



Response to Kenya's UN Permanent Representative's Request for an Emergency session of the Assembly of State Parties

To:

The President of the Assembly of State Parties (ASP) to the Rome Statute

President:

- 1. Ms. Tiina Intelmann, email:
Email: tiina.intelmann@mfa.ee;**

ASP Vice-Presidents:

- 2. Mr. Markus Börlin (Switzerland) –The Hague;
Email: Markus. Börlin@eda.admin.ch;
CC: jan.skalski@eda.admin.ch;**
- 3. Mr. Ken Kanda (Ghana) - New York;
Email: ghanaperm@aol.com;
CC: naanab_74@yahoo.com;**

And

- 4. The President of the United Nations Security Council for the Month of June 2013
H.E. Ambassador Lyall Grant, UK Permanent Representative to the UN.
Email: Lyall.grant@fco.gov.uk;**

At a meeting of the Bureau of the Assembly of State Parties held in NY on June 17, 2013, Ambassador Kamau, Permanent Representative of the Republic of Kenya to the UN, made a verbal request for an emergency meeting of the Assembly of State Parties in order to discuss the Kenyan situation. This request is a follow-up to a letter from the same individual to the United Nations Security Council on Tuesday, May 2nd 2013, during which he called upon the UNSC to terminate ICC cases against Kenyan individuals.

Kenyan for Peace with Truth and Justice (KPTJ)¹ would like to clarify some of the misconceptions raised by the Ambassador:

What happens in the circumstances in which Kenya finds itself at present, (how is a state to deal with a situation in which its President and Vice-President have been indicted), in which the whole state is “aggrieved”?

A. Precedent exists

1) Certainly these circumstances are unique in that it is the first time that both a sitting head of State and his Deputy are indicted at the ICC. There is nonetheless an outstanding warrant for Omar Al Bashir who is also a sitting Head of State for Sudan who has refused to cooperate with the court. Hence the situation is not unprecedented. Further, this issue has been the subject of debate both within and outside Kenya since the current President and Vice President announced that they would be running jointly in the recently concluded 2013 general elections. The reasoning for an emergency session of the ASP is not immediately apparent in this regard. The entire state is not aggrieved; opinion polls show consistently significant public support for the ICC intervention in Kenya.

2) From a legal perspective, this issue has also been addressed by the Rome Statute and the Kenyan Constitution, promulgated in 2010, to which the Ambassador made reference.

a) According to the Rome Statute Article 27, to which Kenya is a signatory:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute

b) Further, the Kenyan Constitution reinforces this doctrine by declaring that International Laws and Agreements will form part of Kenyan Law Article 2(5)(6) states:

The general rules of international law shall form part of the law of Kenya.

¹ KPTJ (Kenyan for Peace with Truth and Justice) is a coalition of over 30 Kenyan and East African legal, human rights, and governance organizations, together with ordinary Kenyans and friends of Kenya, convened in the immediate aftermath of 2007's presidential election debacle and subsequent violence which led to the death and displacement of thousands of Kenyans. KPTJ maintains that there can be no peace without truth and justice - truth and justice for the failed presidential election and the violence that followed. Justice requires that we face the truth of our history, and of the election, to address the deep chasms and inequities in Kenyan society

Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

- c) Further, the Constitution spells out that even the Head of State is not immune from Prosecution from International Treaties 143(4)

The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

- 3) These provisions, in tandem with the President and Deputy President being indicted before they chose to run for office, clearly indicate the following:
- There is a legal provision for such a case in both the Rome Statute and the Kenyan Constitution
 - The case of Omar Al Bashir, who is a current sitting head of state, demonstrates that this is not unprecedented. The primary difference between the two cases may simply be that he has not cooperated with the ICC.
 - The timing of the cases and the debate surrounding the ICC in the electioneering campaign clearly indicate that these two individuals were extremely cognizant of their status as indictees and the implications of this.

B. Electoral Implications

The Ambassador also spoke of the entire Kenyan State being 'aggrieved' with the ICC and that the Kenyan People have used their sovereign right to elect individuals indicted by the ICC. This choice, he argues, represents a

- **Referendum on the manner in which the Rome Statute is being implemented, particularly with regards to the Prosecutor's powers;**
 - **Kenya wanted its President and Vice President unencumbered to run the state**
- 1) The assertion that the entire Kenyan state is aggrieved with the ICC is false. It makes several shaky assumptions:
- a) That H.E Uhuru Kenyatta and H.E William Ruto won with a wide majority – in fact they won by a razor thin margin. The election was marred by tallying irregularities and the result was upheld only by a Supreme Court decision which remains highly contested by opposition supporters.
 - b) That their election represents the country being aggrieved with the ICC. In fact the ICC process has been widely supported since the post-election violence including by the now indicted Vice President H.E William Ruto who coined the phrase 'Don't be vague go to the Hague'. A survey conducted in January 2013 also showed the ICC had a 66% support rate.²

²http://www.africog.org/kptj/statements/memo_responding_to_kenyan_ambassadors_letter_to_the_UNSC_on_ICC_cases

- 2) The recently concluded election was not a referendum on the ICC but a general election decided in part on ethnic lines.
- 3) The President and his Deputy were also well aware of these charges before they chose to run for office and they cannot argue the proceedings of the ICC interfere with their duties. The public were also aware of the same and it was a topic of debate in the election campaign with serious concerns being raised about the viability of having a President and Vice President run the country whilst on trial.
- 4) When Sudan's President Omar Al Bashir, on whom there is an outstanding warrant visited Kenya and was not arrested as per the Rome Statute, civil society went to court for an interpretation of the legality of his visit given that Kenya had ratified and domesticated the Rome Statute. The High Court ruled that the failure to arrest him was unconstitutional in line with Article 2(5)(6) which makes the Rome Statute part of domestic law³. The court offered a provisional arrest warrant for Bashir should he step upon Kenyan soil again. Thus the Kenyan Court has upheld the irrelevance of official capacity in the case of proceedings initiated under the Rome Statute.
- 5) The principle of complementarity has already been applied in the Kenyan case. The Kenyan cases have been referred to the ICC because of a failure of local mechanisms to try perpetrators of post-election violence. Because of the lack of a local tribunal, should the ICC cases not go ahead, there will effectively have been no attempts at prosecution of these crimes. This must be seen as detrimental to the rule of law. Complementarity envisages the ICC as a court of last resort when domestic measures that are given primacy have failed. The ICC is only supposed to intervene in cases where the local justice systems are unable or unwilling to genuinely prosecute international criminal offences as laid out in Article 17 of the Rome Statute. In the Kenyan case, local attempts have failed with three still-born attempts to set up a Special Tribunal.
- 6) The argument regarding jurisdiction has been amply ventilated and exhausted before the ICC. Indeed, the pre-trial chamber confirmed the ICC's jurisdiction in a majority decision while the appeals chamber has dismissed both challenges on jurisdiction and admissibility brought by the Kenyan government.

³ See International Commission of Jurists-Kenya v Attorney General & 2 others High Court, at Nairobi N.R.O. Ombija J November 28, 2011 - See more at: <http://www.kenyalaw.org/kenyaLawBlog/?p=356#sthash.wnGUNOqF.dpuf>

The Ambassador affirmed Kenya's continued cooperation with the court, as long as Kenya is treated with respect, saying, "We will cooperate until it is not in our best interest anymore to do so."

This is a worrying statement, as it reflects a possible move to defy international law and simply ignore the ICC. Currently, Kenyan diplomatic efforts appear to be geared towards dropping the cases against the principals and if it fails to achieve this, in light of the above statement, it may simply choose to stop cooperating with the court. The two principals are therefore, while purporting their readiness to cooperate with the ICC, conducting a concerted, multi-faceted campaign to undermine the standing and legitimacy of the court, and eventually perhaps prepare a scenario where non-cooperation could appear to be justified. This is unacceptable, it must be made clear to them that it is their duty to demonstrate cooperation with the court at all times.

Kindly receive the assurance of our most distinguished sentiments,

Gladwell Otieno

(For Kenyans for Peace with Truth and Justice)

cc:

1. All Permanent member state representatives to the United Nations Security Council (UNSC): China, France, the Russian Federation, the United Kingdom and the United States of America;
2. All other non-permanent member state representatives to the UNSC: Argentina, Azerbaijan, Australia, Guatemala, Luxembourg, Morocco, Pakistan and the Republic of Korea;
3. The Secretary General of the United Nations, His Excellency Ban Ki Moon
4. Martin Huth, Coordinator of the Friends of the ICC in New York
5. Ms. Ana Cristina Rodriguez, Focal Person Security Council, Friends of the ICC in New York
6. Mr. Zenon Mukongo Ngay, Coordinator of the African Group of States Parties in New York

(KPTJ/25/6/13)

