

H.E. Sra. Maria Cristina Perceval Permanent Representative of Argentina to the United Nations  
H.E. Sr. Antonio de Aguiar Patriota, Permanent Representative of Brazil to the United Nations  
H.E. Sr. Gert Rosenthal Permanent Representative of Guatemala to the United Nations

November 14 2013

Your Excellencies:

Re: Draft Resolution on ICC Deferral

We have the honour of writing to you in connection with the recent request made by the Government of Kenya, with the support of many members of the African Union, for a vote on deferral of the Kenya cases at the International Criminal Court which was discussed in an informal interactive dialogue in New York on 31<sup>st</sup> October.

The organizations that have signed this letter came together to address the violence that Kenya faced in 2007/8 after the disputed presidential elections. Since the mediation of the crisis of 2008, we have remained engaged in the process of the search for justice for victims of the violence that occurred at the time.

We write to urge you to reaffirm your support for the International Criminal Court by encouraging members to deny the request for the deferral issue to be put to a vote before the UN Security Council (UNSC). We support the view that seems to prevail within the UNSC that the grounds for a deferral of the Kenyan case through a UNSC resolution do not exist. We have made our views known through prior communications to the members of the UNSC, which we attach for your reference.

We however express our concern about the continued campaign to put to a vote a draft resolution on deferral presented by Rwanda with the support of the Morocco and Togo on behalf of the African Heads of State and Government, despite clear indications that member states are not currently inclined to support deferral, as they have continually declined to do when the issue has been raised. The Assembly of States Parties to the Rome Statute will take place next week; an African Union Summit will be held in January 2014. We believe that the insistence on a formal vote is mainly for the purpose of using the decision that will emerge as a rallying point for African States against the ICC at both meetings, which we consider regrettable.

While we support the legitimate right of the Kenyan government to seek the intervention of the United Nations Security Council in principle, we agree with the members' prevailing opinion that the conditions for a deferral have not been met or demonstrated by the Kenyan government and disagree with the grounds for deferral advanced in the "Draft Resolution on ICC Deferral (*sic*)".

For your ease of reference, we briefly comment on the draft resolution and restate our reasons for urging rejection of a deferral request below:

*The ICC's engagement does not violate Kenya's sovereignty:*

Firstly, and above all, we stress that the ICC's engagement in the Kenya cases can by no means be described as an injury to the sovereignty of Kenya. Kenya is a signatory and contributed greatly to the elaboration of the Rome Statute that created the ICC. Indeed, African nations are the largest single bloc of states parties to the Rome Statute. Furthermore, Kenya domesticated

the Rome Statute through the International Crimes Act of 2008. In August 2010 the new constitution of Kenya was promulgated, making the general rules of international law part of Kenyan domestic law and declaring that any treaty or convention ratified by Kenya - including the Rome Statute - shall form part of the laws of Kenya. The International Criminal Court is, therefore, part and parcel of the Kenyan judicial system.

*The ICC engagement is an African- and Kenyan-led initiative:*

The ICC's involvement in Kenya is also a result of the African Union-initiated process under the Kenyan National Accord and Reconciliation Agreement 2008 (NARA), which was mediated by His Excellency, Kofi Annan. It was a Kenyan judicial commission of inquiry that recommended the establishment of a local Special Tribunal to prosecute the violence arising from the disputed 2007 election and which also requested the intervention of the ICC, in the event that the Kenyan government failed to do so. We therefore reject any description of the ICC's presence in Kenya as a negative foreign or even as a racist intervention. It is rather an expression of Kenyans' deeply held desire for an end to the impunity that has historically afflicted our nation, and the only credible existing attempt to secure accountability for these mass atrocities.

As has been demonstrated in other countries with a long history of massive human rights abuses, an effective process for the resolution of these crimes against humanity is necessary to avoid their repetition and for such societies to come to terms with their past.

We also reject the oft-repeated argument that the ICC "targets" Africa: of the current eight investigations and cases in Africa, four were referred to the court by African governments, including some of those now criticising it; a further two were referred by the UNSC. The Office of the Prosecutor (OTP) commenced *suo proprio motu* investigations into the Kenyan case after they were referred to him by HE Kofi Annan.

*The International Criminal Court has already offered solutions to address the concerns raised:*

The ICC Appeals Chamber recently allowed the possibility for the accused to apply to be absent from trial under "exceptional circumstances".<sup>1</sup> They have offered the possibility of making accommodations in the scheduling of the trial or allowing short adjournments and indeed the Deputy President, Mr. Ruto, has already taken advantage of this flexibility to return to Kenya to attend to various official duties, which were by no means associated only with exceptional circumstances such as a major terrorist threat.

*The draft resolution's attempt to propose immunity for high-ranking state officials is not tenable by the standards of the AU, the UN, Kenya or the Rome Statute:*

The suggestion that serving heads of state should be immune from international justice runs counter to the African Union's own founding principle of "condemnation and rejection of impunity" and to the Kenyan constitution.<sup>2</sup> Immunity of heads of state is recognized in international law with the exception of genocide, war crimes and crimes against humanity. The

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<sup>1</sup> Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial".

<sup>2</sup> *The Constitution of Kenya*, Article 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.

Rome Statue and the International Crimes Act of Kenya both stress the irrelevance of official capacity in the prosecution of such crimes.

*The President and Deputy President cannot in good faith plead the burden of their official positions to support a deferral of the cases against them:*

The Constitution of Kenya, passed in 2010, is clear on the extent and significance of the duties of the two positions. The accused were well aware of this before they chose to become candidates for election to these positions. From January 2012 on they were also aware that they would have to stand trial in person at The Hague for at least a considerable portion of the terms of office for those positions. Indeed, they publicly declared that the cases were merely “personal challenges” - as they legally are - and were confident of their ability to manage the duties of state while cooperating with the ICC. Since their accession to power, however, immense public resources, time and attention have been devoted to the national, regional and international campaigns to evade accountability at the ICC.

*Threats to Kenya’s security are exacerbated by poor governance and impunity, and not by accountability for crimes against humanity:*

There is no evidence that a deferral of the ICC cases would increase the ability of the GoK to deal with the presence or threat of terrorism and matters of international security, or that it would be the necessary extraordinary measure to improve or enhance security internationally, domestically or within the region. Deferral is most likely to achieve the opposite; it will enhance the ability of Kenya’s leadership to protect itself and further embed a dangerous culture of impunity, which increases the country’s vulnerability to security threats, including terrorism.

*There has been insufficient progress on reforms to allow the credible pursuit of accountability within Kenya:*

Contrary to the draft resolution’s assertion, there has been insufficient progress on critical reforms agreed upon under NARA, with no appreciable progress in some areas. This is particularly true of the security sector, which has resisted many key reforms, with negative consequences for the country’s ability to defend itself against threats such as terrorism. There is still no local mechanism to address the post-election violence in Kenya, despite repeated attempts by the Kenyan government to prevent the ICC cases from continuing. There have been no prosecutions of any senior or even mid-level official for post-election violence (PEV) and there has been only a minimal number of successful prosecutions of lower-level perpetrators, as we pointed out in our memorandum to the UNSC. The possible establishment of an International Crimes Division (ICD) has been presented by the Government of Kenya to the ICC as a local mechanism for dealing with crimes against humanity. The ICD is not operational, however. Discussions are still in the nascent stages and there is as yet no consensus within the judicial system as to its future mandate.

*Support to internally displaced persons (IDPs) and the provision of reparations to victims referred to in the draft resolution, and in the AU letter to the UNSC, has been inadequate:*

Victims have also complained that the limited provision of support has been carried out in a discriminatory manner, with victims in some regions, including those associated with opposition to the regime, being left out.<sup>3</sup> The draft resolution’s reference to the operationalisation of the Witness Protection Agency ignores the massive problems being experienced by the Office of the

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<sup>3</sup> See *Report of the Select Committee on the Resettlement of Internally Displaced Persons*, April 17 2012 ([http://www.knchr.org/Portals/0/Reports/PSC\\_Final\\_IDPs\\_report\\_2012-2.pdf](http://www.knchr.org/Portals/0/Reports/PSC_Final_IDPs_report_2012-2.pdf)).

ICC Prosecutor with intimidation of witnesses and their families, and widely publicised efforts to reveal the identity of a protected witness in Case 1, on *Ruto and Sang*. If the trial is deferred, the suffering of witnesses, some of whom are under protection abroad, will continue. The risk is very high that more witnesses will withdraw, particularly since they are well aware that the two most powerful men in the country, who have command and control of the security apparatus, are opposed to the ICC process.

*The Kenyan victims of the post-election violence support the ICC as does a majority of the Kenyan public:* Civil society organisations and others have been monitoring support for the ICC over the years through periodic opinion polls. Despite the hostile political climate and a reduction in support, about 50% of the population still supports the ICC. The official claim of lack of public support for the ICC suppresses this reality.

In a letter to the Security Council, the Common Legal Representative of Victims in Case 2 expressed the opposition of the thousands of victims to the suspension of the prosecution of the case.<sup>4</sup> A deferral would prolong the suffering of victims and endanger the chance of their ever receiving justice. Because of security concerns, some witnesses have long since been removed from the country by the court for their protection and currently live abroad as they wait to testify. A delay in the trial of the Kenyan cases would bring hardships to witnesses, victims and human rights defenders.

*Recent restrictions on democratic freedoms:*

The Kenyan Parliament has recently passed a draconian law against the freedom of the media which now awaits the president's signature. This legislation has been condemned as the most direct affront on media freedom in Kenyan history. Also, only yesterday, the Kenyan Parliament commenced consideration of a set of legislative measures, which, if approved, will lead to a law that caps funding from foreign sources for non-governmental organizations at 15 percent. Since almost all funding for Kenyan civil society is derived from foreign sources, the effect of this law, if passed, will be to shut down many civil society organizations, and therefore alternative voices in Kenya. The effort to repress domestic advocacy in favour of the ICC is, we believe, a significant motivation behind these developments.

*If granted, a deferral would only be in force for a maximum of 12 months:*

It is striking that the Kenyan state remains unable to substantiate the basis for its continued requests for delays, changes and termination of the ICC process. This underscores that, even if a one year deferral were granted, it would be inadequate for the Kenyan government to achieve the objectives presented in the draft resolution and would inevitably be followed by repeated applications.

We close by re-emphasising that the conditions for a deferral of the Kenyan case do not exist: there is no national or regional threat to the security of Kenya of the exceptional nature that would justify such an action. A deferral would send a message of impunity to serving heads of state that would undermine the goals of the ICC and the United Nations. The Kenyan government had every opportunity to conduct credible local prosecutions; it has failed to do so out of a lack of political will. The Rome Statute is by no means a foreign imposition but was

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<sup>4</sup> Letter to the UN Security Council from Fergal Gaynor, Legal Representative of Victims, *The Prosecutor v. Uburu Muigai Kenyatta*, International Criminal Court.

freely entered into by the government of Kenya and its people, a majority of whom support it as the only existing credible deterrent against impunity and a repetition of crimes against humanity. Under these circumstances, the current request for a vote on the deferral issue is clearly intended to provide a rallying point for AU opposition to the ICC.

We believe that the heads of state and government of the African Union states which are parties to the Rome Statute have every right to press their legitimate concerns about the operations of the ICC. The proper forum for such an exchange is the Assembly of States Parties to the Rome Statute. However, such claims must be made in good faith in the spirit of strengthening the search to end impunity and for international justice.

We are confident that we can count on your continued support for the ICC as states parties. We also call on you to use your influence to encourage accountability in the interests of the people of Africa and the world who have been subjected to crimes against humanity.

Please receive the assurance of our most distinguished sentiments,

Africa Centre for Open Governance (AfriCOG)  
Coalition on Violence against Women (COVAW)  
Inform-Action  
Kenya Human Rights Commission (KHRC)  
Kenyan Section of the International Commission of Jurists (ICJ-Kenya)  
Kenyans for Peace with Truth and Justice (KPTJ)  
Muslims for Human Rights (MUHURI)

*Cc:*

*H.E. Sr. Harold Caballeros - Minister for Foreign Affairs, Guatemala*

*H.E. Sr. Héctor Marcos Timerman Minister of Foreign Relations and Culture, Argentina*