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Statement for the General Debate from Kenyans for Peace with Truth and Justice
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We are a network of over 30 Kenyan civil society organizations, the Kenyans for Peace with Truth and Justice, who came together in the wake of the widespread violence that followed the December 2007 presidential elections. We would like to bring the attention of the Assembly of State Parties 12 to certain realities in Kenya, where we have actively been working in relation to the post-election violence of 2008 and the subsequent processes. A background paper that explains the developments in the Kenyan case is also available.

- *First, the ICC engagement in Kenya is a result of an African Union- and Kenyan led initiative:*
  As Kenyan civil society organisations, we stress that the ICC intervention is a direct result and an integral part of an African Union- and Kenyan-initiated process that ended the 2008 post-election violence (PEV); it is neither alien to that process, nor a threat to it. Politicians are describing it as a threat now only because, accustomed to impunity, they never expected to see any genuine process of accountability emerging from the ICC. We therefore reject any description of the ICC's presence in Kenya as a negative foreign, or even as a racist, intervention. It is also an expression of Kenyans' deeply held desire for an end to the impunity that has historically afflicted our nation, and the only credible existing attempt to secure accountability for the mass atrocities that occurred in 2008. We believe the ICC action was a major deterrent to the sort of violence that has historically accompanied Kenya's elections in this year's general elections. We have all along stressed that the ICC intervention is a judicial and not a political intervention and reject the strenuous attempts to politicise it.

- *We also reject the oft-repeated argument that the ICC "targets" Africa:* of the current eight investigations and cases in Africa, five were referred to the court by African governments, including some of those now criticising it; a further two were referred by the UNSC; the Kenya case arose, as we have stated out, of an African and Kenyan process. The attacks on the court are not made in defense of African pride, but in defense of impunity. Out of the various resolutions and communications emanating from the African Union or some of its member states on the ICC and Africa it is striking just how little attention is devoted to the victims of the violence, apart from cursory mentions, if any at all. On the contrary, the situation and rights of victims, and not the powerful, should be at the centre of their claims.

- *Kenya has had ample opportunity to initiate local proceedings against those responsible for PEV* but has failed to do so through lack of political will and lack of an appreciation of the need to fight impunity. The deadline for the establishment of a local Special Tribunal was extended three times. It is only after politicians roundly rejected it that HE Kofi Annan triggered a process recommended by a Kenyan judicial commission of inquiry and handed the matter over to the ICC for its consideration. Only then, did the Office of the Prosecutor, *suo proprio motu,* open investigations leading to the indictment of the three individuals who are now before the Court.

- *We recognize that international justice operates unevenly across the globe.* In some situations powerful governments are able to shield their citizens and the citizens of their allies form the ICCs authority by not joining the ICC or using their veto power at the United Nations Security Council to block referrals of situations to courts. We will continue to work to achieve universality and consistency in the application of international justice. But undercutting justice for crimes

where it is possible because justice is not yet possible in all situations risks emboldening those who commit grave crimes. Working to expand, rather than contract the membership of the ICC is a key step in widening access to justice and sending the message that no one is above the law.

- *The amendment proposing immunity for high-ranking state officials is not tenable by the standards of the AU, the UN, Kenya or the Rome Statute:* The suggestion that serving heads of state should be immune from international justice runs counter to the African Union's own founding principle of "condemnation and rejection of impunity" and to the Kenyan constitution.[1] Immunity of heads of state is recognized in international law with the exception of genocide, war crimes and crimes against humanity. The Kenyan constitution states, "The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity". It also domesticates all international agreements that have been signed by Kenya. Officials advocating the amendment of the RS to allow immunity for serving high officials of state are acting in direct contravention of the Kenyan Constitution. The tenets of international law require states that adhere to treaties to abide by them and promote the objectives of those agreements in good faith. Proposing amendments that would empty the RS of all meaning evidently runs counter to that duty.

- *Allowing certain individuals to absent themselves form the trials on the basis of their status violates the principle of equality before the law.* Both principals were aware of the requirement of their offices and that they had been indicted before the ICC before they launched the campaign for political power. The Court has also made various accommodations to facilitate their attendance at the Court, including adjournment of the proceedings. A specific amendment to allow the accused to attend trial by video-link is unnecessary.

- The President and Deputy President cannot in good faith plead the burden of their official positions to support a deferral of the cases against them: The Constitution of Kenya, passed in 2010, is clear on the extent and significance of the duties of the two positions. The accused were well aware of this before they chose to become candidates for election to these positions. From January 2012 on they were also aware that they would have to stand trial in person at The Hague for at least a considerable portion of the terms of office for those positions. Indeed, they publicly declared that the cases were merely "personal challenges" - as they legally are - and were confident of their ability to manage the duties of state while cooperating with the ICC. Since their accession to power, however, immense public resources, time and attention have been devoted to the national, regional and international campaigns to evade accountability at the ICC.

- *There has been little to no notable progress on local prosecution of PEV*: Contrary to the assertion that its institutions are ready to prosecute the PEV and the ICC's intervention prevented this, it is striking how little Kenya has to show in the way of prosecution. In particular, in the six intervening years, there have been absolutely no prosecutions of mid- to high-level perpetrators. A task force set up by the Attorney General last year examined some 6,084 and came up with 24 successful convictions of PEV suspects. A proposed International Criminal Division being set up by the Judiciary is still in the early stages of discussion.

- *Rather than genuinely addressing PEV and cooperating with the ICC, the Kenya government has spent an immense amount of public resources in trying to avert the ICC challenge.* The OTP informed the Court of

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[1] *The Constitution of Kenya*, Article 143 (4) "The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

the enormous challenges it faced in bringing the *Ruto and Sang* case to fruition. Admissibility challenges have been submitted to the Court and failed. Efforts have been mounted lobbying regional and international actors to support efforts to have the cases deferred or stopped. Coming on the heels of the failure of the deferral challenge at the United Nations Security Council, the Assembly of States Parties (ASP12) of the Rome Statute is the latest forum for such efforts. If the same amounts and attention being spent on evading accountability had been spent in genuine complementarity, cooperation and on reparations to all victims, regardless of their background or origin, we would not be here today, spending yet more precious resources and time.

- *Kenya's interaction with the ICC, since the Prosecutor exercised his proprio motu powers to open investigations, has been characterized by efforts to obstruct justice.* An example is the refusal by authorities to release medical records of victims who were treated at government hospitals during the PEV. The Kenya government has stalled on an old request by the Prosecutor to interview senior members of the national security agencies, taking cover behind a spurious court order that was obtained to block these interviews. Similarly, the extradition of journalist Walter Barasa, charged by the ICC with witness tampering, has run into trouble, because of hair-splitting objections raised in court. The invitation of President Omar al Bashir to Kenya in August 2010 was a further indication of Kenya's failure to comply with its Rome Statute obligations by declining to enforce the ICC's standing arrest warrants issued against the Sudanese president. People previously arrested by the Kenyan government for allegedly hacking into the ICC's emails for purposes of identifying witnesses were released without any charges being preferred against them. Some of these bloggers are now institutionalized within the office of the president.

- *Despite its protestations to the contrary, the Kenyan government's cooperation with the Court has not been genuine or far-reaching enough; it is now endangered by the actions of Parliament:* In a submission on the status of its cooperation with the ICC, the Kenyan government indicated its commitment not to withdraw from the Rome Statute. However recently both the National Assembly and the Senate, both dominated by the political parties of the accused and with significant majorities in Parliament, voted in favour of withdrawal from the Rome Statute. Parliament also voted to abolish the International Crimes Act of 2009. Without the ICA, there will be no legislation to carry out national prosecutions and any call for a referral of the ICC cases to Kenya would therefore in reality, be a call for a permanent termination of the cases and open support of impunity.

- *Despite the hostile political climate and intensive anti-ICC campaigns, public support for the ICC and for accountability continues to be significant:* An independent opinion poll conducted in November 2013, to gauge public attitudes towards the ICC cases shows that 42% of those polled support the trial of the cases before the ICC as opposed to 30% who prefer the case to be dropped. Also in the same poll, 67% of those polled would want the president and deputy to attend their trials before the ICC. The president's media team responded to this poll in typical fashion by pillorying one of the pollsters, an American long-term resident in Kenya, whose deportation they demanded.

- *The African Union has repeatedly cited Kenya's anti-terrorism role to justify deferral or termination of the ICC Kenya cases.* Kenya's vulnerability to terrorist attack does not arise from the search for accountability. Kenya's security is weakened by endemic corruption and other rule of law challenges, which render it vulnerable to terrorist attacks. The devotion of national security resources to the maintenance of the regime and the surveillance of its perceived opponents, rather than to the responsibility to protect its population makes Kenya vulnerable to attack. The reforms proposed under the National Accord and Reconciliation process have progressed most slowly in the security sector, which has been resistant to reform. The tragic Westgate Mall attack

exposed the extent of the resulting dysfunction. Rather than seizing the opportunity for learning and renewal represented by the crisis, the government has gone after the media for reporting on problems and targeted sections of the population who are profiled as being sympathetic to terrorists, in disregard of their rights. A human rights group report released yesterday[2] cites illegal actions by Kenya's anti-terrorism police including extra-judicial executions and disappearances. Rather than countering terrorism, such actions nurture the resentment that provides recruits for terrorism.

- *Claims that bold measures aimed at reconciliation were being undertaken and were interrupted by the ICC intervention are not borne out by the facts. Reparations to victims have been paid out but sectors of victims have not benefitted form that process:* The process of reconciliation embarked upon under the mediation agreement has stalled. There is as yet no progress on implementing the recommendations of the Truth, Justice and Reconciliation Commission's (TJRC) report. Critical sections of the report were expunged, as international members of the commission reported. Referring to the rapprochement between formerly warring politicians, which led to the formation and the victory of the Jubilee coalition at the elections, as reconciliation is misleading. This was a political pact aimed at capturing political power, largely, we believe, with the aim of resolving the ICC dilemma of the two principals and not deep or abiding reconciliation. Reparations to victims have targeted some categories f victims with others, who come form regions, some of them typically associated with the political opposition, largely being left out.

- *The state has recently been initiated moves to clamp down on democratic and constitutional freedoms:* The Kenyan Parliament has recently passed a draconian law against the freedom of the media, which is now before the president for his signature. This legislation has been condemned as the most direct affront on media freedom in Kenyan history. Also, the Kenyan Parliament recently commenced consideration of a set of legislative measures, which, if approved, will lead to a law that caps funding from foreign sources for non-governmental organizations at 15 percent. Since almost all funding for Kenyan civil society is derived from foreign sources, and almost none from public sources even though NGOs pay a significant amount of taxes, the effect of this law, if passed, will be to shut down many civil society organizations, and therefore diminish alternative voices in Kenya. The effort to repress domestic advocacy in favour of the ICC, and the effort to roll back the constitutional gains made by Kenyans are, we believe, a significant motivation behind these developments. Commissions set up by the Constitution are under attack as politicians resist accountability and constitutional reform. The Kenya National Human Rights Commission is practically moribund, starved of resources and with only one Commissioner as yet.

- *The claims that Kenya's claims have been "treated with contempt and suspicion" by the court and the international community are not made in good faith:* If anything, in our view, the court has bent over backward in an effort to make cooperation palatable to the accused. In the process, witness attrition has been occurring at an alarming rate as witnesses are intimidated, bribed or withdraw from the cases, aware that the two most powerful men in the country, who are in charge of the security apparatus, are bitterly opposed to the ICC process. Meanwhile important questions as to who is behind the threats to witnesses remain unanswered. W e are also concerned that the rights of victims are being threatened by repeated delays, as they languish with their needs mostly unattended to and some die as time passes.

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[2] See "We Are Tired of Taking You To Court: Human Rights Abuses by Kenya's Anti-Terrorism Police Unit", Muslims for Human Rights and the Open Society Justice Initiative, November 2013

- *The supporters of impunity, fuelled by the proceeds of decades of unaccountable access to public resources, are winning the publicity battle in Kenya.* Where they could educate, they distort, where they could enlighten, they actively misinform; where they could unite, they divide and poison people with hatred. They are negatively defining the terms in which the search for international justice is to be understood; in typically inflammatory fashion, Mr. Kenyatta spoke at the AU Summit in October of the ICC as a "painfully farcical pantomime, a travesty that adds insult to the injury of victims". This undermining of the international justice system while purporting cooperation with it must not be allowed to continue. Member states must provide the ICC with the resources to effectively counter such campaign and conduct effective and appropriate outreach to victims and others.

- *It is time for the unending campaign to evade accountability to stop monopolizing international attention and time that should go to more important issues*; let Mr. Kenyatta and Mr. Ruto attend to their personal challenges at the Hague, as they attend to their official duties; they promised the voters during the electoral campaigns that they would be able to do both. The Court has made every effort to make it possible for them to do so. Accountability for middle and lower level perpetrators of PEV must continue to be pursued at the national level.