



Submission to the Office of the Prosecutor of the International Criminal Court

October 22nd 2012

Introduction

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 2007's presidential election debacle. Numerous members of the coalition have worked with, and continue to work with victims of the 2007-2008 post-election violence in various capacities, including as ICC intermediaries, and undertaking advocacy on behalf of the victims. In the following we, the members of KPTJ, and colleagues in civil society, highlight issues which we believe should be of concern to the Office of The Prosecutor of the International Criminal Court (ICC) and indeed to Kenyans as we enter the decisive stretch before the elections of March 4 2013 and the trials that are set to begin in April 2012.

In respect to Victims Participation:

- Firstly, we would like to highlight our concerns in relation to two almost identical Decisions on victim's representation and participation¹ in the two Kenya cases rendered by Trial Chamber V on 3 October 2012 which we believe will impact on victims' rights to representation and participation. The Decisions have now transferred the mandate of victims representation in the Court from the independent CLR's to the Office of Public Counsel for Victims (OPCV); an office within the Office of the Registrar of the ICC in the court's structure. Also, the Decisions revise the victims registration procedure by providing two options: the first allows the victims to be represented through a CLR and the second still allows victims to apply individually to the Court to participate; but the registration aspect has been watered down to simplify the information that the victims provide about themselves to the Court.

¹ ICC-01/09-01/11-460,ICC-01/09-02/11-498

- KPTJ understands that these Decisions do not fall under the mandate of the OTP but would like to underline its concerns to the Prosecutor that neither the intermediaries nor the communities that the Decisions affect were consulted by the Chamber in arriving at these Decisions. Furthermore, this raises the question as to how these victims will perceive a change in the way their interests are being represented in Court. Even more significantly, KPTJ recognizes the Court's interest in solving the issue of individual applications, but wish to implore the Court not to water down the procedure of victims' participation to the extent that it has a negative effect on the Kenya Cases.

In respect to Government of Kenya's cooperation with the ICC:

- The Prosecutor and Head of Cooperation have been quoted in the press lamenting the lack of cooperation by the Kenya Government. In fact this lack of cooperation has been tacitly admitted by the AG Githu Muigai who described his office as only a clearing house; and that all requests sent to him by the OTP had been forwarded to relevant government agencies. He blamed these agencies for the delays.

Recommendation

- The AG should be asked to clarify what agencies are refusing to cooperate and who the specific State and public officers are, and are thereby in breach of Kenyan law?
- The previous Prosecutor has been quoted as saying that some prosecution's witnesses may have been either: intimidated, bribed or threatened. If this is an accurate depiction of the state of affairs a number of key issues arise and in particular:
 - Recalling Article 70 of the Rome Statute on offences against the administration of justice and recalling Section 16,17 and 18 of the International Crimes Act, have investigations been mooted to ascertain these facts, identify the perpetrators of the offences and bring them to account?
 - If investigations have commenced what processes is the OTP mooting to retain or regain confidence in its witnesses and victims of the case?

In respect of the Integrity and Leadership Act and ICC Suspects vying for political office:

- In spite of the new constitution and efforts to raise the integrity threshold for aspirants to elective positions such as the enactment of a substantive vetting law, government has actively and efficiently subverted efforts at ensuring that individuals involved in criminal and unethical behavior are not eligible to stand for elective positions.
- The overall motive of these efforts is amongst other things to ensure that accountability for the crimes they face before the court is forestalled.
- It is for this reason that they requested during that Status Conferences that Trial be held after the elections and subsequently requested through the attorney general that the Trial date be pushed back to facilitate the swearing in of the president in the event of a run off.
- The commitments signed by the suspects after the status conference to attend Trial on the dates specified by the Trial Chamber are binding upon the suspects to the extent that they will honour those commitments under threat of sanction, specifically the issuance of warrants of arrest in the event of breach. However, it is unwise to expect that suspects of the crimes under consideration before the Court would be bound by consideration of honour or the threat of sanctions that they believe can be frustrated once they are in office.

Recommendations

- The Prosecutor should emphasize to Kenyans how serious the charges of the crimes are and the implications of having leaders who are constantly out of the country to attend court hearings.
- The Prosecution should put State Parties on alert and require commitments from the same that in the event of violation of the suspects' commitment to appear for Trial that warrants of arrest will be effected by the State Parties.
- This advocacy should focus on countries within the AU as they have already been lobbied by segments of the government to withdraw support for the Kenyan Cases before the ICC and find mechanisms of removing the Cases from its jurisdiction.

In respect of National Security: Violence across the country:

- *Violence is already occurring in various locations around the country and could spread.* Much of the violence has been in response to demarcation of electoral boundaries, resource conflicts and specific local issues but there are also growing perceptions that these aspects are overlaid by increasing political instrumentalisation of violence, e.g. in Tana River.
- Politicians are raising tensions along ethnic lines as they have historically depended on ethnic balkanization to secure political interests. This process is methodically thought out and implemented.
- Government has often been slow to respond appropriately and in a timely manner to outbreaks of violence, despite early warning from organisations on the ground.
- There have been incidents of excessive use of force with security agencies of the State in response to incidences of civil unrests as illustrated in Mombasa with the MRC and in Tana River after the clashes and utterances by senior police officers seem to indicate that this approach is the sanctioned and preferred approach to policing.

Recommendations

- The OTP should alert the public that it shall be intently watching the trends of ethnic mobilization and balkanization in processes leading up to the next general elections in 2013 and emphasise the measures at its disposal if the suspects are seen to not be adhering to the conditions imposed on them by the Pre-Trial Chamber.
- The OTP should also indicate that it will be observing closely the conduct of the Police and how they handle incidents of political unrest, to watch for trends, patterns and the organization of Police response. This is particularly in view of comments of police spokesperson on the reluctance of Police to act against serious violence due to fears of persecution by the ICC. If serious crimes are committed in Kenya and the Police remain inactive the OTP should make it clear they would still be subject to investigations and prosecutions if serious crimes are committed.

In respect to Complementarity:

- There have been no serious local attempts to achieve accountability for post-election violence, including police involvement, despite the establishment of a new Task Force by the Director of Public Prosecutions.
- The DPP task force that was to review the 5000 PEV cases returned with the position that there was insufficient evidence to proceed with the greater majority of those cases.

Recommendation

- The OTP should advocate for the effective conduct of local prosecutions against mid and lower level perpetrators of Post-Election Violence as this will augment the principle of Complementarity.

Witness tampering and protection

- Kenyans would like to be reassured that OTP has that sufficient contingency measures put in place to ensure the protection of witnesses and victims once their names are disclosed to the defence, including the witnesses who will be rejected by the Court and whose names would have already been disclosed and would thus be subject to risk.
- We note that there are allegations about interference with witnesses and the posting of information impugning the credibility of the involved witnesses on blogs by individuals who are close to the suspects. We request the OTP to underline the seriousness with which the Court views any attempt to suborn witnesses and that such attempts will be decisively dealt with.
- Kenyans would equally like to be informed if there has been any progress on the investigations with regard to the intention highlighted by the former Prosecutor to bring charges against perpetrators involved in Police shootings and Sexual and Gender Based Violence (SGBV).
- As civil society we underline our continuing concern on the possible effect of the extension of Trial dates if this should be granted. Calls have been made for extension in case of a run-off in the presidential elections, which is probable. Any request based on political considerations should not be entertained. Victims have a legitimate expectation that the trial date given is the date on which the Trials will begin.

(ends kptj oct2012, Nairobi)