



**To:**

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Your Excellencies,

**Memorandum to the United Nation's Security Council (UNSC): letter to the UNSC by Kenya's Ambassador to the United Nations (2<sup>nd</sup> May 2013) calling for the termination of the Kenyan cases before the International Criminal Court.**

Kenyans for Peace with Truth and Justice (KPTJ) 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 the disputed 2007 presidential election. 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 2007 election, to address the deep chasms and inequities in Kenyan society.

**Concerns**

KPTJ would like to express its concerns in relation to to a letter written by the Kenya Permanent Representative to the United Nations, Ambassador Macharia Kamau, on Tuesday May 2<sup>nd</sup> 2013 to the United Nations Security Council (UNSC). The letter calls for the termination of the Kenyan cases at the International Criminal Court (ICC).

The demand for termination of the cases is predicated upon the premise that the absence from Kenya of indictees Uhuru Kenyatta and William Ruto, who have been confirmed in office as President and Deputy President of Kenya by a Supreme Court decision, would endanger peace and security in Kenya and the region. The letter states that:

“The security in the Horn of Africa region would be compromised by instability in Kenya if the cases continued to be prosecuted. The implications for the viability and continuity of the state should be self-evident. What this delegation is asking for is not deferral. What this delegation is asking for is immediate termination of the case at the Hague without further ado.”

The letter raises concerns with regard to consistency with the norms of international law, the ICC and the domestic situation in Kenya. The following points need to be considered in this regard:

1. In asking for the termination of the ICC cases on Kenya, and not a deferral under Article 16 of the Rome Statute, Ambassador is **asking for a remedy which the Security Council does not have the mandate to grant**. Furthermore, by calling for the termination of these cases, he clearly demonstrates that the Kenyan government, far from cooperating with the ICC, totally rejects the legitimacy of the ICC’s involvement in Kenya. This undermines any basis for possible future requests for deferral of the Kenya case, as any such request could only be aimed at frustrating the ICC engagement in Kenya.

2. Ambassador Kamau asserts that the **ICC process would instigate tensions in the entire East African region if allowed to proceed**.

- This is a most serious assertion, raising as it does the spectre of violence. It is also difficult to understand: there is no qualitative or quantitative evidence to show that prosecution of the President and his Deputy will lead to violence. In fact, the Deputy President recently travelled to The Hague to appear at a status conference, without this occasioning any unrest.

The letter argues that the continued ICC process would lead to heightened tensions within the country and within the region. Hence, Ambassador Kamau argues that the Principals should be exempted from the Hague process in order for them to discharge their duties effectively. In reality, however, studies show that governments that fail to pursue justice send the message that they are not committed to the rule of law. This can intensify inter-group mistrust, hinder security and development goals, and can even lead to the cyclical recurrence of violence in various forms.

- Given the lack of evidence or indicators that continued prosecution of the ICC cases would lead to instability, if the UNSC acceded to these demands it would delegitimize the ICC as a viable international legal institution which would be detrimental for victims of mass atrocity crimes.

There has been sufficient discussion, amongst others in pre-election debate fora, to inform the public of the implications of electing candidates who had been indicted at The Hague. Mr. Kenyatta reaffirmed that this was a personal challenge that did not involve the State and that he and his deputy were confident of being able to cooperate with the ICC, while carrying out their official duties. They cannot now plead the pressure of those same official duties to prevent their cooperation with the ICC.

3. Ambassador Kamau argues that **the International Criminal Court lacks legitimacy in Kenya, despite Kenya's status as a signatory of the Rome Statute governing the Court.**

- Kenya has been a signatory of the Rome Statute of the ICC since March 15<sup>th</sup> 2005. As part of the new constitution promulgated in 2010, Kenya made provisions for instruments of international law to be incorporated into her domestic law and jurisprudence as per Articles 2 (5) and 2 (6), which state in part that the "... general rules of international law... form part of the law of Kenya" and as a result, "any treaty or convention ratified by Kenya shall form part of Kenya's law under this constitution."
- These aforementioned constitutional provisions mean that the government is bound by the dictates of the ICC with no exception and thus cannot utilize political expediency as a result. The constitution of Kenya gives the Rome Statute the same legal legitimacy that any domestic law in the country possesses.

The ICC has always enjoyed high public support in Kenya; as of January 2013, 66% of Kenyans said they supported the ICC prosecutions. Surely 66% is of far greater significance than the figure cited by Kamau as evidence of "overwhelming support" of the indictees.

4. The letter attempts to undermine the **post-election violence victims' quest for justice and the recourse the International Criminal Court provides.**

- The cases ongoing in the Court seek redress for the injustices suffered by the victims of the post-election violence and would never have been referred to the Court (to which the country is party to under the Rome Statute) without sufficient evidence on legal grounds, despite claims to the contrary.
- Thus, the letter not only serves as an affront to these victims, the overwhelming majority of whom are still yet to see substantive justice done in relation to their plight, but also risks the very concept of the "rule of law" on the altar of political expediency. This should never be allowed or seen to be legitimized.

We remind the UNSC that the ICC became involved in Kenya at the behest of Kenyan institutions and that it only intervened after the Kenyan political elite, including the two principals who now find themselves in the international dock, repeatedly rejected any serious attempt to set up credible domestic accountability mechanisms.

5. Ambassador Kamau also states that the recently concluded presidential election **gives the two principals unassailable legitimacy to govern and a vote of no confidence in the cases against them.** The March 4<sup>th</sup> General Election was not a referendum on the International Criminal Court;

- The new government won the election with a very slim margin. Out of the just-over 12 million votes cast, Kenyatta only received 50.07 percent, clearing the constitutional barrier by 0.07%. With the runner-up receiving 43.31 percent of the vote, this can hardly be counted as "overwhelming support."

- The assertion that the election of both the President and Deputy ensures their innocence since they provide the very “glue” that facilitates the cohesion of the peoples of Kenya also does not hold merit. The recent election petition in the Supreme Court served by the Coalition of Reforms and Democracy (CORD) against the Independent Electoral and Borders Commission (IEBC) laid bare the deep societal divisions that pervade the country and persist despite the verdict passed in IEBC’s favor by the Supreme Court judges. The presidential election petitions also revealed massive irregularities by the electoral management body, some of which were identified by the Supreme Court as worthy of investigation and prosecution, even though it reaffirmed the election results.

Given the issues raised above, we call upon the United Nations Security Council to disregard the letter from the Kenya’s UN ambassador as it is not properly mandated and does not reflect the reality in Kenya. We emphasise that the process at The Hague is a legal, and not a political process and reject any attempt to politicize the International Criminal Court. We call upon the Security Council to press for the unequivocal commitment of the Kenya government to cooperate fully with the International Criminal Court and to desist from any further attempts at mobilizing sentiment internationally or at the regional level against the Court.

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/17/5/13)*