**Advocacy Brief on Kenya: 15th Session of the Assembly of State Parties (ASP) to the Rome Statute of the International Criminal Court 16-24 November, 2016**

## Background

At the height of the violence that gripped Kenya after the disputed 2007 elections, the Party of the National Unity and the Orange Democratic Movement, who were parties to the conflict, wrote to the International Criminal Court (ICC) seeking its intervention to stop what they called genocide. A local investigatory commission with international participation found that some actions during the post-election violence likely met the threshold of crimes against humanity and recommended the establishment of a Special Tribunal for Kenya, or in the alternative, the handover of the sealed evidence to the Prosecutor at the ICC.

Efforts to establish the Tribunal were defeated by political forces aligned to suspected perpetrators, hence triggering the handover of evidence to the ICC and the subsequent investigation. Six Kenyans were named in connection with seven crimes against humanity charges; the ICC Pre-Trial Chamber II confirmed charges against four suspects. Two suspects – Uhuru Kenyatta and William Ruto were subsequently elected President and Deputy President, respectively, before their trials could begin at the ICC. Thereafter, the Prosecutor withdrew charges against two suspects – Francis Muthaura and Kenyatta – citing **witness bribery and intimidation, as well as failure by the Kenya government to cooperate with the court**. The remaining case against Ruto and journalist Joshua arap Sang was terminated citing **"intolerable levels of witness interference and political meddling".**

Kenyans for Peace with Truth and Justice (KPTJ) has followed closely the developments around accountability for the crimes committed during the 2007 post-election violence. Since the opening of the investigations in March 2010, we have observed certain shortcomings and challenges on the part of the Government of Kenya, the ICC, the Assembly of States Parties (ASP) and the African Union (AU). This brief seeks to focus on key issues emerging from the situation that the ICC and international justice finds itself in today, while drawing linkages from how the Kenya cases and other ICC cases were managed. KPTJ also **makes recommendations** on actions that require to be undertaken by the ASP, the ICC and African governments in order to address the emergent challenges.

## I. Engage and Withdraw Simultaneously?

*A Contradiction in the Mandate of the AU Open Ended Committee*

1. The 27th ordinary session of the African Union's assembly in July 2016 issued a decision on the ICC[1] pursuant to a similar one from the previous session[2]. Besides praising the court's termination of the case against Kenya's Deputy President William Ruto, the AU outlined a five-point agenda for the Open-Ended Committee of Foreign Ministers on the ICC, which included the following:
   - **Engaging** with the United Nations Security Council (UNSC) before the January 2017 AU Summit and before the 15th Assembly of State Parties in November 2016.
   - **Maintaining** the earlier decision from January 2016, to develop a comprehensive strategy to inform the actions of AU member states that are party to the Rome Statute; a strategy that includes collective withdrawal from the ICC.
   - **Concluding** a review of the ICC's interpretation of Article 93 of the Rome Statute regarding the compulsion of unwilling witnesses to testify, with a view to inform debate at the 15th ASP.
   - **Conveying** the message that AU member states object to the inclusion of language requiring the UNSC to mandate UN peace-keeping missions to enforce arrest warrants in Africa.
   - **Utilising** the AU Mission in Brussels, Belgium, as the secretariat to the Open-ended Ministerial Committee and provision of institutional support to the African Group in The Hague, Netherlands, to ensure effective coordination of its activities.

2. The AU has since held a meeting with the UNSC in September 2016 to present pre-formulated terms developed by the Open-ended Ministerial Committee as conditions to keep African States as parties to the Rome Statute. These conditions were as follows[3]:
   - **Immunity** under the ICC's Rome Statute for sitting heads of state and government as well as senior officials;
   - Intervention of the ICC in cases involving African states **only after** those cases have been submitted to the AU or AU judicial institutions; and
   - **Reduction in the powers** of the ICC Prosecutor.

3. Recent developments have seen South Africa, Burundi and The Gambia commence processes to withdraw from the ICC; seemingly as part of actualising the threat cited in the agenda of the Open-ended Ministerial Committee. **These actions expose the agenda by the AU to be disingenuous and presupposes that the deliberations within the ASP would be futile..** The

[1] Assembly/AU/Dec.616 (XXVII)
[2] Assembly/AU/Dec.590(XXVI)
[3] Press Release: "UN/African Union: Reject ICC withdrawal". Available here: http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/552-un-african-union-reject-icc-withdrawal.html

wave of withdrawals occurs against a counter-wave of support for the Court by countries including Cote d'Ivoire, Nigeria, Senegal, Sierra Leone, Tanzania, Malawi, Zambia and Botswana[4]; an indication that the strategy for mass withdrawal **does not enjoy the consensus suggested by the AU** decision of July 2016. These countries have suggested that concerns expressed by African states are not insurmountable and can be addressed within the framework of the ASP. Their support for the ICC underscores the fact that the obligations under the Rome Statute are State obligations and not AU obligations; as such, decisions on withdrawal will be based on national interest that cannot be assumed by the AU.

4. Furthermore, the strategy for AU member states to withdraw undermines the other outlined agenda items of engagement with the ASP, such as the review of the interpretation of Article 93 of the Rome Statute and the enforcement of arrest warrants. Such contradictory actions raise the question of whether the AU is negotiating ICC reforms in good faith.

5. ***In light of the foregoing, KPTJ recommends that:***
   - ***African States abandon and disregard calls for mass withdrawal from the Court and instead consolidate the member bloc to advance their concerns within the bounds of the ASP in deliberations based on good faith.***
   - ***African states should continue to publicly reaffirm their support for engaging with the ICC through the ASP and prevail on the AU to adjust its engagement strategy accordingly. We applaud the statements made by Cote d'Ivoire, Nigeria, Senegal, Sierra Leone, Tanzania, Malawi, Zambia and Botswana.***
   - ***An ICC Liaison Office should be established at the AU headquarters in Addis Ababa to facilitate more productive and sustained communication between African States and the ICC as part of restoring a relationship that has become plagued by mistrust and misunderstandings.***

## II. Absence of Accountability?

*Peace, Security and Stability*

6. The characterisation of the ICC as undermining the peace and security of states or threatening their stability has become a recurring theme by those advocating disengagement or withdrawal from the ICC. In its notice of withdrawal, South Africa claims that its aspirations for the peaceful resolution of conflicts were being hindered by its obligations under the Rome Statute[5] to arrest Sudanese President Omar Al Bashir when he attended the June 2015 AU Summit in

[4] Article: "Which African states slammed Burundi, South Africa and Gambia's withdrawal from ICC?" Available here: http://www.ibtimes.co.uk/which-african-states-slammed-burundi-south-africa-gambias-withdrawal-icc-1589711

[5] https://www.justsecurity.org/wp-content/uploads/2016/10/South-Africa-Instrument-of-Withdrawal-International-Criminal-Court.jpg

Johannesburg. Kenyan government officials have also previously described the cases against Kenyatta and Ruto as an existential threat to peace and stability.

7. A closer scrutiny of this assertion in the face of ongoing conflict situations suggests the contrary. The absence of accountability processes does not necessarily facilitate peaceful resolution of conflicts; the South Sudan and Burundi conflicts **instead point to protagonists willing to escalate violence, even in the context of peace negotiations**. Burundi and The Gambia have commenced processes to withdraw from the ICC at a time when their respective governments stand accused of acts of repression and mass human rights violations. Rather than advance the cause for peace, the clamour for withdrawal from the ICC is playing into the hands of those wary of the prospects of accountability in the aftermath of conflict. Even more concerning is an apparent trend of rising post-election violence, such as that witnessed in Kenya previously and in Gabon currently, or violence stemming from efforts to instal third-term incumbencies in the Democratic Republic of Congo (DRC) and Burundi. Such trends are bound to persist in the absence of mechanisms for accountability, of which the ICC is a critical component.

8. **The assertion** that the African Court of Justice and Human Rights (African Court) and its proposed expanded criminal jurisdiction through **the Malabo Protocol would fill in any void created by a mass withdrawal from the ICC is erroneous**. The African Court is a distant prospect for addressing the impunity gap: it is far from being operational. Since 2013, only five states namely Benin, Kenya, Congo, Guinea Bissau and Mauritania have signed but not ratified the Malabo Protocol, which requires the ratification of 15 states to begin operations. Kenya is the only state thus far that has made a financial pledge of USD 1 million to operationalise the court -- **a far cry from the resources required** for a court of broad jurisdiction consisting of a mandate on human rights as well as international law and interstate disputes. It has previously been estimated that a singular international criminal trial costs USD 20 million to undertake. In addition, the protocol contains contentious provisions that undermine its viability as an alternative platform for international crimes, the most notable being the clause of immunity for sitting heads of state and senior government officials. As a testament to the inability of the African Court to be an immediate replacement of the ICC as desired by some, even South Africa through its Justice Minister has indicated that it will ask for a review of the Malabo Protocol to address contentious issues. Furthermore, limited progress has been made towards establishing national mechanisms that can sufficiently undertake the obligation of accountability for international crimes.

9. ***KPTJ recognises the pursuit of justice in conflict and post-conflict settings as an essential pillar of rebuilding democracies and restoring rule of law. These are the pathways to lasting peace, security and stability. Rather than push to void international justice mechanisms after the conflict to facilitate mediation, we recommend that:***

- ***African states fully implement and consistently apply already established norms on democracy, peace and security as a preventative measure to conflict including: the African Charter on Human and Peoples' Rights; the African Charter on Democracy, Elections and Governance and; the African Governance Architecture.***

- ***African states must critically reflect on and address the issues of the African Court's capacity, accessibility, legal standards outlined for crimes under international law and expunge provisions conferring immunity on sitting Heads of State and senior government officials. This process must not be rushed or predicated on a manufactured crisis precipitated by a strategy of mass withdrawal from the ICC.***

- ***African states should establish robust and credible national mechanisms to address the accountability question at first instance and in complementarity with regional and international mechanisms. They must also broaden their policy considerations to include comprehensive reparation programmes for victims of international crimes.***

## III. Disparity between State Obligations and Reality?

*A look at State Cooperation*

10. The Kenya and Sudan cases have exposed the frailties within the Rome Statute framework in as far as state cooperation is concerned. These cases have laid waste to the presumption that States will willingly engage with the court in the face of cases seeking to prosecute sitting heads of state, their deputies or powerful elites in close proximity to power. State cooperation has only demonstrably worked in instances where the target for prosecution is a vanquished foe of conflict as seen in the cases of Uganda and Cote d'Ivoire, that are fast advancing a notion of "victor's justice". This challenge is further compounded by the fact that the final recourse for addressing the lack of state cooperation rests with the ASP. The ASP being a political organ of the Rome Statute is influenced by political rather than purely legal considerations in making its decisions, which makes the issue of resolving the non-cooperation of states problematic. A final challenge to state cooperation is the failure of the United States, China and Russia to ratify the Rome Statute while also being members of the UNSC with the power of referral of matters to the court. This has created the notion of double standards within the international justice system and emboldened other states to disregard cooperation with the court.

11. ***KPTJ calls on the members of the UNSC who have not ratified the Rome Statute to display leadership on State cooperation with the court by first ratifying the Statute and utilising its discretion on referral and deferral in a manner that adheres to the objectives of the Statute. We further wish to reiterate that state cooperation must denote effective cooperation that facilitates the mandates of the respective organs of the court and not feigned cooperation which creates the perception of facilitating the court but in fact consists of using procedural***

***and technical obstacles to undermine the court. We call on the ASP to adopt a consistent and objective legal standard in the assessment of state cooperation.***

## IV. Are there lessons to be learned?

*Taking stock of the experience in the Kenya cases*

12. The Kenya cases and the manner of their termination carry critical lessons for consideration to inform future actions by the court and the content of reforms within the strategic plans of its respective organs. The Office of the Prosecutor (OTP) as well as the bench on various occasions decried the instances of witness tampering and intimidation as well as non-cooperation by the state in responding to the OTP requests for information and a failure to execute ICC warrants of arrest with respect to three Kenyans suspected of witness tampering. This in fact has led to a finding of non-compliance against Kenya and led to its referral to the ASP under article 87(7) of the Rome Statute. In the midst of all this, was an unprecedented and disruptive diplomatic effort that deliberately exerted political pressure on the court with a view to influencing the outcome of the Kenya cases. It is arguable that these diplomacy efforts yielded the concession of excusing President Kenyatta and Deputy President Ruto from continuous presence at their trial and that the current wave of **withdrawals from the ICC on the basis of an apparent bias by the court against Africans are a fallout from these diplomatic efforts.** The capitulations of the cases have also pointed to significant flaws in the investigative and prosecutorial approaches that informed the development of the cases and must lead to some introspection from the relevant mechanisms. The fact that the Trust Fund for Victims is yet to commence operations in Kenya cannot go without mention.

***13. KPTJ urges all the organs of the court to reflect on these experiences and take due cognisance of the following lessons and recommendations:***

- ***The ICC, particularly the ASP, should do more to ensure that it does not allow political statements to interfere with the judicial independence of the Court.***
- ***The ICC should ensure that it takes steps to respond to messages of a political nature and correct inaccurate statements in a timely manner. In addition, it should ensure that such key messages reach the right audiences, including victims and affected communities.***
- ***The Court should continue to build its relationship with African States that openly support the mandate of the ICC; in addition, the ICC should do more to improve its relationship with, and image at, the AU.***
- ***The Trust Fund for Victims should commence operations in Kenya, as victims have received little to no assistance from the Kenyan government.***

- ***The Prosecutor should carefully consider when to request 'summons to appear' as opposed to 'warrants of arrest' and take into account the individual circumstances of each accused person in doing so, particularly their potential to intimidate witnesses and interfere with evidence.***

- ***Swift action should be taken by the Prosecutor and the Court in instances of non-cooperation by States Parties. Any instances of non-cooperation should be resolved as speedily as possible, in such a manner that the outcome of proceedings on non-cooperation can be applied to strengthen an ongoing case and not be delayed to the point that the outcome is only of academic significance.***

- ***The Prosecutor should continue to carry out a review of its investigative strategies and methods in order to improve its chances of success at trial.***

- ***The Prosecution should ensure that its staff are able to spend as much time as possible on better understanding the context and nuances of a given situation country.***

## V. Pursuit of reform without prejudice?

*UN Reform vs ICC Reform*

14. The unique role played by UNSC in referral and deferral of cases before the ICC means that the debates on reforming the court and reforming the UN and in particular the UNSC have inevitably intersected. We have witnessed both undertones and overt accusations of imperialism and undue influence directed at the court on account of cases on Africa referred to it by the UNSC (Libya and Sudan). Arguments made to amend the Rome Statute to confer immunity for sitting heads of state and senior government officials are laced with grievance against the UNSC permanent five members possessing a de facto immunity from prosecution under the ICC on account of their veto power. The end result is a misdirected effort to amend the Rome Statute or in the extreme withdraw from the ICC on the basis of perceived excesses that are better addressed by engaging the broader debate of UN reforms.

***15. While KPTJ acknowledges the slanted relationship of the UNSC with the court and supports a robust conversation on its reforms, we call on states not to misdirect the agenda of reforming the UNSC into discussions on improving the functions of the court and occasion amendments to the Rome statute that sacrifice the future of the court as part of a bargaining process on UNSC reforms. We call on African states in particular, to distinguish the broader question of UN reforms as enshrined in the "Ezulwini Consensus" from the question of reforming the Rome Statute and reflecting on the performance of the court. We call upon African member states to the Rome Statute not to sacrifice the promise***

***of justice for victims of atrocity crimes at the altar of grievance against the unequal power relations represented by the UN Security Council.***

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**About KPTJ:**

This brief was prepared by Kenyans for Peace with Truth and Justice (KPTJ), a coalition of Kenyan citizens and over 30 organisations 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.