in Kenya's view is the clear intent of Article 98 of the Statute. This immunity, in Kenya's view, is not defeated merely by the provisions of Article 27(2) of the Statute on the irrelevance of official position for purposes of whether the Court can exercise jurisdiction over a situation. Kenya therefore regrets that the Appeals Chambers recently found that the Hashemite Kingdom of Jordan had failed to comply with its obligations under the Statute by failing to arrest and surrender Mr. Al-Bashir to the Court while he was on Jordanian territory. We are concerned that this view may serve to diminish democratic developments on the continent as it runs counter to the reality of state stability on the African continent. This approach will further entrench the widely held perception that the court lacks pragmatic appreciation of context. We are however gratified that the Appeals chamber vacated the trial chamber's decision to refer the non-cooperation to the ASP and UN Security Council. This approach gives an opportunity for continuous dialogue between the Court and the state party that could lead to common

understanding and advance implementation and respect of the Statute in the long term.

Mr. President,

Kenya has noted the concern raised by the Committee on Budget and Finance (CBF) that a number of budget lines in particular non-staff costs in the 2020 proposed budget are exactly the same for each budget line item as they were in 2019. Kenya is also concerned about repeated requests by the Court for allocation of resources to investigate situations that have been pending for more than 10 years without any indication of the progress made. We call upon the Court to prioritize its caseload and ensure prudent allocation and use of resources.

Mr. President,

Finally, Kenya welcomes the proposed review of the Court and efforts on strengthening the Rome Statute system by State Parties and Independent experts. Progressive institutions serving robust mandates such as the international criminal justice enterprise must regularly upgrade its business practices. It will be important for this process to incorporate especially the use of technology to improve efficiency and address cost constraints facing the operations of the Court. Kenya looks forward to contributing to the discussions that will better the Court's operational frameworks.

Mr. President,

Seldom does a treaty build within its structure a framework for regular normative and institutional improvement as does the Rome Statute of the International Criminal Court. This ASP is envisioned by the Statute to be the prime mover for the regular realignment of the Court's operations with the objects and aspirations of its founders. This 18th ASP

meeting on this wintry December week at this historic Dutch city must rise to its noble calling.

THANK YOU, MERCI BEAUCOUP, MONSIEUR LE PRESIDENT