



November 10, 2014

Response to Ambassador Macharia Kamau's Statement to the 69th Session of the United Nations General Assembly (UNGA) on 30th October 2014 Regarding the Report of the International Criminal Court (ICC) to the UNGA

In a statement to the United Nations General Assembly (UNGA) regarding a progress report tabled by the International Criminal Court (ICC), Kenya's Ambassador to the UN, Macharia Kamau, attacked and ridiculed the ICC without providing any constructive recommendations on improving the Court. His conclusion is that the ICC has failed in its mandate.

While the ICC has undoubtedly experienced some challenges in its quest to pursue justice for atrocity crimes around the world, these challenges were not entirely unexpected. This is because the ICC is the first court of its kind, which seeks to end impunity by prosecuting some of the most powerful individuals while relying largely on state cooperation for the success of its investigations. As with any other new institution, there is room for improvement in the way the ICC carries out its tasks. Indeed both the Office of the Prosecutor and the Registrar of the Court have recently embarked on far reaching reforms to address some of the challenges that they have faced in the first decade of the Court's existence. These include the adoption of a new prosecutorial strategy and an overhaul of the Victims and Witnesses Unit.

But to admit that the ICC has faced some legitimate challenges and is continually seeking to improve its processes is not to agree with Ambassador Kamau's simplistic and ahistorical attacks on the Court.

Ambassador Kamau bemoans the fact that the ICC has concluded only one case since it was founded. This conveniently ignores the fact that the ICC was not set up to investigate and prosecute all international crimes but is in fact a court of last resort. The duty to prosecute lies primarily with the states, and in this regard, Kenya should be the last State to complain, given its own abysmal record in prosecuting perpetrators of post-election violence seven years after it occurred. Three attempts to set up a Special Tribunal for Kenya immediately following the post-election violence

were thwarted by politicians, resulting in the ICC's intervention, while a recently proposed International Crimes Division of the High Court of Kenya is still not operational. Given the Director of Public Prosecution's public admission that he is unable to proceed to prosecute any cases resulting from post-election violence, there is little likelihood of any progress on seeking accountability at the national level.

In his statement, Ambassador Kamau also complains that the ICC has 'rendered representation for only 8040 victims for a decade.' This statement clearly displays ignorance of how the Court's victim participation regime works since under the Rome statute, not all victims of an active situation are represented in court. It also ignores the fact that the Rome Statute system's recognition of the victims' role in proceedings at the ICC, including the right to participate in proceedings and to seek reparations, is a significant and unique improvement on previous attempts to achieve justice for atrocity crimes.

Ambassador Kamau's purported concern for victims on the international stage also contrasts sharply with the way the government of the country he represents has treated victims at home, with many victims of post-election violence not having received any form of recognition or reparations from the Government of Kenya. The report of the Truth Justice and Reconciliation Commission, which recommends reparations for victims and investigation of alleged perpetrators of human rights violations dating back to independence, has also been ignored by the government.

Since the onset of the Kenyan cases before the ICC, a significant number of witnesses are alleged to have been killed, disappeared or bribed and intimidated to frustrate the ICC's proceedings in Kenya. The ICC has issued a warrant of arrest for Kenyan journalist Walter Barasa, for allegedly participating in the bribery and intimidation of witnesses but he is yet to be transferred by the state to The Hague to answer the charges. Finally, the refusal of the Government of Kenya to fully cooperate with the ICC in accordance with its Rome Statute obligations is conspicuous in its absence from Ambassador Kamau's statement and diagnosis of the alleged causes of the Court's supposed failures.

Ambassador Kamau alleges that 'the ICC continues to be a hindrance and a stumbling block' for the aspiration of the Kenyan people 'to proceed ahead with matters of social reconciliation and development'. While the desire of the Kenyan people for genuine peace cannot be doubted, their demand has always been for a sustainable peace founded on justice. This includes accountability for

atrocious crimes including post-election violence, reparations for victims, truth-telling for past violations and institutional reforms.

Ambassador Kamau needs to be reminded that he is not the defence counsel for Uhuru Kenyatta, William Ruto or Joshua arap Sang, all of whom are charged in their individual capacities. He is the permanent representative of the Republic of Kenya to the United Nations and as such he should represent all Kenyans including the victims of post-election violence in their quest for justice and not merely pursue the partisan interests of the powerful individuals who have been indicted by the ICC. The fact that two of the three Kenyans facing charges at the ICC are prominent politicians, who acceded to power after charges against them were confirmed, does not absolve Kenya from its responsibility as a State Party to cooperate with the Court and constructively engage the Assembly of State Parties (ASP).

Finally, instead of attributing the ICC's legitimate challenges to an imaginary 'pernicious group of countries that have hijacked its operational mandate', Ambassador Kamau and the Kenyan government should play their role alongside other States Parties of the Rome Statute in strengthening the Court, ending impunity and pursuing justice for victims of international crimes.

Kenyans for Peace with Truth and Justice

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