23rd October 2013

HE Ambassador Agshin Mehdiyev

Ambassador/Permanent Representative of the Republic of Azerbaijan

The United Nations and

President of the Security Council

for the Month of October, 2013,

New York, USA.

RE: KENYAN GOVERNMENT REQUEST FOR A DEFERRAL OF THE ICC CASES

We, the undersigned Kenyan civil society organizations, write with regard to the Kenyan government's request for a deferral of the ICC cases.

The organizations listed below have interacted regularly with victims and affected communities and have been engaged with the accountability process in Kenya since the onset of the 2007-2008 post-election violence (PEV).

Given the above, we believe that abandoning the process of accountability would send the wrong signal in Africa and internationally. Kenya and other governments voluntarily ratified and domesticated the Rome Statute which established the International Criminal Court (ICC) in order to stem impunity internationally. The Kenyan cases were initiated by the Waki Commission, which investigated the PEV and recommended the establishment of a Special Tribunal to try perpetrators of crimes against humanity locally, failing which the ICC would be called on to intervene.

Following three failed attempts to establish that tribunal, the intervention of the ICC was triggered by AU mediator Kofi Annan. It is on this basis that the ICC Prosecutor (OTP) exercised *proprio motu* powers to conduct investigations leading to the indictment of six, now three, Kenyans by the ICC for crimes against humanity. The ICC process in Kenya is thus a Kenyan and African-initiated process. The attached memorandum contains detailed information on the reasons we believe that these cases should NOT be deferred, including:

1. *The conditions of Chapter VII of the UN Charter on which a successful request must be based do not apply to Kenya***:** The prevailing situation in Kenya is suitable for trials against the Head of State and his deputy. The perceived threats to peace and security indicated by the government do not meet the threshold required to invoke Chapter 7 of the UN Charter. Trials against the President and Deputy President do NOT constitute a threat to peace and security in Kenya. The causes of insecurity in parts of Kenya are NOT related to the ICC proceedings. The ICC is the only existing credible deterrent to a repeat of events similar to the PEV on a mass scale.
2. *Threats to Kenya's security are exacerbated by bad governance not by accountability:* Terrorism and insecurity in the region occur in a context of impunity, poor governance, corruption and their consequences, which have prevailed in the country for decades. The Annan-brokered agreement prescribed fundamental reform of the security sector, which has been resisted. The recent Westgate tragedy made the dysfunctionality of our security institutions only too clear. Previous terrorist attacks have taken place in Kenya and were not linked to the accountability which must be sought both for the post-election violence and the rule of law concerns which create an enabling environment for terrorism in Kenya. Rather than facilitating improved security, deferral of the cases would further embed impunity and the associated breakdowns that increase opportunities for further such attacks.
3. *There have been repeated failures to establish credible local justice mechanisms or to effectively prosecute crimes against humanity***:** Kenya failed to establish a local justice mechanism to try offences committed during the post-election violence, which would have obviated the need for the Court's intervention. The failure was caused by a lack of

political support for a tribunal by current and past political leadership and their supporters. Five years later, there has been no progress to speak of on prosecution of the post-election violence in Kenya.

4. *A deferral will complicate the already endangered situation of witnesses and others:* The resulting delay will compound existing delays in the trial of the Kenyan cases and prolong hardships to witnesses, victims and human rights defenders. Witnesses in the Kenya cases have been killed, compromised and intimidated. The Prosecutor regularly reports witness intimidation and bribery. An arrest warrant has recently been issued in connection with this problem. A deferral could place the lives of witnesses at risk.
5. *There is still public support for accountability before the ICC:* Despite the hostile political climate, more than 50 per cent of the Kenyan population still supports the Court**.** Ordinary and prominent Kenyans continue to speak out on the need for accountability. Victims and survivors continue to call for both retributive and restorative justice. Official statements about a lack of public support for the ICC process do not reflect these voices.
6. *The Kenyan government has yet to establish good faith in its dealings with the ICC:* Despite official expressions of support, the Kenyan government has actively sought to undermine the ICC. Attempts to mobilise the African Union membership against the ICC to the extent of proposing a mass withdrawal are the most recent escalation in the campaign against cooperation with the process. The proper and constructive forum to bring forth legitimate grievances on the ICC engagement in Africa is in the Conference of States Parties, of which the African member states form the largest bloc.

The undersigned organizations present this letter and attached memorandum in good faith, with the hope that victims who still bear the suffering and scars of the post-election violence will not be robbed of their chance to secure accountability. Further, the facts are presented to clarify misleading information on the state of peace and security in Kenya.

Yours Sincerely,

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: <u>Ambassadors- All Member State Permanent Mission Representatives to the United Nations Security Council</u>

WHY THE UN SECURITY COUNCIL SHOULD REJECT THE APPLICATION FOR A DEFERRAL OF THE KENYAN CASES BEFORE THE INTERNATIONAL CRIMINAL COURT

A Memorandum from Kenyan Civil Society Organizations

The Government of Kenya, supported by the African Union, has applied for a deferral of the Kenya cases now before the International Criminal Court. While any state party to the Rome Statute is at liberty to request a deferral, Kenya's request lacks merit: first, because the conditions of Chapter VII of the United Nations Charter, on which a successful request must be based, do not obtain in Kenya; second, because the current and previous requests for deferral of the cases, paired with a failure to establish credible local justice mechanisms, indicate a continuing pattern of efforts to undermine accountability for the post-election violence; third, because the resulting delay in the trial of the Kenyan cases will bring significant hardships to witnesses, victims and human rights defenders; and fourth, because there is significant support in Kenya for accountability before the ICC**.**

To these reasons, we would like to add that the manner in which the Security Council deals with the Kenyan request has direct implications for the difficult situations it is facing elsewhere and future situations which may involve sitting heads of state.

The following paragraphs provide further detail on these points.

I. The conditions of Chapter VII of the UN Charter on which a successful request must be based, do not obtain in Kenya

The reason the Kenyan state has failed to clearly articulate the situation in Kenya in terms of Chapter VII of the UN Charter is that it does not meet the requirements for deferral envisaged by Chapter VII.

We agree with the Progress Report of the African Union Commission on the Implementation of the Decision (Assembly/AU/Dec.482 [XXI]) of the Assembly of the African Union on international jurisdiction, justice and the International Criminal Court (ICC), that Article 16 of the Rome Statute must be read as having "envisaged deferrals [...] only when a threat to or breach of peace and security has been established by the UN Security Council under Chapter VII of UN Charter" (Document Ext/EX.CL/2[XV]) of 11 October 2013).

We also note that security conditions have not changed since the Security Council last informed Kenya, on 12 April 2011, that it could not grant a deferral.

II. The Kenyan security environment and its applicability to a Chapter VII request

The Kenyan state has presented the tragic terrorist attack at the Westgate Mall in September 2013 as evidence of peace and security issues warranting a deferral of the cases. However, increasingly disturbing evidence is emerging that the attack occurred in a context of state inertia, in the face of credible intelligence warnings of the attack that were ignored, and unnecessarily prolonged which facilitated looting by the Kenyan Defence Forces. The Westgate incident is not evidence of Kenya's peace and security challenges. Rather, it evidences state decline and insensitivity to the responsibility to protect its population. The events at Westgate are unfortunately not a singular instance, but rather occurred within a larger context of ongoing security failures in Kenya that have not been addressed. High levels of corruption and a deep culture of impunity will remain a permanent invitation to domestic and international terrorism until their root causes are tackled.

Kenya's airports, seaports and borders are easy to penetrate and abuse because of uncontrolled corruption, compromised security forces, and limited investigation and criminal prosecution of transnational crimes. No amount of international resources, or internationally trained counter-terrorism units or border patrols, or decades of donor-funded police and judicial reforms have improved this situation, because the political will is absent. For as long as the state and its security apparatus focus protection and resources on a tiny political elite, extraordinary efforts will fail to secure the necessary environment to counter critical domestic and international security issues. This is evidenced in the 2007-2008 post-election violence; in the 2013 pre- and post-election killings; in the frequent use of small explosive devices in Kenyan urban and border areas; and most recently at the Westgate Mall. During the Westgate attack, the government dangerously undermined public and international confidence during and after the siege, through contradictory information, the frustration of an international forensic team, the actions of its security and intelligence units, and by obstructing humanitarian and diplomatic efforts.

There is no evidence that deferral of the ICC cases would increase the ability of the government of Kenya to deal with the presence or threat of terrorism and matters of international security; or that it would be a necessary measure to improve or enhance security internationally, domestically or within the region. Deferral is most likely to achieve the opposite: it would actually enhance and improve the ability of Kenya's leadership to protect itself from public accountability and further embed a dangerous culture of impunity. This would increase opportunities for terrorism and invite new and grave international security threats. Kenya suffers from a long legacy of political

violence. In the absence of domestic justice mechanisms, it is only the ICC cases which now credibly counter this culture and stand to prevent future political violence and loss of life. Their impact is evident and should not be undermined.

III. Repeated failures to establish credible local justice mechanisms and effectively prosecute crimes against humanity

The report of the Commission of Inquiry on Post-Election Violence (Waki Commission), appointed by the AU and the Kenyan state to investigate the post-election violence, warns that unless deliberate measures are taken to address impunity for political violence in Kenya, the country risks becoming a failed state. Kenya repeatedly failed to establish a local justice mechanism as recommended by the Waki Commission to try offences committed during the post-election violence to obviate the need for the Court's intervention. The Kenyan parliament subsequently insisted on the need for the ICC, and only rejected involvement of the Court when influential politicians were themselves indicted. The same politicians who rejected a local justice mechanism and called for intervention by the ICC are now its loudest opponents.

Even the Kenyan state's own documents are critical of its record: the report of a taskforce appointed by the Attorney General in April 2012 to advise on Kenya's response following the confirmation of charges in the cases now before the ICC noted that, whereas the government made claims to be committed to a local justice mechanism and whereas the police had announced investigations against the six persons facing ICC charges, only one of them had ever been formally questioned by the police. A multi-agency task force established to review, re-evaluate and re-examine all pending investigations, pending trials and concluded cases reported that out of 6,081 cases reviewed, only 24 post-election violence suspects had been convicted. Attempts by civil society organizations to seek redress through a class-action lawsuit for sexual and gender-based violence (SGBV) that occurred on a massive scale have been frustrated by continual adjournments and by the government's failure to answer or enter an appearance in this case, more than two months after the court deadline.[1]

Inconsistent information issued by the Office of the Director of Public Prosecutions (ODPP) on actual prosecution of PEV does not strengthen public confidence on commitment to pursuing accountability for PEV. After publicly stating that they did not have any evidence to effectively prosecute perpetrators of SGBV, the ODPP recently indicated that it had prosecuted and convicted 54 perpetrators.

[1] *High Court of Kenya Constitutional Petition 122 of 2013*: The Coalition On Violence Against Women and others – vs- the Attorney General and others.

While Kenya's political leadership continues resisting the ICC process, no credible efforts to establish a local justice mechanism.

IV. The possible establishment of a local International Crimes Division of the Judiciary as a substitute for the ICC process

The Judicial Service Commission (JSC) in 2012 established a committee to look into the formation of a Special Division of the High Court, the International Crimes Division to prosecute international and transnational crimes in Kenya. These efforts are still in the very nascent, consultative stages and there is as yet no clarity on the mandate or jurisdiction of such a division. It can therefore not be viewed as a replacement for the ICC proceedings. The establishment of such a division would not, however, address the problem of the lack of capacity or political will to investigate and prosecute post-election violence cases. The Office of the Director of Public Prosecutions (ODPP) continues to experience significant manpower and skills constraints to prosecute ordinary crimes, let alone the special techniques required to investigate and prosecute crimes against humanity.

The Judiciary itself is currently mired in an embarrassing internecine controversy on cases of corruption and other scandals, putting at risk the progress made in reforming that institution.

The ultimate effect of the cynical manner with which the Kenyan state has chosen to treat the ICC intervention is that it may contribute to fulfillment of the Waki Commission's prediction of state failure.

V. Continuing efforts to undermine accountability for the post-election violence

The record shows that since the opening of the Kenyan cases before the ICC the Kenyan state has acted in less than good faith toward the Court and toward the genuine public interest, especially in relation to victims of the crimes against humanity addressed by the cases.

On 15th December 2010, the date the Prosecutor announced the names of the six persons against whom he intended to bring charges before the ICC, the Kenyan Parliament passed a motion to withdraw the country from the Rome Statute. While it is the sovereign right of Kenya to withdraw from the Rome Statute, the reason for that motion was to defeat accountability. A similar motion passed in 2013, together with a further motion to repeal Kenya's International Crimes Act, the law that domesticates the Rome statute; both are reflective of these intentions.

When the six names were made public, then-Kenyan President, Mwai Kibaki, announced that those among them who were senior public officials would remain in office until the charges against them were confirmed. When the charges were confirmed in January 2012, the President changed his position, saying that they would remain in office until they had exhausted appeals against the confirmation of charges.

Other than undermining the ICC by maintaining people in public office against whom the Court was proceeding, this also imperiled investigations and put witnesses in harm's way.

In January 2011, the then-President, Mwai Kibaki, appeared at a public rally in Eldoret, in the epicentre of the post-election violence. This was to be the first in a series of joint public appearances by William Ruto and Uhuru Kenyatta, both of whom had by then been charged by the Prosecutor. This appearance was meant to demonstrate solidarity by the Kenyan state with the accused persons. The solidarity was an important factor in the political platform the two subsequently built, which has now given them authority over the Kenyan state as President and Deputy President.

The address by President Uhuru Kenyatta to the Extraordinary Summit of the AU in Addis Ababa on 12th October 2013 revealed that the Kenyan leadership does not believe in the ideals of justice and that it reserves the strongest condemnation for those who do.

The following are excerpts:

In reference to the West:

> The philosophies, ideologies, structures and institutions that visited misery upon millions for centuries ultimately harm their perpetrators. Thus the imperial exploiter crashes into the pits of penury. The arrogant world police is crippled by shambolic domestic dysfunction. These are the spectacles of Western decline we are witnessing today.

Also:

> It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation "race-hunting". I find great difficulty adjudging them wrong.

In reference to the Court:

> The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers.

Kenya's conduct toward the Court, including repeated requests for deferral of these cases, is intended to defeat accountability. If the UN Security Council were to grant the current request, this would amount to abetting the game between Kenya and the African Union, designed to defeat the Court and the quest for justice for victims of crimes against humanity. The ICC was established through the voluntary participation of member states including African countries which form the single largest bloc of State Parties. The appropriate forum for raising legitimate concerns is the Assembly of States Parties to the Rome Statute.

VI. The hardship that a deferral would impose on witnesses, victims and human rights defenders

Ever since the investigation of Mr. Kenyatta and Mr. Ruto became public, there has been a campaign of vilification, intimidation, and violence, against witnesses, victims and intermediaries. As a result, the Court has had to move its witnesses outside of Kenya for their own safety. Even in other countries, however, they have been in danger as the Kenyan state has found ways of reaching and compromising them. It is a fact that some witnesses have been killed and others threatened or intimidating into withdrawing from participation in the cases. For example, Witness Number 4 in the Kenyatta case was located in the United States and eventually withdrew his testimony, making implausible allegations against Court officials. For other witnesses abroad, life has stopped as they wait for the day they will testify. It is already three years since most of them were moved out of Kenya. A deferral for one year means a postponement, by at least a year, of the day they will be discharged of the burden of being witnesses. It is inevitable that deferral would result in witness withdrawal and further compromise. It may also result in more killings. Any decision to defer must be made with full cognizance of its effects on the possible fate of witnesses.

The Office of the Prosecutor has repeatedly complained of unprecedented levels of threats against witnesses in the Kenya cases. In her statement on the arrest warrant recently issued against Kenyan journalist Walter Barasa for allegedly attempting to interfere with witnesses, Ms. Bensouda spoke of *"a network of people who are trying to sabotage the case against Mr. Ruto et al. by interfering with Prosecution witnesses"*.[2] Rather than simply effecting the arrest warrant, as is required by the Rome Statute and International Crimes Act 2010, the Kenyan government is delaying action and purporting to submit the matter to the Kenyan courts for interpretation.

[2] http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/statement-OTP-02-10-2013.aspx.

With the Kenyan state claiming to be cooperating with the Court but effectively undermining it at every point, there has also been a campaign of vilification against human rights defenders supporting the objectives of the Court. Human rights defenders have been threatened, intimidated, and accused of serving foreign interests, in the same way the Court itself has been portrayed both before the AU and the UN General Assemblies. A deferral exposes these human rights defenders to prolongation of the difficult circumstances under which they currently live.

The campaign of vilification has not spared even the chief mediator of the Kenyan crisis, Mr. Kofi Annan, who has been publicly demeaned and disparaged by agents of the Kenyan state, notably the Foreign Secretary.

VII. Public support for the ICC remains strong in Kenya

Public opinion about the ICC has been monitored by civil society, including by signatories to this letter, through periodic opinion polls. Despite the intimidating political atmosphere, more than 50 per cent of the Kenyan population still supports the Court. Both ordinary and prominent Kenyans continue to speak out on the need for accountability; victims and survivors continue to call for both retributive and restorative justice. Yet the Kenyan state fails to include those voices as it continues to insist that the ICC lacks public support.

Furthermore, the Kenyan state has argued that since the government was popularly elected, it can no longer be held accountable by the ICC. Popular election does not affect the duty of accountability for individuals who were indicted before standing for office and who should have been barred from elective office under the Kenyan constitution.

During the campaigns Mr. Kenyatta clearly stated that the ICC case was a "personal challenge" which he would be able to manage while running the affairs of state. What was a personal challenge has now ostensibly been transformed into a regional and indeed international challenge, absorbing an immense amount of resources and attention.

Immunity of Heads of State is recognized in international law with the exception of genocide, war crimes and crimes against humanity. This exception is now recognized under the peremptory norms of customary international law (*jus cogens*) since the decision of the House of Lords in the case of Re Pinochet. The Constitution of Kenya 2010 recognizes international law as part of domestic law. Customary international law is incorporated in the definition of general rules of international law, which are now part of Kenyan law under Article 2(5) of the Constitution of Kenya 2010. In addition, the Rome Statute at Article 27 and the International Crimes Act which domesticates the

Rome Statute both stress the Irrelevance of Official Capacity when it comes to the prosecution of crimes against humanity, war crimes and genocide.

VIII. Implications for other situations and future situations

The ICC is a new court, which was established and supported internationally to tackle issues of impunity of a magnitude that domestic courts could not or would not address. This is critical to international peace and security and the progress of democracy. It deals with individuals who put themselves above the law, and does not discriminate, however powerful or elevated their position may be. Its practices, including the relationship with the Security Council, are evolving. As such, the Security Council has a duty to ensure its decisions do not have the effect of undermining the Court.

The Security Council should exercise utmost caution in considering Kenya's request for deferral in view of its implications on future situations of mass violence. As stated in the foregoing, despite efforts to make a case for deferral based on Chapter VII of the UN Charter, Kenya's request is in reality ultimately based on little more than the fact that the accused persons are now President and Deputy President respectively. If the request were to succeed, the precedent set would have serious repercussions on situations such as Sudan and Syria, where Presidents Bashir and Assad could well also seek to be excused from accountability based on the fact that they are heads of state. It would also create an incentive for warlords to manipulate their way to power or cling onto power to evade accountability for crimes against humanity

Conclusion

For these reasons, the signatories to this letter, which are all Kenyan-based civil society organizations working to promote accountability for crimes committed in Kenya in 2007-2008, are greatly opposed to this application for the deferral of the Kenyan cases before the ICC. The ICC was established with the capacity to sustain the type of pressure that the Kenyan cases are now bringing to bear on it. It is the duty of the Security Council to support the ICC to manage its responsibilities. If these cases are deferred, the message will be clear that the international community does not have a system capable of withstanding the political pressure that often accompanies the search for justice.

Nairobi

23rd October 2013

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