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STATEMENT BY

Rev. 1

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THE REPUBLIC OF KENYA

AGENDA ITEM 73

REPORT OF THE INTERNATIONAL CRIMINAL COURT

71<sup>ST</sup> SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Monday, October 31, 2016

*Please check against delivery*

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**Sayid Rais**, Kenya takes this opportunity to recognise **Judge Sylvia Fernandez de Gurmendi**, President of the International Criminal Court.

Over the years we have continued to encourage the ICC to expand activities, to enhance its work, to improve its efficiencies and improve its footprint so that no country would have a privileged relationship within it.

Kenya continues to engage robustly; encourage and provide guidance to the Court to try and keep it faithful to our collective objective, while keeping it aligned to the Rome Statute.

As we carefully look at the report of the International Criminal Court that is before us today, we cannot help, but renew and underscore our deep disappointment.

### **Senor Presidente**

This Session's report is slightly more encouraging than that of the last Session. However, we continue to express our deep regret that in a world that has been consumed by violent devastating wars and violent clashes and where hundreds of thousands, if not millions of people are adversely affected; this dismal output of tangible results is disheartening and simply confounding.

Clearly something is deeply wrong at the ICC, With only one new accession during the reporting period, it is clear that this Court, only continues to enjoy membership and support from a small segment of countries in the world. We take note, with very keen interest, of the recent developments within the membership and shall continue to actively monitor these unfolding events.

Like no other member State, Kenya has actively and intimately interacted with the Court over the past few years and can unequivocally state that something radical and urgent must be done if this Court is to stand any chance of long-term survival as a viable and credible international institution.

A cursory reading of this annual report may lead one to believe that indeed some success is at hand. However Kenya wishes to highlight a few pertinent issues for we know and believe that the current application of the Rome Statute is counterproductive and antagonistic, to its founding ideals.

### **Sayid Rais**

When we, the member States, established the International Criminal Court, we were convinced that we were setting up a Court with higher standards of practices and procedures than those found in our national jurisdictions. However, today we find ourselves saddled with a Court that has lower thresholds and standards than those found in our national courts. This is simply unacceptable.

To illustrate this, in paragraphs 49 and 50, *the report mentions ongoing investigations into the situation in Kenya. The integrity of the investigations in the Kenyan cases has been called to question owing to the*

*alarming, but credible revelations that the witnesses were procured with promises of reward. The efficacy of this information, which is now over 8 years old, still being received by the Court, is now even more suspect.*

Further, the revelations of witness tampering that led 190 Members of the Parliament of the Republic of Kenya to petition the President of the Security Council and the President of the Assembly of States Parties, seeking their intervention in resolving this, remains unanswered. Under the guise of judicial and prosecutorial independence, we have to date, received no substantive response from the Court, the OTP or the Assembly. The studious, calculated silence of some Member States is also particularly troubling.

#### **Mr President**

During the reporting period, 2571 victims were admitted to participate in the proceedings before the Court. It is Kenya's experience that the issue of admitting victims remains a likely avenue for abuse as we are concerned that adequate measures are not in place to ensure that only genuine victims, and indeed witnesses, are included in the proceedings and are availed the protections laid out in the Rome Statute.

Notwithstanding the huge financial outlay and the pressure on an already overstretched budget, we remain concerned that any attempt to interrogate this matter continues to be met with stiff resistance again, under the guise of protecting the independence of the Court and its organs.

Another matter of concern to our delegation is that save for a casual mention in paragraph 83, the report fails to address the very pertinent issue of financing of Security Council referrals. Despite the heated and sometimes unpleasant discussions we hold in the General Assembly annually, Kenya's efforts to have a genuine discussion on this pertinent matter continues to be met with dogged resistance from some States Parties and some non-States Parties alike.

Yet again we find the Court unable to unshackle itself from the influence of a group of member States who continue to use their might, as major contributors to the budgets of international organizations, to block any discussions on this matter. If the Court is to make any meaningful impact, the General Assembly has to take its rightful place and address this problem, the manipulation of these countries or groups of countries notwithstanding.

#### **Monsieur le President**

The ICC was never intended to replace national courts and is therefore a court of last resort. Therefore, greater emphasis should be accorded to supporting national and regional initiatives.

In this regard, African States have tried to engage constructively with the International Criminal Court with little success. Despite all our individual and collective efforts to initiate and develop an enabling environment for constructive dialogue with the ICC, this has not happened. We therefore appreciate the cogent comments of the distinguished representative of Japan - and quote "the ICC and its states parties should

listen to the concerns expressed by wider audience.” The distinguished representative of New Zealand insisted that Africa’s problems with the ICC “merit careful consideration.” Yes, indeed.

The attempts by members of the African Union’s Open-ended Ministerial Committee on the ICC, to meet with Security Council continue to be thwarted through an arcane reading and interpretation of the rules of procedure. At the sidelines of the General Assembly High Level Week in September 2016, a planned meeting failed to take place due to a mismatch in the levels of representation.

It should be noted, for record, that before this meeting was called off, in line with established rules and practice of diplomatic engagement, *5 African Ministers for Foreign Affairs, were present, at the appointed time and venue, ready to engage, to no avail.*

Section B of the report deals with the cooperation with and assistance from States, other international organisations and civil society. Once again, Kenya takes note of what is a glaring omission in *paragraph 98*, that is the absence of any mention of the *African Union*. We are convinced that the African Union continues to be largely ignored by the ICC.

One would think that as the bulk of the work is centered in Africa, there would be a greater and more proactive effort on the part of the Court to deepen its interactions and cooperation with the African Union and the African member States. From the obvious lack of this interaction, we can only conclude that the ICC is not ready to engage constructively with African States. This unfortunate state of affairs needs to be discouraged. Any well meaning suggestions of remedial action fall on deaf ears.

In conclusion, Mr. President, this perfunctory report we have in front of us fails to tackle the real issues facing the ICC and fails to offer any insights on possible pragmatic solutions as we proceed. None of the organizational realities and challenges that the Court has faced in implementing its mandate are contained in this Report. There is a curious lack of deep analysis and well thought out balanced perspective in it. The continued silence of Member States where we fail to interrogate the real issues affecting the ICC by just glossing over the real issues will undermine the legitimacy of court. Kenya’s continued acceptance of the status quo, will only undermine the legitimacy of the Court and its core mandate; the fight against impunity.

**Merci Beaucoup, Monsieur Le President.**