KENYA'S STATEMENT ON THE SUPPLIMENTARY AGENDA BY THE CABINET SECRETARY, MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE, ON 20th NOVEMBER, 2015 AT THE 14TH SESSION OF THE ASSEMBLY OF STATES PARTIES, THE HAGUE, NETHERLANDS.

POLITICAL STATEMENT AND INTRODUCTION

I WOULD LIKE TO THANK YOU MR PRESIDENT, THE COORDINATOR OF OUR AFRICAN GROUP AND THE BUREAU FOR GRANTING THE REQUEST OF THE AFRICAN GROUP TO ALLOCATE TIME FOR MUCH NEEDED DEBATE ON THE THREE ITEMS SUBMITTED BY KENYA AND SOUTH AFRICA. WE BELIEVE THAT WITH THE GOOD WILL OF THE ASSEMBLY WE WILL MAKE PROGRESS AND PROVIDE COMFORT TO THE DEMANDEURS OF THE REQUESTS BEFORE THE ASSEMBLY.

For the last six years we have been cooperating with this Assembly, the ICC and all its organs. As a result we got to know the court up close and personal. We did not shy away from our obligations and our responsibility. I do not know any other country that can make that claim under the same circumstances.

We did that as Africans, even as we dealt with other national, regional and global priorities, from governance, national cohesion and victim resettlement programs, to poverty alleviation and the improvement and perfection of our 52 years young democracy to the global- form terrorism to piracy to peace, stability and refugee challenges or maybe we should just call them illegal migrants.

Mr. President, of all those the most challenging issue that we have been dealing with remains the ICC. Why? Because the goal posts are unreliable and keep shifting, because what in other circumstances we have taken for granted .i.e. Negotiating in good faith and trust and confidence in the outcome of painstaking negotiations is absent and because we never seem to make concrete progress we can depend on. We make one small step forward and five steps backwards. It seems to us that our obligations under the Rome statute have consumed every other obligation that we have. That Friends, is not sustainable.

At the very least we expect that agreements made in good faith will be upheld against any and all odds. At best we must be sensitive to the environment around us. We must recognize and accept that nothing not even the ICC exists in a vacuum. That it exists within a context and a reality. We must be alive to the source of the legitimacy of our institutions. We ignore that at our peril.

Mr. President, the African Union prepares comprehensive reports of all meetings that it participates in. *Fortunately*, in 2013 the AUC was represented by its Legal Counsel. The report of 2014 of the AU is in the public domain and anyone who really cares about what happened and the understanding that was reached should look at it. At that time we had our doubts, but, the clear understanding on

non-retroactivity of the amendments to rule 68 and our desire to trust our partners convinced us to go along with it.

Kenya signed, ratified and domesticated the Rome Statute because we believed in what the statute stood for and we wanted to be associated with it. Our hope had been that as fully fledged members we would be part of the solution and make our contribution. That, Ladies and Gentlemen, is still our intention if we are allowed and not treated as outlaws. The space we have here has been shrinking and many of us from Africa are beginning to feel unwanted and frankly a nuisance.

It is becoming difficult to feel comfortable and it is as if the Assembly would be better off without us. That is what we are struggling with. Our question to you today is, "**Are we a heavy load that you wish to get rid of?"** In engaging with the court we have had to persuade many of the virtue of engaging and have had to fight off criticism for having done so. Were we right to have done so? Please be as clear as we have been...Ladies and Gentlemen, ARE WE ADDING VALUE OR TAKING UP YOUR VALUABLE TIME? That is a question that is getting louder.

One which we will have to deal with at the end of January when we report back to the African Union Summit.

Mr. President, for the avoidance of doubt I wish to recall what we are asking of this Assembly.

The first request is a reaffirmation of the legislative intent of the amendments to Rule 68 as agreed in 2013 and as reflected in our record at the AU, that amendments to Rule 68 cannot be applied retroactively to situations that commenced before 27th November 2013. Our Kenyan cases commenced long before.

We have heard concerns about this request being *sub judice* or interfering with the independence of the court. Neither is underpinned by legal practice. In fact, it is of concern to us, that the unlimited legislative powers of the ASP should be constrained by organs of an institution that is a creation of a treaty negotiated by the very states that form the ASP.

Furthermore there is strong precedent that underscores the ASP's broad law-making and clarification mandate and inapplicability of the "sub *judice*" principle. In 2013, when rule 134 *quarter* was discussed and introduced by the ASP, there were active pending proceedings before Trial Chamber V (B) on the issue of attendance at proceedings by accused persons which is the same matter that rule 134 *quarter*, then under discussion, sought to address (See Decision on Prosecution Motion for Reconsideration of the Decision Excusing Mr. Kenyatta from Continuous Presence at Trial:

26th November 2013). It is clear that on this matter, both the ASP's legislative, and the Court's judicial processes, happened simultaneously and yet no claims of *sub judice* or interference with the Court's independence was made. Indeed, the two concurrent and parallel processes - judicial and legislative- concluded only a day apart; the former on 26th November 2013 and the latter on 27th November 2013.

There is also powerful persuasive opinion from the court itself on this very issue.

Judge Eboe Osuji, while addressing the Prosecutor's challenge to the ASP's legislative powers in a related matter has stated, in part:

"Examples abound in domestic legislative practice where gaps in Statute law were subsequently filled by the legislature following subsequent events that exposed the gaps. Judges will do their best in good faith to fill gaps through reasonable construction but it remains the prerogative of the legislature to fill any gaps they see a need to fill regardless of the interpretations offered by judges. When gaps are discovered in the current text of a treaty, necessary accommodation must be made to fill those gaps and notable methods of achieving that end include subsequent agreements...."

"To deny the ASP the facility of using the rules to indicate legislative intent underlying the given provisions of the Statute such as in the present case is to deny them flexibility to resolve with relative speed impasses in the application of the Statute. The attitude does not stand on any judicial precedent in International law. It should not become one through a decision of this Chamber".

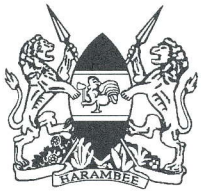
It is somewhat surprising and indeed ironical, therefore, that the very organs of the Court that successfully drove the agenda for amendment of the rule and have subsequently applied it in a manner that evidently contradicts the ASP's legislative intent, now turn around and seek, in a letter dated 13 November 2013, to shelter under the *sub-judice* principle, to effectively gag the ASP from clarifying that intent.

Mr. President, the second request is to establish an Ad Hoc mechanism of Independent Jurist to audit the Prosecutor's witness identification and recruitment processes in the Kenya cases. *This is in light of emerging credible concerns on witness procurement highlighted in the petition of 190 Kenyan legislators, as well as the concerns expressed.*

***Mr. President**, Please allow me now to request our Solicitor-General, Mr. Njee Muturi to shed light on our requests.*

Thank you Mr. President.

KENYA'S STATEMENT ON THE SUPPLIMENTARY AGENDA BY AMBASSADOR RAYCHELLE OMAMO, SC, CABINET SECRETARY FOR DEFENCE, DURING THE 14TH SESSION OF THE ASSEMBLY OF STATES PARTIES – 20TH NOVEMBER 2015



STATEMENT OF INTERNATIONAL PRINCIPLES ON JURISPRUDENCE

Mr. Presidents
Honorable Delegates,

1. The supplementary item submitted by our delegation is intrinsically tied to the independence of the court which is a critical component of the rule of law and the fair administration of justice. We believe within the context of the Rome Statute, the independence of the court i.e ICC also involves the concepts of impartiality; accountability and the respect of other lawful institutions of governance such as the ASP. [1]

2. The promise of the rule of law is a fair and transparent trial. The law does not pretend to guarantee a particular result or outcome. It is concerned with fair process. The necessity of a fair trial for any accused person or any other party before the ICC is an irreducible value which is utterly foundational to the existence and integrity of the court. Every time this supreme principle is upheld, the integrity and stature of the court as a powerful exponent of justice on the world stage is reaffirmed and underscored. Any time that value proposition is derogated from or perceived to have been ignored, no matter how minimal this departure is, global justice is placed in serious jeopardy. Eternal vigilance is required of the ASP to remind the court of its obligation to use its independence to advance the rule law.

3. It is for this reason that our delegation is convinced that the capricious application of the amended rule 68 in the Kenyan cases is a direct affront to the fair trial safe guards and undermines the authority and direction of the ASP in the rule making process. Francis A. Hayek, one of the foremost legal thinkers of our time, has defined rule of law to mean "that a government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge". It is this reasoning that gave rise to the principle of non-retroactivity which the Rome Statute sanctifies. In seeking the non-retroactive application of the amended rule 68 therefore, Kenya upholds the fidelity of certitude which allows a defendant the facility to prepare their defense with alacrity. Worse, an unfair process rather than bring closure to the victim, re-traumatizes and keeps the victim in shackles and fails justice.

4. The ASP is the Supreme organ of the Rome Statute as it exercises legislative oversight over the court and is thus an organ to which the court is accountable. In discharging this function, the ASP's should act not in deference to any other organ of the Court but its fidelity should be to the Statute.

5. It is well recognized that world peace rests upon a narrow platform of right laws, right attitudes and right execution. For it is now well known that justice anywhere is justice everywhere while injustice anywhere is injustice everywhere. In our responsibility as the custodians of the court and the guardians of international criminal justice, we have the

opportunity to significantly affect those who come before us with proper values. These values must be enduring and must be predicated upon just principles and practices in order for our pursuit of universality to be actualized. Unfortunately, an ICC that lacks credibility also lacks the capacity of pollinating other domestic jurisdictions with the integrity and purity of its fair trial procedures. In so acting, the ICC denies the world a truly enduring model of international justice. It is absolutely essential therefore that the ad hoc mechanism proposed by Kenya to audit witness identification and recruitment be adopted.

6. Kenya cannot be accused of undermining the ICC. The participation of Kenya and the cooperation of its leaders at the highest levels of authority, underscores our respect for international criminal justice and the rule of law. The actions of our leaders represent our significant contribution to the legitimacy and respect that now reposes in our Court. We seek to build and strengthen the court. We do not wish to escape from justice. We desire to be heard on matters of critical importance to the future legitimacy of the ICC and this Assembly. No debate on principle can ever be considered *sub judice*. We raise our voices here, in support of what is right. We speak because we know that silence is the maid servant of impunity. We express ourselves as friends of the rule of law because we know that silence breaks the backs of institutions.

---

[1] N. R. Madhava Menan 20/11/2015