



October 9, 2013

Dr Nkosazana Dlamini Zuma
AU Commission Chairperson
African Union Headquarters
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Your Excellency,

RE: THE GOVERNMENT OF KENYA'S UNWILLINGNESS TO INVESTIGATE AND PROSECUTE CRIMES ARISING FROM THE 2007/08 POST ELECTION VIOLENCE IN KENYA

The undersigned organisations, send you compliments on the eve of the Extraordinary Session of the African Union Assembly (AU), and we would like in this regard to raise the following issues:

We recall that the AU, on the instigation of Kenya and Mauritania, is convening this session for considering the implementation of Decision Assembly/AU/Dec.482 (XXI) that was adopted in May 2013. That decision, noted, *inter alia*:

6. RECALLS that, *pursuant to the principle of complementarity enshrined in the Rome Statute of the ICC, Kenya has primary jurisdiction over the investigations and prosecutions of crimes in relation to the 2007 post-election violence, in this regard, DEEPLY REGRETS* the Decisions of the Pre-trial Chamber II and the appeals Chamber of the ICC on the admissibility of the cases dated 30 May and 30 August 2011 respectively, *which denied the right of Kenya to prosecute and try alleged perpetrators of crimes committed on its territory in relation to the 2007 post-election violence;*

7. SUPPORTS AND ENDORSES the *Eastern Africa Region's request for a referral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in support of the on-going peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence in Kenya;*

8. REQUESTS the African Union Commission, in collaboration with the African Union Commission on International Law (AUCIL), to organize, with the participation of Member States, all the relevant Organs of the African Union and other relevant Stakeholders, a brainstorming session, as part of the 50th Anniversary discussion on the broad areas of International Criminal Justice System, Peace, Justice and Reconciliation as well as the impact/actions of the ICC in Africa, in order not only to inform the ICC process, *but also to seek ways of strengthening African mechanisms to deal with African challenges and problems.*

We would like to bring to your attention the realities in Kenya, where we have been actively working in relation to the post-election violence of 2007-2008 (PEV).

Regarding the issue of Kenya's right to investigate and prosecute the post-election violence of 2007-2008 - We acknowledge and support the principle of complementarity as enshrined in Article 1 of the Rome Statute of the ICC. We, however, note the provisions of Article 17 that seek to protect victims from States that are unwilling to prosecute perpetrators of the violence or those that would seek to use their national mechanisms to shield suspects from criminal responsibility. The Kenyan Parliament declined to set up a special court to prosecute perpetrators of the violence on three occasions and insisted that the Kenya situation be referred to ICC. Contrary to allegations by the Kenyan government, the Constitution of 2010 has not changed the legal position in favour of national prosecutions. In fact, Article 2(6) of the Constitution now recognizes all international treaties and conventions which Kenya has ratified as domestic law. Therefore, the Rome Statute has been given added constitutional jurisdiction in addition to that accorded to it through its domestication by the International Crimes Act 2009. The ICC is already, constitutionally, part and parcel of the Kenyan legal system.

Further, we express our concerns about the continued unwillingness by the Kenya government to investigate and prosecute crimes emanating from the 2007 post-election violence. Instead, the government has made concerted efforts to frustrate the prosecution of the current cases and/or create circumstances leading to non-cooperation with the International Criminal Court.

The Kenya government's efforts to rally the African Union around two *personal* cases involving the President and the Deputy President of Kenya, both of which began *before* they both ran for those offices, are aimed at not only scuttling the pursuit of justice for the victims of the violence, but would also set back decades of hard won achievements on the African continent against impunity. While we acknowledge that the ICC has its challenges, we remind the AU that Africa was instrumental in the creation of the Court, as part of the effort to end serious and unchecked violence on the continent. If the court is undermined, there will be no mechanism for dealing with the impunity within the African continent, the response to which led to the creation of the ICC. We encourage active engagement with the Assembly of State Parties of the ICC to address any concerns by the Africa's ***State Parties*** to the Rome Statute. That, in our humble opinion is the correct forum for the same, and where we believe constructive results may be achieved.

Regarding the issue of Kenya's national mechanism to prosecute- We would wish to direct your attention to the current state of the Kenyan Judiciary which, regrettably, leaves much to be desired. The last two months has seen the Judiciary locked in embarrassing internal cases of corruption, public scandals, email and personal hackings, a situation that has been serious enough to draw a response from Parliament. This belies the sincerity of the Kenya government's claims that this is a 'reformed judiciary' capable of prosecuting grave crimes.

The Kenya government has not only failed to prosecute PEV crimes, it has deliberately frustrated the completion of cases such as the Public Interest Litigation Case filed in February 2013 (*High Court of Kenya Constitutional Petition 122 of 2013, COVAW & Others- vs-the AG & Others*) by our organizations and victims of PEV seeking redress for sexual and gender based violence. Since the filing of the Petition, neither the Attorney General nor other government agencies, as respondents, have answered the petition, nor have they entered appearance, more than two months after the deadline provided by the court. The case has since suffered six unnecessary adjournments as more often than not the matter is not listed in the day's cause list or the presiding judge is out of town. This experience contradicts assertions about a reformed judiciary

Also, in April 2012, the government of Kenya announced the formation of a multi-agency task force with the mandate of reviewing, re-evaluating and re-examining all PEV pending investigation, pending trial and concluded cases. In 2012, they reported that 24 post-election violence suspects had been convicted out of the 6,081 cases presented to the task force for review by the police. This is a negligible number considering the wide scale of the violence experienced in 2008. This Task Force, however, is yet to release another report on its work and on the progress made so far in relation to its mandate. (ICC-01/09-02/11)

Regarding the East Africa's region request for referral of the case- We have serious concerns that such a decision would cause great injustice to the victims of the violence. We note that the Kenyan government has on many occasions indicated a "commitment" to prosecuting cases of PEV and that "reforms in the judiciary" have been a key ingredient in this. In its submissions to the ICC on the status of its cooperation with the ICC, the Attorney General indicated that the Kenyan government has initiated key institutional reforms in the criminal justice system "*that will go a long way in addressing impunity.*"

However, the government's unwillingness to prosecute PEV cases can be inferred, and evidenced, from its contradictory statements, and its departure from solemn commitments. The Director of Public Prosecutions recently indicated that his office has prosecuted and convicted fifty four (54) PEV perpetrators of Sexual and Gender Based Violence (SGBV). The same Office of the Director of Prosecutions (ODPP) had previously publically averred that they did not have any sufficient evidence to prosecute perpetrators of SGBV. This continued lack of consistency has led to a failure to prosecute any middle or high level perpetrators for the last **six (6) years**.

Furthermore, in its submission on the status of cooperation with the ICC, the Kenyan government indicated its commitment not to withdraw from the Rome Statute. However, soon after that both the National Assembly and the Senate voted in favour of repealing the International Crimes Act 2009. Without the International Crimes Act, there will be no legislation with which to carry out any national prosecutions, **and any call for a referral of the ICC cases to Kenya would therefore, in reality, be a call for a permanent termination of the cases, and open support for impunity.**

In addition to the above, it is on record that the Kenyan government has failed to investigate allegations of witness intimidation in the Kenya situation before the ICC, causing several witnesses and victims to withdraw their evidence or simply refuse to testify due to fear for their lives. Kenya's Witness Protection Agency remains largely under-funded and inadequately supported, receiving less than a half of its requisite annual budget. If witnesses and victims of the ICC cases are threatened and made to withdraw from testifying, how will they be expected to testify in a national process where a hostile environment exists against human rights defenders, and where no adequate protection mechanisms are in place?

In conclusion, Your Excellency, we would wish to recall Article 4 (o) of the constitutive Act of the African Union 2000, which urges the AU member States to condemn and reject impunity on the continent. We recognize again that the ICC is only complementary to national criminal jurisdictions and that Kenya has the jurisdiction and primary obligation to investigate, punish, and prevent international crimes. This is a principle we whole-heartedly support, as we do the sovereignty of our States and our national institutions. However, we are also acutely aware that the Rome Statute exists to protect victims of all nations from situations, and even leaders, who can, and will use national mechanisms to shield themselves from genuine accountability. The evidence and situation of Kenya speaks for itself.

We urge you to remember that victims of the violence were fellow Africans, and a genuine analysis of the situation would convince you to support these victims by allowing them to have their day at the ICC.

Yours sincerely,

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Kenya Section of the International Commission of Jurists

Saida Ali
Coalition of Violence against Women

Kenyans for Peace with Truth and Justice