EXECUTIVE COUNCIL
Twenty-Third Ordinary Session
19 – 23 May 2013
Addis Ababa, Ethiopia

REPORT ON THE INTERNATIONAL JURISDICTION, JUSTICE
AND INTERNATIONAL CRIMINAL COURT
AIDE MEMOIRE
ON INTERNATIONAL JURISDICTION, JUSTICE
AND INTERNATIONAL CRIMINAL COURT - THE KENYAN SITUATION

EXECUTIVE SUMMARY

Africa continues to make strides in entrenching its democratic and economic aspirations. In this context, the Kenya experience has demonstrated notable success in making deep democratic reforms on a constitutional basis forming a sound basis for sustainable peace and reconciliation following the post election conflict of 2008.

Kenya has demonstrated that it is committed to the strengthening of an effective, impartial International Criminal Court (ICC), operating in line with the aspirations advanced in the Rome Statute. However, the country’s democratic and reconciliation gains of the last few years could be derailed by an Office of the Prosecutor (OTP) of the ICC pursuing an agenda that contradicts the sovereign will of the people as expressed freely and democratically in the most recent landmark election of 2013.

The need to sustain the case in the face of poor and even false evidence has been reflected in the conduct of the Prosecutors, so much so that that ICC judges, among other credible actors, have made repeated serious criticisms. The Kenya case demonstrates an OTP pursuing a weak-and-weakening case that runs counter to peace and security all to “make Kenya an example to the world” according to the Prosecutor’s repeated public pronouncements – even before the commencement of the case.

Such conduct should be of profound concern to all African countries, and the rest of the world. Indeed, the serious concerns of such a scenario of an unaccountable ICC prosecutor – with a political axe to grind – as expressed by some countries as the basis of their rejection of the court just before the adoption of the Rome Statute, have now, unfortunately, been proven prescient.

The ICC’s Kenya cases have grave implications for Africa. Arraigning a sitting Head of State before the ICC is no casual affair. That such a fundamental change in international relations can come courtesy of a politicized prosecution implies that a Prosecutor whose powers are unchecked can become a highly destabilizing and potentially risky factor in matters of peace and security. Also, the African Union has pronounced itself unanimously on Kenya’s, together with other ICC cases. The African Union Heads of State must ensure that the will of their Assembly is telling on the conduct of international governance and justice as reflected in the ICC Kenya cases.

At a time when the traditional approach to state sovereignty is changing on the basis of Right to Protect and other measures to maintain peace and security supported by Africa and the African Union, it is imperative that this is not an excuse to vacate the notion of sovereignty and the equality of nations.

All African Union Member States will recall the common African Union position on the ICC and acknowledge the changed circumstances in Kenya, and in particular the
democratic outcome of the 2013 election. The AU should consider urging the ICC to terminate the case or refer it in view of changes to Kenya’s reformed judiciary and new constitutional dispensation. Finally, steps should be taken to reform the ICC by its State Parties so that it more effectively carries out the serious responsibilities that all well-meaning signatories of the Rome Statute intended.
I. PREAMBLE

1. While addressing the Assembly of the African Union on 1st February 2008, Kenya’s former President, H.E. Mr. Mwai Kibaki, invited the African Union Commission to lend its voice and support to efforts and commitments made by the Government and People of Kenya to reach a durable settlement of the Post Election political crisis. In particular, the President pointed to the country’s dialogue and reconciliation efforts, and called upon the African Union to help the country address the underlying problems that triggered the violence in parts of Kenya. Indeed, the African Union has not only stood in solidarity with Kenya during that difficult moment following the elections, but also took a decision - Assembly/AU/Dec.187 (X) - on 1st February 2008 which, inter alia, called on Kenya to:

   • Commit to a peaceful solution to the crisis through dialogue and in conformity with the law;

   • Extend full cooperation to the mediation efforts undertaken by the group of eminent African elders; and welcomed the ending of violence and the pursuit of dialogue.

II. CIRCUMSTANCES GIVING RISE TO THE PROSECUTIONS

2. You will recall the unfortunate events that took place after Kenya’s elections in 2007. Following an instance of post election violence, the basis for reconciliation was laid by the formation of a Grand Coalition government in April 2008 and the adoption of a comprehensive reform agenda.

3. On 31st March 2010, the Prosecutor of the International Criminal Court initiated investigations on his own initiative for crimes against humanity committed in the Republic of Kenya between 1st June 2005 and 26th November 2009. It is critical to note that the post election violence occurred within a period of less than a month between the 31 December 2007 and January 2008.

4. At the time the ICC Prosecutor brought the case, Kenya was grappling with a delicate national process to generate a new constitution and transform its governance structure that would, among other measures, build an effective and credible judicial system with the capacity to deal with impunity and serious crimes.

III. KENYA’S COMMITMENT TO THE ROME STATUTE

5. While the Kenya Government has continuously expressed concern in the manner in which the Rome Statute has been invoked by the International Criminal Court (ICC), it has nonetheless, based on belief in the value of a universal jurisdiction that treats all as same, Kenya continues to extend its fullest cooperation to the ICC. Kenya’s track record as a State Party to the Rome Statute cannot be faulted. It has supported the implementation of the Rome Statute by providing the fundamentals that would support its work. These include:
• Fully domesticating the Rome Statute through the International Crimes Act, 2008;

• The enactment of the International Crimes Procedures for obtaining Evidence Rules 2010;

• Witness Protection (Amendment) Act, 2010;

• The appointment of a judge of the High Court to preside over taking of statements by Government officials;

• Concluding an agreement granting the ICC officials additional diplomatic cover while in Kenya.

IV. ACTIONS AND CONDUCT OF THE PROSECUTION

6. The former ICC Prosecutor showed clear disregard for the political and legislative realities faced by Kenya and appeared to pursue a political agenda from the onset by:

• Failure to appreciate the realities in Kenya

  a) The Prosecutor made his request for proprio motu investigations (to institute investigations on his own initiative) despite the fact that Kenya had been progressively instituting crucial and historic reforms that would ensure credible domestic prosecutions.

  b) His actions disregarded the normal challenge of putting in place new legislation and institutions.

  c) He failed to consider that the reforms were being undertaken in the context of a politically sensitive transition, which obviously posed difficulties to the reform process.

  d) He was insensitive to the rights of the so-called “Ocampo six”. It will be recalled that these six were selected from a group of 20 somewhat arbitrarily. Indeed, the Pre-trial judges expressed concern that the prejudicial and premature public naming of the six and his interaction with the media might have the potential to affect the administration of justice and integrity of proceedings before the Chamber. The current prosecutor has continued to make public utterances that may be prejudicial to the persons that are before the Court.

  e) The former Prosecutor utterly disregarded the risk his methods of work posed to the stability of Kenya and the East African sub-region.
Unreliable Evidence and Poor Investigation in Pursuit of a Political Agenda

a) It is clear that the Prosecutor carried out little or no investigation but largely relied on NGO reports and the conclusions of an internal commission of inquiry known as the Waki Commission of Inquiry whose findings, according to its own report, was inconclusive and needed further investigation.

b) In fact, the cases may never have belonged to the ICC in the first place. In Judge Hans-Peter Kaul’s dissenting opinion of the confirmation of charges decision, he noted that although serious crimes had been committed in Kenya during the post-election violence, they did not attain the threshold of crimes against humanity and thus warrant the invocation of ICC jurisdiction.

c) Quite significantly, the ICC Judges have taken issue with the prosecution's failure to conduct sufficient investigations, and on occasion have accused the Prosecution of violating statutory obligations to fully respect the rights of persons arising under the statute. In a decision by the Court on an application by the defence, Judge Christine Van Den Wyngaert, noted in her judgment that “there could be no excuse for failure by the Prosecution to verify the trustworthiness of its evidence” and that “there was serious negligence towards verifying the reliability of central evidence in the Prosecution case”.

d) It has been demonstrated that due to the failure to carry out in-depth investigations, the Prosecution has relied on rumours, speculation and political witch-hunt. Names of the alleged perpetrators were bandied about without the slightest regard to investigating the serious allegations. Unfortunately it is these reports that the prosecutor extracted as evidence without resort to independent investigations.

e) The Prosecutors driving force was to “make Kenya an example to the world”, an intention that was communicated publicly on several occasions.

f) He fast tracked the process without genuine consultations with the Kenyan Government, which was on record as amicus curiae (friend of the court) in the proceedings.

g) He disregarded the crucial role his office should play to support Kenya in exercising her primary responsibility to investigate and prosecute suspects of the Post-Election Violence in line with the principle of complementarity.

h) As a consequence of the Prosecutor’s conduct, Parliament passed a motion for Kenya to withdraw from being a Party to the ICC. The then President did not heed to this call because Kenya has, throughout its independent history, remained a steadfast supporter of a rule based international system.
i) The then President was left with the unenviable task of dealing with the consequences of the Prosecutor’s methods of work, timing and choices. These actions prompted the Government to request that the African Assembly of Heads of State and Government to call for a deferral of the cases. This received unanimous support. The United Nations Security Council however subsequently turned it down.

j) At every juncture, respective ICC judges have pronounced themselves on the Kenyan cases and castigated, and at times deplored, the prosecutorial manner and activities of the Prosecution. They have been critical of the Prosecutor’s methods and tactics, finding them wanting, and in violation of the rights of the accused.

k) The Prosecutor has continued to make unfortunate and misguided extrajudicial statements in print and electronic media, in blatant disregard of the provisions of the Statute. The statements of the OTP, which have been delivered through the media largely, seem to be aimed at seeking and winning sympathy from known and unknown quarters at the expense of due process. We are aware of intense pressure on the OTP to proceed with these proceedings in line with earlier veiled and unveiled threats to the Kenyan people and leadership before, during and after the election, warning of consequences in the event of voting in the President and his running mate. The continued interactions of the Prosecution with the print and electronic media are a blatant deviation of the responsibilities placed on the OTP by Article 42 of the Rome Statute.

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

m) The Attorney General of Kenya has repeatedly called upon the Prosecution to raise their concerns relating to the Government of the Republic of Kenya reneging on its obligations to cooperate with Court as provided for in Article 87 and in particular Article 87 (7) of the Rome Statute.

V. KENYA’S RECORD OF COOPERATION WITH THE ICC

7. The Government of Kenya has always shown and taken each and every opportunity to co-operate with the Court and honour its obligations as enumerated in the Rome Statute. This is the case even in times when it has been unfavorable politically or otherwise to the Government.

- **Unfettered access into Kenya and within Kenya** In January 2011, the then President of the Assembly of State Parties, acknowledged this cooperation.
• **The conclusion of a host country agreement with the Court:** On 3rd September 2010, the Government entered into an agreement with the ICC to extend such privileges and immunities as are necessary for the independent and effective functioning of the Court, in the territory of Kenya.

• **The formation of a Multi-Agency Task Force on Post-Election Violence:** In January 2012, the Government formed the above mentioned Task Force whose mandate included, inter alia; reviewing, re-evaluating and re-examining all Post-Election Violence pending investigation, pending trial and concluded cases. All the police files that had been forwarded to Post Election Violence Task Force (PEV) were evaluated by the team and in October 2012, the Government provided the Office of Prosecutor access to these files.

• **Establishment of Witness Protection Agency:** In 2011, the Government created an independent Witness Protection Agency (“WPA”) which, it should be noted, was constructed with extensive assistance and advice from the United Nations Office on Drugs and Crime, to provide an effective and robust witness protection program. All parties are free to refer its witnesses to this agency for consideration for inclusion into the Kenyan witness protection scheme.

• **Access to Highly Sensitive Documents:** The Government authorized access to confidential national security materials to the court, including minutes of meetings of the National Security Advisory Committee, which constitutes an unprecedented act of cooperation with the court.

VI. KENYA’S REFORMS FOR PEACE AND DEMOCRACY

8. Since the unfortunate events of 2008, Kenya has made historic strides to set itself on a trajectory that would prevent a repeat of such circumstances.

*In its governance system*

• Kenya undertook a comprehensive consultation process that led to the adoption of a progressive Constitution in August 2010. This constitution formed the basis for overall restructuring of society and the implementation of a wide range of institutions, commissions and legislative reforms that domesticate the constitution, safeguard human rights, ensure land reform, promote gender equality, promote the rights of minorities and define and initiate a devolved government. It should be noted that these reforms have taken root, which is a historic feat, achieved within a period of less than 5 years.

• In light of this exceptional record of reform, t Kenya has demonstrated that she has the capacity to offer a home-grown solution in respect to the ICC cases. In this regard, it is our position that the presumed inability or
unwillingness for Kenya to deal with issues related to challenges of post 2007 elections has since fallen off. The principal of complementarity, as envisaged in the Rome Statute, must therefore take effect.

The Truth, Justice and Reconciliation Process

- The country initiated a Truth, Justice and Reconciliation process, as part of the Accord signed in 2008, to address the cause and effects of historical injustices and gross violations of human rights that will contribute to national healing and reconciliation. Among the institutions of this provision is a commission that was instrumental in checking leaders particularly during the campaign period not to use language that could inflame passion among the population. A number of people were arraigned and charged in court for incitement, but overall this commission played a significant deterrent role and contributed to the delivery of the peaceful elections of 4\textsuperscript{th} March 2013.

- In light of the 2007-2008 post-election violence, the Government of Kenya has undertaken the settlement of Internally Displaced Persons. Measures taken so far include the purchase of land for resettlement of the IDPs; construction of houses for the IDPs; officering of counselling services; cash transfers, some access to free medical attention for some IDPs in government facilities; and periodic food distribution to victims.

Reform of the Electoral process

- After 2008, Kenya created a new and reformed independent electoral body. The body has so far demonstrated capability to run elections (by-elections and a general election). The capability of this body was demonstrated when it undertook a historic feet on 4\textsuperscript{th} March 2013, by running 6 elections across Kenya.

- The maturity of the electoral system was tested immediately after the 4\textsuperscript{th} March, 2013 elections by the dispute to the declaration of the presidential vote. But the peaceful adjudication of the dispute at that highest level was testimony to the capacity of the institutions and the confidence of Kenyans about their electoral and judicial processes.

- This experience is also testament to the progress Kenya has made in strengthening its democratic institutions, and the desire of the Kenyan people to move their country forward.

VII. THE MEANING OF THE 2013 ELECTIONS

9. The Rome Statute is meant to support lasting peace and security. It 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.
10. Kenyans, in whom the sovereign right is vested, in a free and fair election, elected Uhuru Kenyatta and William Ruto as President and Deputy President respectively. The consequence of the conduct of the court runs counter to the exercise of the sovereignty, embodied in the Head of State. The just-concluded landmark elections presented an opportunity for Kenya to consolidate democratic gains and to usher in a new era in the country’s history. Importantly, the President and the Deputy President were key players in helping achieve sustainable peace and reconciliation between two of the main communities that had previously experienced tension, and this cannot be ignored.

11. The two top Executives in Kenya have been critical agents of cohesion in the country during the election and transition period, thereby closing a chapter that had given rise to some of the underlying causes of conflict. Away from the formal processes that have been evolving, the two undertook various measures since 2008 to facilitate and build reconciliation between the two communities that were mostly affected and beyond. Their campaign was coloured by a message of peace and in the transition, they have continued to urge peace, engaging with all of the country. It is therefore obvious that their absence from the country may undermine the prevailing peace and any resultant instability may spill over to the neighbouring countries.

VIII. IMPLICATIONS OF THE OFFICE OF THE PROSECUTOR’S CONDUCT FOR AFRICA & THE INTERNATIONAL COMMUNITY

12. The Kenyan President would be the first sitting head of state to be prosecuted in an international court. As the Rome Statute is a treaty like any other it must be read within the framework of international law that confers immunity to sitting Heads of State and Governments. Any contract practice would set a serious precedent with far-reaching implications for African countries and indeed all members of the International Community.

13. That such a fundamental change in international relations can come courtesy of a politicized prosecution implies that a Prosecutor whose powers are unchecked can become a highly destabilizing and dangerous factor in matters of peace and security.

14. The African Union has pronounced itself unanimously on Kenya’s ICC case. Its position reflects the wishes of countries without which the Rome Statute would never have proceeded. It is critical that Africa’s Heads of State and Government ensure the will of their Assembly is telling on the conduct of international governance and justice as reflected in the ICC’s Kenya cases.

15. At a time when the traditional approach to state sovereignty is changing on the basis of the Right to Protect, and other measures to maintain peace and security supported by Africa and the African Union, it is imperative that this is not an excuse to totally vacate the notion of sovereignty and the equality of nations. This is a line that the African Heads of State, and all well meaning states, need to uphold otherwise the
stability of the international system will be endangered by unaccountable actors driven by political agendas that deviate from the common interest of peace and security.

16. The conduct of these cases have not only been prejudicial to the accused but also threatened the integrity of the Kenyan state while potentially undermining the peace and stability of the country. This represents one of the factors that have led to a growing perception that the Rome statute is undergoing a test as to its veracity, usefulness and impartiality.

17. Ambassador John Bolton who served as the U.S. Ambassador to the United Nations from August 2005 until December 2006 anticipated this clash. He 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.”

18. While Kenya has remained a steadfast supporter of the ICC, it is now clear from the Prosecutions that the United States Ambassador was correct in his caution.

IX. RECOMMENDATIONS

19. This matter posses an existential threat to Kenya. First it risks destabilizing the progress that the Government and the people of Kenya continue to make towards healing, reconciliation and peace. More fundamentally, it risks disregarding the democratic imperative, as expressed by the sovereign – the Kenyan people. Second, it is believed that such an outcome, which is perceived as partly engineered from beyond the continent, has grave implications for Africa. African states I see the merit of the Kenyan case and understand the urgency and gravity of the situation Kenya faces. African states, and all other countries of goodwill, with an appreciation of the complexities of nation building, and the peace and security challenges of nascent democracies such as Kenya, appreciate the deep reforms undertaken in Kenya, acknowledge the sovereign will of the Kenyan people as reflected in the 2013 election
and the spectre of an Office of the Prosecutor that intends to proceed with a weak case that endangers all this.

20. In light of the foregoing, African Union Member States and all friendly nations are requested to, individually and collectively:

   a) Recall the common African Union position on the ICC – in relation to the decisions taken in the past, noting that the UNSC has not heeded any of these requests.

   b) Acknowledge the changed circumstances in Kenya, and in particular the democratic outcome of the 2013 election; encourage the leadership to continue with the reconciliation efforts that it has started; and further urge the ICC to terminate the case or refer it in view of the changes to Kenya’s judiciary and constitutional framework.

   c) Raise concerns at the pursuit of interests through the prosecutions that are not in alignment with the search for sustainable peace and reconciliation.

   d) Mandate the AUC to organize an AU reflection as part of the 50th Anniversary discussion on the broad areas of international jurisdiction, justice, peace and reconciliation, as well as the impact of the ICC on Africa so as to inform the ICC process and also seek ways of strengthening African mechanisms to deal with African challenges and problems.

   e) Urge for steps to be taken to reform the ICC by its State Parties so that it more effectively carries out the serious responsibilities that all well-meaning signatories of the Rome Statute intended.