KENYANS FOR PEACE WITH TRUTH & JUSTICE

14TH SESSION OF THE ASSEMBLY OF STATE PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

NOVEMBER 18-26, 2015

ADVOCACY BRIEF ON KENYA[1]

A SUMMARY OF KEY ISSUES FOR STATES

1. **The Kenya State's endgame, as publicly declared by various officials including the President, is the immediate, and premature, termination of the case against William Ruto and Joshua Sang**, just as was witnessed with the Kenyatta case. This end, according to Kenya's political elite, justifies the means and it matters not the extent to which this pursuit undermines the Court in the delivery of justice for victims of atrocity crimes everywhere.

2. **Kenya continues to employ double-speak** where it pledges to cooperate with the Court while at the same time actively frustrating it from continued investigation and prosecution of the cases at home and orchestrating a sustained international campaign against it abroad.

3. Granting Kenya license to question ongoing prosecutions on the floor of the ASP risks undermining the judicial independence of the Court, which could fray the fabric that holds the Rome Statute system together.

4. **The ASP should play its rightful policy-making, oversight and management role and avoid stepping into the judicial role.** Under the Rome Statute, there is a clear separation of roles between the Assembly and the Court that needs to be respected. The ASP is not an appellate or review body.

5. **Kenya has not offered domestic solutions for justice, accountability and reparations for the victims of post-election violence**. Over 1,133 were killed, thousands sexually assaulted, maimed and over 600,000 displaced. To date, 17 camps for the Internally Displaced remain open across the country, with over 89,000 integrated IDPs still not resettled, sexual and gender-based violence (SGBV) victims, those who suffered bodily harm, loss of property and loss of family remain unaddressed. The Director of Public Prosecutions says a majority of these crimes cannot be prosecuted, a statement reiterated by the President.

6. **The ICC still remains the only viable hope for justice**, truth- telling, accountability and reparations for the victims of the post-election violence and the only credible deterrent against future similar crises.

7. **The Kenya case has run into unprecedented challenges,** with 8 witnesses dead/disappeared in one case, and another 16 out of 42 prosecution witnesses in another case withdrawing/recanting their testimony. The Court has issued arrest warrants for three Kenyans in connection with witness tampering in the remaining case.

[1] This brief was prepared by Kenyans for Peace with Truth and Justice (KPTJ), a coalition of Kenyan citizens and over 30 organizations working in the human rights, governance and legal fields that came together during the crisis over the disputed results of the 2007 presidential election to seek truth and accountability for the elections and the widespread violence that followed; and who continue to work closely with the victims of that period. It is a brief update on the situation in Kenya as pertains to pursuing accountability for the crimes against humanity committed during the 2007-2008 Post-Election Violence as well as its adherence to its obligations under the Rome Statute.

I. INTRODUCTION

a) Current Political Environment in Kenya – 'Tired of the ICC's 'interference"[2]

1. The 14th Assembly of State Parties to the Rome Statute takes place against the backdrop of a highly charged and polarized political landscape in Kenya rife with incendiary anti-ICC rhetoric, and coupled with the continued difficulties in the investigation and prosecution of the Kenya cases before the Court. Kenyan politicians have consistently used a myriad of platforms to heap negative criticism on and make toxic, unsubstantiated allegations against the ICC. Domestically, possibilities and opportunities for accountability and justice for victims continue to remain elusive. This is likely to get worse as the country begins to prepare for the next elections due to be held in 2017. As in previous years leading up to elections, including the 2007 elections, expression of divisive political rhetoric has begun through public rallies, including those disguised as "prayer meetings" in support of the ICC accused persons.

2. **The ICC debate continues to define and inform Kenyan politics. Conversely, Kenya's domestic politics continue to define and inform its interventions on the ICC and at Assemblies of States Parties.** The decision by Uhuru Kenyatta and William Ruto to run for election on a joint ticket in 2013 was predicated on the ICC cases as the main coalescing factor. Their Jubilee coalition, on which they contested the presidency, turned the ICC intervention in Kenya into the main campaign issue. The withdrawal of charges against Uhuru Kenyatta in December 2014 has complicated this political marriage and generates disquiet on the fate of the Jubilee coalition as the country heads towards elections in 2017. The tenuous marriage of convenience that brought together the two communities from which the President and the Deputy President come is now at stake because only one of the two still continues to face trial. The case against William Ruto continues to be used by the political elite to spread division among communities in Kenya. Politicians have sustained a campaign to delegitimise the ICC and call for the termination of the Ruto case through, *inter alia,* pressurising the Assembly of State Parties to insert itself into the judicial process in the case, which would violate both the spirit and the letter of the Rome Statute.

3. **The last year has also seen increased attacks on witnesses and perceived supporters of the ICC.** An extreme example of this is the case of Mr Meshack Yebei. An alleged ICC witness, Mr Yebei was abducted close to his home in December 2014, only for his decaying body to be discovered in March 2015, in a national park, over 600 kilometers away from where he was last seen. The Kenyan judicial and legal system has also been used to delay and defeat the ICC warrants of arrest against Walter Barasa, who is wanted in The Hague to answer charges of witness tampering. **The government did not enforce the warrant of arrest, even after the lapse of a court order barring Barasa's arrest.**

[2] October 20, 2015, President Kenyatta said he was "tired of interference" and stated that the International Criminal Court (ICC) should keep off Kenya's internal affairs. http://uk.reuters.com/article/2015/11/15/uk-kenya- diplomacy-idUKKCN0T411M20151115

Barasa has since filed other motions seeking orders to protect him from being extradited to the ICC. In September this year, the ICC unsealed arrested warrants against lawyer Paul Gicheru and Phillip Kipkoech Bett on suspicion of offences against the administration of justice, consisting in corruptly influencing prosecution witnesses. These are notable developments in the quest for justice, given the high level of witness interference that both Kenyan cases have experienced and which in part led to the withdrawal of charges against Uhuru Kenyatta.

4. Blistering verbal attacks by politicians and through social media by supporters of Uhuru Kenyatta and William Ruto have continued unabated. They are levelled against anyone who is perceived as supportive of the ICC process, with civil society bearing the brunt for its steadfast position on the importance of seeing the ICC cases through to their logical conclusion, considering that domestic efforts to establish accountability have failed due to lack of political will.

5. **As Kenya enters 2016 -- a year to the next elections -- the fear arising from past experiences where divisive political tactics were used to polarize communities, leading to election-related violence, is growing.** Hate speech is on the rise at public political meetings and "prayer rallies". Since the return of multiparty democracy in the early 90's Kenya has consistently experienced election-related violence. The 2007 violence was by far the most severe and widespread. In view of minimal domestic efforts to bring those who committed the atrocities in 2007 to account, and with the ICC process greatly challenged by Kenya's relentless efforts to ensure the cases initiated are not concluded, concern is deepening within the country on what options would be available in future to deter a crisis similar to the one the country went through in 2007/8.

6. **KPTJ therefore strongly urges the ASP to remain steadfast in protecting the integrity and independence of the ICC, because in many crisis situations it remains the only viable option for checking impunity.**

b) Recent AU-ICC Developments

7. After his election as ASP President, Hon Sidiki Kaba sought to rally support for the Court through positive reinforcement of the ICC's mandate by African States Parties. In 2015, President Kaba has visited Kenya, Nigeria and the African Union Commission in an effort to build support for the ICC within the Continent. During his Kenyan visit, President Uhuru Kenyatta promised Kenya's continued cooperation with the ICC.

8. The Office of the Prosecutor has also shown commitment in strengthening the Court's relationship with the AU. In 2015 the OTP initiated the development of an OTP-AU strategy to create a road map for how the ICC-AU relationship could be improved and strengthened.

9. Despite these positive developments, there has been continued backlash directed at the Court. Kenya continues to lead efforts to delegitimize and undermine the Court. More recently, South Africa has also adopted a defiant approach in dealing with its obligations under the Rome Statute, particularly after it hosted Sudanese President Omar al Bashir in June 2015, who has an outstanding arrest warrant for genocide, war crimes and crimes against humanity. Both Kenya and South Africa have declared their intention to withdraw from the Rome Statute and lead a mass withdrawal by African States. Despite the political elites' purporting to act on behalf of Africa and perpetuating the anti-ICC rhetoric, it must be stressed that there is no unanimity in Africa against international criminal justice.

10. **On the contrary, repeated actions and decisions of African countries and organs demonstrate a commitment to accountability and international criminal justice.** The recent self-referrals by Cote d'Ivoire and Mali were explicitly endorsed by the largest African regional economic community, ECOWAS. The AU has endorsed the law setting up the Special Criminal Chamber in the Central African Republic, which was the result of ICC-facilitated negotiations, arising out of the positive complementarity mandate and obligation of the ICC. There are many other examples. Victims of atrocities in Africa demand accountability: Kenyan victims of the post- election violence, both in the Ruto and Kenyatta cases were overwhelmingly supportive of the ICC's intervention in Kenya. Indeed, after the termination of charges against Mr. Kenyatta, the victims expressed frustration and despair that there would be no justice for them in Kenya.

II. KENYA'S REQUESTS ON FORMAL AGENDA DISCUSSIONS AT ASP 14

11. Ahead of the ASP, the government of Kenya made demands for the inclusion of certain formal agenda items for discussion by the Assembly. Kenya has also mobilized a number of friendly States to support its requests for the said agenda items to be adopted and discussed during the meeting. These discussions proposed by Kenya relate to the Kenya cases currently being handled by either the trial or the appeals chambers of the ICC.

a) What does Kenya want State Parties to discuss?

12. Kenya wrote to the ASP Presidency formally requesting for a discussion on 'the interpretation and application of rule 68 of the ICC rules of procedure and evidence' to be included in the ASP 14 Agenda as well as discussions on the oversight mechanism.

13. Kenya's interest in having Rule 68 discussed is based on the recent application of the rule by the trial Chamber in the *Prosecutor v. William Samoei Ruto and Joshua arap Sang* case, where the Court found that pre-recorded prosecution witness testimonies could be admitted, having considered a variety of factors that had led to the unavailability of witnesses. Mr. Ruto and Mr. Sang appealed the decision and the African Union was subsequently admitted as *amicus curiae* in the appeal that is still being considered by the appeals chamber.

14. The request by Kenya for the ASP to substantively discuss an issue that is currently under consideration by the Court amounts to direct interference in an ongoing judicial process. It creates a very dangerous precedent – that States Parties with active situations and cases before the Court can reverse decisions or leverage political pressure on the Court through the ASP, to take decisions in favour of the States' position.

15. The government of Kenya has also proposed that the ASP 14 Agenda include a discussion on a request for an ad hoc mechanism to audit the witness identification and recruitment processes by the ICC Prosecutor in the case against Ruto and Sang.

16. This request is an escalation of failed request made at ASP 13 for a discussion on the 'ICC Prosecutor's conduct'. States refused to have this discussion then and one of the reasons cited was that such discussion would amount to interfering with the independent office of the Prosecutor. The present request, which is being fronted as an initiative by Kenyan legislators, should be rejected as was the case at the ASP 13.

b) **ASP 14 States should not allow any decisions that may impact on the independence and integrity of the Court to emanate from this discussion**

17. It continues to be our position that the discussion relating to the application of Rule 68 at the current ASP risks undermining the independence of the Court. The Court is the only organ that has the power to interpret provisions and the application of the Rome Statute and the Rules of Procedure and Evidence. Any discussions on the oversight mechanism should be within the framework on supervision provided for in the Rome Statute and such discussions must be conducted in an objective manner aimed at improving and strengthening the ICC rather than delegitimizing and weakening it.

18. While the ASP14 may be seen as presenting a legitimate forum for ventilating critical issues, Kenya has repeatedly demonstrated that its real interest is not in strengthening the Court but in frustrating the search for accountability for crimes committed on its territory in 2008.

19. The request to discuss the Prosecutor's strategy of identification and engagement of witnesses should not be allowed and if granted would constitute an unacceptable interference in the independence of her office. The government of Kenya has in the past presided over activities aimed at intimidating the ICC, in particular the Prosecutor, so as to frustrate the ongoing prosecutions related to the post-election violence. The current request is yet another attempt at interfering with the ongoing cases before the Court. Already such interference has had untold ramifications for the victims participating in the *Kenyatta* case; victims in the *Ruto* case should not suffer the same fate.

III. UNCOMFORTABLE TRUTHS ON THE STATE OF ACCOUNTABILITY IN KENYA

a) Kenya continues to support and finance a determined campaign to undermine the ICC

20. In the past two months leading up to the ASP 14, Kenyan media has been flooded with reports of numerous so-called prayer rallies held by the political class, ostensibly on behalf of Deputy President William Ruto. The main focus of the prayer-cum-political rallies is the ICC case facing Mr. Ruto and Mr. Sang for crimes against humanity allegedly committed during the 2007-2008 Post Election Violence (PEV) in Kenya. The "prayer rallies" are characterized by a castigation of the ICC in general, and the Prosecutor and judges of the ICC in particular. The prayer rallies are largely attended by members of the ruling Jubilee coalition, with the backing of the President, who have consistently called for the withdrawal of the case against Ruto. Little mention is usually made of Ruto's co-accused, Joshua arap Sang, or of the victims of the crimes with which the two are charged.

21. These rallies have openly and negatively criticized the Prosecutor's application and subsequent favorable decision of the judges allowing for the use of prior recorded evidence by the Prosecution in accordance with Rule 68 of the ICC rules of procedure and evidence. The rallies have perpetuated Kenya's track record of attempting to delegitimize the ICC as a credible judicial institution. This campaign has attracted the attention of the judges of Trial Chamber V (a) who issued a public warning to Kenyan politicians against using the prayer rallies to attempt to prosecute matters before the Court. The warning not only fell on deaf ears but was responded to by a defiant commitment to scale up the rallies. The President urged that the prayer rallies proceed despite the Chamber's warning, stating that the ICC cannot dictate to Kenyans not to pray.

22. These "prayer rallies" have the effect of polarizing the country and stoking tensions. Political leaders from one wing of the coalition have used these platforms to brand those leaders who do not attend the rallies as "enemies of the Kalenjin people" – the ethnic group that Ruto and Sang belong to.

b) Eight years later there has been no progress towards domestic investigations and prosecutions for the serious crimes committed.

23. The process of establishing an International Crimes Division of the High Court, initiated in 2010 to assist in the effective determination of cases emerging from the 2007-2008 post-election violence, has stalled. Promises by the government that it was committed to the establishment of the division so as to bridge the impunity gap created by the ICC's strategy of prosecuting just a few of the perpetrators have not been fulfilled. This represents a lost opportunity for Kenya to address past atrocities.

24. **The Truth Justice and Reconciliation Commission Report, which was released in May 2013, presented yet another opportunity for addressing the serious violations committed in Kenya.** The report made some very good findings and recommendations on past violations and went as far as naming some of the perpetrators who it recommended for further investigation and possible prosecution. Since the report's release, there has been no progress in implementing its recommendations. The only effort made has been for the government and Kenyan legislators to undermine the findings of the report. Powerful individuals and legislators implicated in the report have made attempts to expunge their names from the report. Over two years since the release of the TJRC report, the result of 36 months of efforts in documenting past violations, the promise of accountability for victims and survivors, who had engaged the commission with great hope, remains a mirage.

c) **Kenya remains unwilling to adopt effective reparative and accountability measures**

25. **Regrettably, close to eight years since the post-election violence, Kenya has not adopted or implemented effective accountability and reparation measures.** The government through the Cabinet Secretary in charge of the IDPs resettlement programme, has maintained that the government has resettled all IDPs. The resettlement programme however continues to be faced by credibility challenges, arising out of the lack of a proper mapping of the IDPs, as well as the discriminatory manner in which the resettlement has been carried out. Most of the victims who have benefitted from the resettlement are associated with the ethnic communities of the President and deputy President. IDPs from the western parts of the country and integrated IDPs have not benefitted from this programme. For some of those who have been resettled there have been integration issues with the host communities turning hostile whereas others have been resettled in areas that are not favorable to their socio- economic development and sustenance.

26. In the past three weeks there has been a rush to close the remaining 44 IDP camps in Kenya. In the second week of November this year, the government provided KES 200,000 (about USD 2000) per household for resettlement of displaced persons but these efforts are discriminatory and exclude victims from certain communities. There are 17 camps remaining in Nyandarua, Kuresoi, Trans Nzoia, Kakuma, Uasin Gishu, Lodwar, Isiolo and Nairobi. There still are over 89,000 integrated IDPs across the country who have never benefitted from this programme. The government does not have accurate records of genuine IDPs and other victims, a situation that has resulted in benefiting fake IDPs at the expense of the real victims, many of whom continue to languish in sub-human conditions in dilapidated camps.

27. Over and above this, the government has continued to treat the victims of the post-election violence as comprising only of IDPs. The government's reparative efforts have excluded the victims of other violations such as those whose kin and kith were killed, those who lost property, the victims of sexual and gender-based violence and those who were maimed. The failure to provide holistic and responsive reparations remains a great challenge in the country.

28. The Truth Justice and Reconciliation Commission also submitted a comprehensive reparations framework for adoption by the government. The reparations framework was meant to guide the implementation of reparations in a methodical manner. The government of Kenya has refused to adopt the reparations framework and continues to disburse the few reparations it does using discriminatory and disjointed approaches.

29. The government has however enacted the Prevention, Protection and Assistance to Internally Displaced Persons Act (the IDP Act) in 2013 and established the National Consultative Coordination Committee (NCCC) to oversee the implementation of the Act. The NCCC includes members nominated by IDPs. However their effective participation in the decision making is often curtailed by arbitrary executive decisions of the cabinet secretary, interference from local politicians bargaining to bring non-victims to benefit from the funds, lack of allocation of adequate funds and lack of consultation with victims' groups.

30. In March 2015, the President announced in his State of the Nation Address that the government would set up a KES 10 Billion (USD 100 Million) reparations fund for victims of human rights violations going back to the pre-independence era. To date there is no framework for the establishment and management of the fund, a process that would require adequate consultations with relevant actors, particularly victims. Further, in the absence of the implementation of the TJRC report, Kenya lacks a proper reparations framework. Worse still, given the difficult situation in which the economy is strangled by massive corruption and misuse of funds, it is unlikely that the government would be able to finance, sustain and implement this ambitious project in the foreseeable future.

d) **Kenya has perfected the instrumentalisation of regional and national institutions in its campaign to delegitimize the ICC**

31. Over the past six years, Kenyans have observed the worrying trend of their government using national, regional and international platforms to undermine and discredit the ICC. The African Union has particularly been a favourite instrument of Kenya's efforts to attack the Court. Increasingly, since ASP 12, the Kenya government has also attempted to use the ASP platform to further its agenda to delegitimise and weaken the ICC.

32. It is even more worrying when States entertain Kenya's unreasonable demands in the belief that all that is being presented is a platform to raise concerns and provide positive criticism on the Court's operations, which would eventually strengthen it. This approach is misguided for several reasons; Kenya has demonstrated that it is not interested in reforming those aspects of the court's operations that are not working well. Kenya's interest is in bringing to an end the cases before the Court and this it will do by all means, regardless of the damage to the Court. The more States give in to the pressure by the Kenya government campaigns the more the demands will increase in intensity and frequency until Kenya attains its ultimate goal – the premature termination of the remaining case.

33. **In Kenya's campaign, a pervasive narrative has gained ground that Africa in its entirety is supportive of Kenya's efforts. Nothing could be further from the truth.** The fact is there is no homogeneous position by African States on their support for the ICC. Support is largely driven by each individual country's interests, but, in consideration of regional geo-political realities, increasingly, countries are intimidated from speaking out against Kenya's misguided efforts to undermine the Court, even as they remain quietly critical. Many states that the Kenyans for Peace with Truth and Justice (KPTJ) coalition has interacted with have reinforced their commitment to upholding their obligations under the Rome Statute. They have also reiterated that joining the Rome Statute system was an independent choice and not a collective one. The African Union, sub-regional bodies and individual states also continue to endorse various accountability mechanisms on the continent, including some driven by the ICC.

34. During its second Universal Periodic Review (UPR), earlier this year, the government of Kenya accepted all the recommendations made to it in relation to the ICC. In June 2015, at the adoption of the outcome of the review, Kenya committed to fully cooperate with the ICC including by ensuring the safety and security of witnesses. In November 2015, Kenya's human rights record as relates to its obligations under the African Charter on Human and People's Rights was reviewed. The question of the implementation of the TJRC report was put to Kenya, whose response was that there have been legislative measures taken and that the government was in the process of setting up the KES 10 billion (USD 100 Million) fund addressed above.

CONCLUSION

35. It is clear that the heightened political and diplomatic activity witnessed in Kenya and by Kenya in the lead up to ASP 14 is intended to intimidate the States Parties to act in accordance with political pressure as opposed to following the law and the evidence in determining the outcome of the remaining Kenyan cases. Kenya also seeks to use the ASP for a purpose that was never intended by the Rome Statute; that of an appellate division of the Court sitting in judgment over the judges and the Prosecutor. This unlawful interference with the independence of the court would have far reaching implications for the search for justice for victims of post-election violence in particular and on international criminal justice in general.

This should not be allowed to happen.

End/kptj/19.11.15