

Le Président du Conseil de sécurité présente ses compliments aux membres du Conseil et a l'honneur de transmettre, pour examen, le texte d'une note verbale datée du 2 mai 2013, adressée au Président du Conseil de sécurité par la Mission permanente du Kenya auprès de l'Organisation des Nations Unies, et la pièce qui y est jointe.

Le 3 mai 2013

The President of the Security Council presents his compliments to the members of the Council and has the honour to transmit herewith, for their information, a copy of a note verbale dated 2 May 2013 from the Permanent Mission of Kenya to the United Nations addressed to the President of the Security Council, and its enclosure.

3 May 2013



PERMANENT MISSION OF THE REPUBLIC OF KENYA
TO THE UNITED NATIONS

No. 167/13

The Permanent Mission of the Republic of Kenya to the United Nations presents its compliments to the President of the United Nations Security Council for the Month of May 2013 and has the honour to enclose herewith a Statement on the Situation in Kenya ICC-01/09 and the International Criminal Court.

The Permanent Mission of Kenya to the United Nations would be grateful if the President of the United Nations Security Council for the month of May 2013 could have this document circulated to the Members of the United Nations Security Council ahead of the meeting with the Prosecutor of the International Criminal Court scheduled for May 7 2013.

The Permanent Mission of Kenya to the United Nations avails itself of this opportunity to renew to the President of the United Nations Security Council for the Month of May 2013 the assurances of its highest consideration.


New York May 2, 2013



H.E. Mr. Menan Kodjo
President of the Security Council
for the Month of May 2013
c/o Permanent Mission of Togo to the United Nations
112 East 40 Street
New York, NY 10016

BRIEF ON THE SITUATION IN KENYA AND THE INTERNATIONAL CRIMINAL COURT

The Preamble of the Rome Statute affirms the need to ensure effective prosecution of the crimes proscribed under the Rome Statute. The events surrounding the two cases in the Kenya situation reveal that the Court has dropped the charges against two individuals and the Prosecution had to issue a notice of withdrawal. This obtained for want of evidence. Obviously, the Prosecution abdicated its duty under Article 69 of the Rome Statute by failing to undertake investigations and brought before the court testimonies made by coached witnesses. In light of the foregoing it seems reasonable to assume that the Court has the wrong people before it and it is a miscarriage of justice to continue trying them when the prosecution case is manifestly wanting.

The Rome Statute also reaffirms the Purposes and Principles of the Charter of the United Nations, including the need to respect the sovereignty of member States and to refrain from acting in a manner that is inconsistent with the political independence of any State. Kenyans, in whom this sovereign right vests, spoke with a loud, clear, concise voice when they overwhelmingly elected Uhuru Kenyatta and William Ruto as President and Deputy President respectively. We are therefore concerned that the Court may or is being used to undermine the voice of Kenyans contrary to these very fundamental principles.

The UNSC one of the overseers under the Rome Statute has the duty to ensure that the principles of the UN Charter are upheld in the context of the Rome Statute lest any undermining of the said principles endangers peace and security.

In relation to Kenya, the proceedings are misplaced in light of the present prevailing circumstances. It has since come to light that the:-

- The original claims might have been false and or manufactured. It has since come to light that there is hardly any cogent evidence to back the same. It has since come to light that the evidence could be tainted and or procured through inducement and or corrupt measures. The case is not sufficiently grounded to justify any further action by the Court.
- Two and half years later there is nothing on record or any recent event to show or justify the continuation of the Cases in relation to Kenya; there is nothing on record to justify that the continuation of the case is in the interest of justice or necessary for keeping of the peace in the Republic.



- Furthermore some individuals who are under question before the Court have not only been the greatest agents of cohesion and but have been at the forefront and are the glue that binds the country during the election and transition period. There is nothing to suggest that the continuance of the matter is in the interest of peace and justice in Kenya, yet it is obvious that their absence from the country may undermine the prevailing peace and any resultant insecurity may spill over to the neighbouring countries.
- It is a fact that the very suspects who are being prosecuted and suffice to say have received overwhelming support from the citizens of the Kenya in the just concluded 4th March 2013 elections. The citizens in their droves (86% voter turnout) and looking at the votes garnered by Mr. Uhuru Kenyatta and Mr. William Ruto suggest that the Kenyan populace is ready for them to be their political masters. This mandate was received from the Kenyan public in the exercise of their inalienable democratic rights and civic duty.

We are of the considered opinion that the manner in which the cases are being conducted is neither impartial nor independent. The conduct of the OTP is falling short of this. There is no demonstrable intent from this conduct to show that the main purpose of the proceedings is to bring justice.

The Attorney General of Kenya has on several occasions brought to light that continued conduct of the Office of the Prosecutor (OTP) is not consistent with the old and established tenets of legal adage, practice, use, customs ethics professional courtesy and decency.

This has created serious doubt as to the intention of the proceedings. The continued actions of the OTP are clearly in breach of Article 67 which safeguards the rights of the accused persons and Article 66 which provides for the presumption of innocence. The Kenya case that was taken up by the Prosecutor of the ICC at his own behest, is falling apart in the face of a lack of evidence, withdrawal of witnesses and incompetent prosecution. At every juncture that respective ICC judges have pronounced themselves on the Kenya cases they have castigated and at times deplored the prosecutorial manner and activities of the OTP. They have been critical of the prosecutor's methods and tactics finding them wanting, violating of the rights of the accused, unprofessional and at times verging on incompetence. Despite these turn of events the OTP has continued to doggedly insist that there is a case where

there is none, and has disingenuously shifted the goal posts of the prosecutors case, evidence, and coached witnesses in attempts to make a case where clearly there is none.

We are of the reasoned opinion that what is currently ongoing at the instant is an affront to the domestic policy and internal affairs of our sovereign Republic of Kenya. This inalienable right is being undermined and manipulated using different actors from within and without the territory of Kenya. As in the past, civil society bodies are currently being used by external dark forces to espouse their own policies using the Rome Statute as a conduit and the ICC as the manifestation of this interference.

For these reasons we are of the considered reasoned opinion that this conduct is prejudicial to the domestic policies of the Kenya; the peace and security situation of Kenya; the democratic rights as espoused in the Constitution of Kenya 2010 that deposits the sovereign power and rights in the people of Kenya.

All the while the Government of Kenya has always shown and taken each and every opportunity to co-operate with the Court and ensure that it meets its obligations as enumerated in the Rome Statute. This is even in times when it has been unfavorable politically or otherwise to the Government. The Government has always abided by the provisions of Article 86, 86 and 93 of the Statue even when at times such adherence is detrimental to the interests of the government of the day.

This flies in the face of the unfortunate and misguided statements that the OTP has constantly repeated at every opportunity that arises. These statements have been made in blatant disregard of the provisions of the Statute and are made in extrajudicial manner aimed at seeking and winning sympathy from known and unknown quarters at the expense of due process. The continued interactions of the OTP with the print and electronic media are a blatant deviation of the responsibilities placed on the OTP by Article 42 of the Rome Statute.

In this regard the Attorney General of Kenya has repeated called upon the OTP to raise her concerns as per the laid down procedures and if she is of the opinion that the Government of the Republic of Kenya is renegeing on its obligations then the thing to do is to raise the same in Court as provided for in Article 87 and in particular Article 87 (7) of the Rome Statute.

The UNSC has always remained seized of this matter and from the foregoing it is clear that the present proceedings as relates to Kenya are not in the interests of peace and security in Kenya and/or the region and it is high time that the UNSC takes cognizance of this matter afresh in light of the fundamental changes and present circumstances prevailing in Kenya.

The Security Council **needs** therefore to take up its responsibility as the political abettor of last resort on matters related to the peace and security even as related to the ICC. In this regard it is important and necessary that members of the of the UN Security Council not see themselves as disinterested observers of the ICC legal process, but rather recognize the potential and dire toll of the OTP as regards Kenya and the danger that it poses to international peace and security in Eastern Africa to say nothing of the further damage to the credibility of ICC.

This delegation has always maintained in its submission to the UN Security Council, in its numerous statements in the Bureau of the ICC, as well as in its statements in the UNGA that the case that have been taken up unilaterally by the OTP was ill advised, had no legal merit nor political or social usefulness whatsoever. In fact we affirmed that the actions of the Prosecutor were not only prejudicial to the accused but threatened the integrity of the Kenyan state while potentially undermining the peace and stability of the country. It has taken great resolve and discipline on the part of the Kenyan people not to be provoked into turmoil and violence by these protracted and unpopular cases. I reiterate all statements that I made to the UNSC, The Bureau of the Court of this matter, for the same are true and relevant today as when I first made them over two years ago.

A classic example of this lack of merit, legal locus or usefulness is the cruel and inhuman treatment that was meted out on Amb. Francis K. Muthaaura, former Permanent Secretary, Head of Public Service & Secretary to the Cabinet. On Amb Francis Muthaura's indictment, when he was the top civil servant on the Republic of Kenya, we suffered a great disruption in the operations of the civil service as the perception of a fetter on the exercise of the mandate of officials crept in. After this indictment his reputation built over a long tenure at national, regional and international levels suffered a blot that will forever haunt him.



Thereafter, after two years of unimaginable mental anguish, pain and torture, the OTP unilaterally decides to drop this indictment stating there was no evidence to continue the case against him. The question we raise here is it fair to subject Kenya's top ranking civil servant, an Permanent Representative Emeritus to the United Nations, an honest, humble and wise man of repute to such humiliation that he has now no recourse to any recompense under the international criminal justice system not to mention the arduous strain that was occasioned to his otherwise good health, social standing, illustrious career and not to mention financial resources. Surely this is not what the Rome Statute envisaged as a result of its implementation.

At present I am of the view that the Rome statute is undergoing a test as to its veracity, usefulness and impartiality. Which test can add it is currently falling short of expectations. It is time for the UNSC to pronounce itself in light of the interests of peace and security in Kenya, the region and recognize the sovereign inalienable right of the Kenyan people and exercise of the democratic space of the people.

This delegation wishes to reiterate that we are not in any way interfering with the conduct of the cases before the Court. To the contrary the Government of Kenya will continue cooperating with the Court and being a State Party to the Rome Statute is cognizant of the obligations placed on it.

At this point of time we ask sister African and Latin American States and friendly allies (China, USA, India, Russia et al) to use their influence and good offices to ensure that UNSC being seized of this matter takes the necessary steps as in our opinion the ICC has shifted its focus in general.

While in the past the Court presented that its actions and that of its supporters in relation to their stand in Case I and II of Kenya presented a principled stand to the interest of law and a reprieve for the victims of post election violence in Kenya in 2008, the same cannot be said today.

In relation to the Kenyan cases there is a constant shift of goalposts that is very calculated to keep the Government, the leaders of Kenya and the people of Kenya on a leash and in a distracting sense of alertness. This scenario is created to ensure that the reputation of the country and its leaders especially H.E. Hon Uhuru Kenyatta, President and Commander-in-Chief of the Defence Forces of the Republic of Kenya and H.E. Hon William Ruto, Deputy President of the

Republic of Kenya are sufficiently tarnished notwithstanding the fact that the true sovereigns of Kenya, the people of Kenya, have spoken with a loud, clear and concise voice.

It is said that all shall be revealed in due course. At the time when the Rome Statute was adopted at a diplomatic conference, the United States of America, China, India and other countries voiced their concerns claiming that the ICC would have unacceptable unintended consequences. In a statement Amb. John Bolton who served as the U.S. Ambassador to the United Nations from August 2005 until December 2006 said;

'The problems inherent in the ICC are . . . matters that touch directly on our national interests and security, and therefore also affect the security of our friends and allies worldwide.

For numerous reasons, the United States decided that the ICC had unacceptable consequences for our national sovereignty. Specifically, the ICC is an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence.

Subjecting U.S. persons to this treaty with its unaccountable Prosecutor and its unchecked judicial power is clearly inconsistent with American standards of constitutionalism. Our concerns about politically motivated charges against U.S. persons are not just hypothetical Without sufficient protection against such frivolous charges, responsible officials may be deterred from carrying out a wide range of legitimate functions across the spectrum, from actions integral to our national defense to peacekeeping missions or interventions in humanitarian crises or civil wars Simply launching criminal investigations has an enormous political impact. Although subsequent indictments and convictions are unquestionably more serious, a zealous independent Prosecutor can make dramatic news just by calling witnesses and gathering documents, without ever bringing formal charges.

Accumulated experience strongly favors a case-by-case approach to resolving serious political and military disputes, rather than the inevitable resort to adjudication . . . The international effort should encourage warring parties to resolve questions of criminality within

national judicial systems, as part of a comprehensive solution to their disagreements.

We strongly support states fulfilling their sovereign responsibility to hold perpetrators of war crimes accountable rather than abdicating that responsibility to the international community. In matters of international justice, the United States has many foreign policy instruments to utilize that are fully consistent with our values and interests. We will continue to play a worldwide leadership role in strengthening domestic judicial systems and promoting freedom . . .¹

The current actions of the OTP as regards the Kenyan case best exemplify the sentiments expressed above.

India refused to sign or ratify the Rome Statute for similar reasons. The principal objections of India to the Rome Statute are that it

- Made the ICC subordinate to the UN Security Council, and thus in effect to its permanent members, and their political interference, by providing it the power to refer cases to the ICC and the power to block ICC proceedings.
- Provided the extraordinary power to the UN Security Council to bind non-States Parties to the ICC ; this violates a fundamental principle of the Vienna Convention on the Law of Treaties that no state can be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted.
- Blurred the legal distinction between normative customary law and treaty obligations, particularly in respect of the definitions of crimes against humanity and their applicability to internal conflicts, placing countries in a position of being forced to acquiesce through the Rome Statutes to provisions of international treaties they have not yet accepted.

¹ John Bolton "American Justice and the International Criminal Court"
(November 2003) <http://reckoning.facinghistory.org/content/reading-2> (May 2013)



- Permitted no reservations or opt-out provisions to enable countries to safeguard their interests if placed in the above situation
- Inappropriately vested wide competence and powers to initiate investigations and trigger jurisdiction of the ICC in the hands of an individual prosecutor
- Refused to designate of the use of nuclear weapons and terrorism among crimes within the purview of the ICC, as proposed by India²

What is evident is that there was and still is truth in the statements made by these countries who declined to sign the Rome Statute. The actions of the OTP are a clear and concise manifestation of the facts expressed then. It is time to act, and act decisively.

Other prominent commentators on these issues have summarised the prevailing position as;

The court's structure establishes few, if any, practical external checks on the ICC's authority. Among the judges' responsibilities are determining whether the prosecutor may proceed with a case and whether a member state has been "unwilling or unable genuinely to carry out the investigation or prosecution, which would trigger the ICC's jurisdiction under the principle of "complementarity," which is designed to limit the court's power and avoid political abuse of its authority. Thus, the various arms of the ICC are themselves the only real check on its authority. This absence of external checks raises serious concerns.

The ability both to interpret the law and effectively to force member states to adopt its view gives the ICC unprecedented power. For the first time, a permanent international institution is entitled to determine the legal obligations of states and their individual citizens and to criminally punish those individual citizens—even if its understanding of

² Dilip Lahiri, Should India Stay out of the ICC

<http://www.observerindia.com/cms/sites/orfonline/modules/analysis/AnalysisDetail.html?cmaid=20612&mmacm-aid=20613> (1 May 2013)

the law radically differs from the relevant state's position. Moreover, the ICC's judges are not otherwise subject to the supervision or control of the states parties, except in matters of personal corruption. Thus, when the ICC determines what international law requires in any of its areas of competence, this is arguably the final word.³

The barriers to the re-sign and ratification of the Rome Statute by the USA can be summarised as

The ICC's Unchecked Power. The U.S. system of government is based on the principle that power must be checked by other power or it will be abused and misused. With this in mind, the Founding Fathers divided the national government into three branches, giving each the means to influence and restrain excesses of the other branches. The ICC lacks robust checks on its authority; the court is an independent treaty body. In theory, the States that have ratified the Rome Statute and accepted the court's authority control the ICC. In practice, the role of the Assembly of State Parties is limited. The judges themselves settle any dispute over the court's "judicial functions." The prosecutor can initiate an investigation on his own authority, and the ICC judges determine whether the investigation may proceed. The U.N. Security Council can delay an investigation for a year--a delay that can be renewed--but it cannot stop an investigation.⁴

The Challenges to the Security Council's Authority. The Rome Statute empowers the ICC to investigate, prosecute, and punish individuals for the crime of "aggression." This directly challenges the authority and prerogatives of the U.N. Security Council, which the U.N. Charter gives "primary responsibility for the maintenance of international peace and security" and which is the only U.N. institution empowered to determine when a nation has committed an act of aggression. Yet, the Rome Statute "empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime" free of any oversight from the Security Council.⁵

³ Brett D. Schaefer and Steven Groves, *The U.S. Should Not Join the International Criminal Court*

<http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court> (1 May 2013) at pg 4

⁴ *Ibid*

⁵ *Ibid*

A Threat to National Sovereignty. A bedrock principle of the international system is that treaties and the judgments and decisions of treaty organizations cannot be imposed on states without their consent. ⁶

From the foregoing we need to ask ourselves some pertinent questions:-

- What purpose ~~a case serves~~ that is brought before the ICC against a sitting head of state and his deputy not by a state party, nor by the UNSC or any other legitimate group but by a prosecutor of the very institution to which the state is party.
- A case where the prosecutor has cherry picked individuals to prosecute, arbitrarily and most insidiously, from a long list whose veracity was never independently checked or verified.
- A case ostensibly to prosecute crimes against humanity, when the very humanity stands firm behind the accused and proclaims them innocent. It should be noted that the Kenya case at the Hague is no longer the case of an individual or group of individual citizens. It is now a case that is directed against the person of the Head of State and Commander-in-Chief of the Defence Forces of the Republic of Kenya and his Deputy. The incongruence if such a proposition must be face squarely.
- A case whose evidence base is irreparably weak and flawed, whose witnesses are manifestly coached and compromised and whose distinguished judges to whom it is brought before are disdainful of the lack of professionalism of the prosecutor and scathingly critical of the methods of prosecution.
- What are we to make of such a case? And why should the international community continue to allow its institutions and resources to be used to harangue a members state and abuse the rights of its individual citizens ?
- The case has not been brought to the ICC by State party more by the UN Security Council it begs the question when an individual should be able; why an individual should be able to do so and have no recourse to a higher authority

⁶ Ibid

CONCLUSION

The verdict of the Kenyan people flies in the face of any or any contention that has been said of the suspects and their involvement of crimes against humanity for it is the same humanity who have spoken clearly. These cases are crumbling and fast at that. The UNSC needs to take bold and decisive steps to ensure that justice is done and the same is achieved within the confines of the Rome Statute in spirit of openness, fairness and with respect the sovereign will of an independent Nation.

The international community needs to recognize these achievements and must now respects the free and democratic will of the people by upholding their democratic decision and reaffirm their sovereignty. No external party, least of all an institution to which the Kenyan Government is a signatory to, can claim to uphold the rights of the Kenyan people and to protect their collective humanity more than the Kenyan people themselves and most especially not without their sanction.

The democratically elected and popularly endorsed leaders of the Kenyan people and government cannot be expected to effectively perform their duties and state functions in an orderly manner in the face of an off-shore trail that has no popular resonance and that serves no national or international purpose. Neither can the state be expected to be orderly under such circumstances.

We wish to remind that the ICC is the court of last resort and it is supposed to compliment the national judicial systems, and espoused by the provisions of the Preamble of the Rome Statute, for this is what the family of Nations collectively signed up to.

A lot has changed in the last 2.5 years; we submit that Kenya has the capacity to offer a homegrown solution. The continued state is an affront the state of peace and security in Kenya and is a hindrance to the attainment and sustainability of the same. It is an affront to the exercise of democratic space in a sovereign nation. Clearly Kenya has made incredible, historic, even unprecedented strides in improvements to its governance system and institutions over the past 2.5 year. The drafting and adoption of a progressive constitution and its implementation of a wide range of institutions, commissions and legislation to domesticate the constitution, safe guard human rights, promote gender equality, protect the rights of minorities and define and initiate devolved government is nothing short of exceptional.

Kenyans in their sovereign wisdom elected to power two of the accused as President and Deputy President respectively in effect sending a clear and unequivocal message that the two persons are not only innocent but deserving of responsibilities in the highest office of the land.

Under the UN Charter, the Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself.

We thus ask the UNSC to take the much needed political stance that Kenya must be given the time and opportunity to apply the principle of pre-eminence of National Courts. The UNSC has a duty and obligations to assist Kenya overcome this serious politically sensitive and potentially destabilising and disabling situation. The incoming administration must and should be given a chance to start off without the yoke and burdens of the past fettering their actions.

We are of the opinion that the UNSC must play its role and bring this matter to a halt, if the purpose for which the Rome Statute was negotiated is to be achieved.

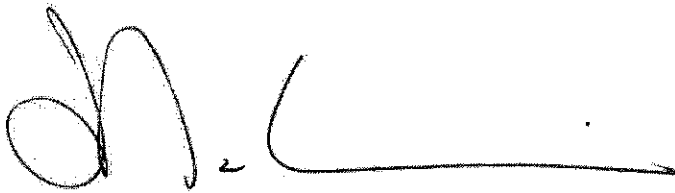
Finally we note that in his congratulatory message to the Hon Uhuru Kenyatta, President Barack Obama stated "The electoral process and the peaceful adjudication of disputes in the Kenyan legal system are testaments to the progress Kenya has made in strengthening its democratic institutions, and the desire of the Kenyan people to move their country forward."

It is from this and the reasons hereinabove that we ask friendly nations to use their good offices and prevail upon the International Criminal Court to reconsider the continued process in relation to the situation in Kenya.

Our hope is that the friendly nations will see the merit in our case and understand the urgency and gravity of the situation we face. We also hope that you will act in a fashion that reflects a deep understanding of the complexities of nation building, the challenges of nascent democracies such as Kenya, and the need to act in a manner that rises above partisan international

relations commensurate with our longstanding relationship is based on a shared commitment to democracy, security, and opportunity.

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 for the ~~immediate~~ termination of the case at the Hague without much further ado.



Macharia Kamau

Ambassador/Permanent Representative

May 2nd 2013

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