

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

BC/U/1657.09.13**10 September 2013****Mr. President,**

We are writing following our letter No BC/U/1096.07.13, dated 8 July 2013, conveying the decision of the 21st ordinary session of the Assembly of Heads of State and Government of the African Union in which a request was made for a referral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a national mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation.

In this connection, we are seriously concerned that the proceedings of the Court on the Kenyan defendants are beginning to adversely affect the ability of the Kenyan leaders in discharging their constitutional responsibilities.

This is clear in the recent decisions of the Court in relation to the Kenyan situation where Trial Chamber V (a) allowed the Prosecutor's appeal and granted the request for Suspensive Effect. This means that until the Prosecutor's appeal against the decision to allow the Deputy President not to attend all Court sessions is decided, the Deputy President will have to attend every session.

The Trial Chamber in its earlier decision had taken cognizance of the Deputy President's constitutional responsibilities on which basis the Court permitted him to attend only some sessions. On these grounds the Court should have upheld its decision pending the determination of the Prosecutor's Appeal.

We are reliably informed that the Constitutional obligations of the Head of State of Kenya and his Deputy do not allow them to be out of the country at the same time. While Kenya has always cooperated and reiterated its commitment to continue cooperating with the Court, it must do so in the context of its own Constitutional requirements.

Judge Sang-Hyun Song
President
International Criminal Court
Maanweg, 174
2516 AB, The Hague
The Netherlands

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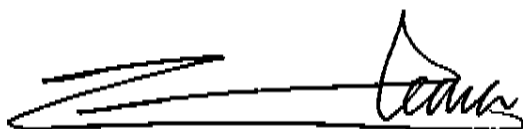
Addis Ababa, Ethiopia, P.O. Box: 3243, Tel.: (251-11) 5513 622, Fax: (251-11) 5519 32 Email:

Kenya as a member of the international community and an active participant in the international arena will clearly be disadvantaged should the Suspensive Effect be allowed to continue. This means that during the absence of the Deputy President at the trial, the President of Kenya will automatically be prevented from meeting his International obligations. These include the forthcoming United Nations General Assembly High Level Segment scheduled to take place from 23-27 September 2013, and the European Union facilitated "New Deal Somalia Conference" scheduled to take place on 16 September 2013, in Brussels. Participation in both conferences at the highest level is critical for Kenya in its trajectory and efforts towards peace and security both at the national and regional levels.

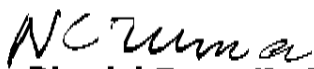
Five years ago, Kenya was grappling with its own internal problems and five years later, commendable progress has been made towards recovering from the post-2007 election violence. The measures put in place towards restoration of peace and national reconciliation have been spearheaded and championed by the President and his Deputy. Kenyans democratically elected their leaders in March 2013, and they expect that their leaders will discharge their constitutional responsibilities as elected executive leaders of the Republic of Kenya. In this regard, Kenyans greatly anticipate celebrating 50 years of their Independence and other national days, under the guidance and visionary leadership of their duly elected leaders. This will be adversely impacted by the process at The Hague. Bearing this in mind and its consequences on the region, the recent decision of the Court will undermine progress and threaten Kenya's peace and stability.

In addition, the Prosecution has ignored several procedural requirements having the effect of eroding the principles of natural justice. The Court's attention has been drawn to this aspect on two occasions by its own Judges. This leaves the African Union with no option but to ask that until the request of the AU is considered and clearly responded to, the cases should not proceed. Therefore, on behalf of the African Union, we would like to request the Court, in light of the above-mentioned reasons, to allow the Head of State of Kenya and his Deputy to choose the sessions they wish to attend in accordance with their Constitutional obligations and duties that they are required to fulfill and for which they are accountable to the people who elected them.

Please accept, Mr. President, the renewed assurances of our highest consideration.



Hailemariam Desalegn
Prime Minister of the Federal
Democratic Republic of Ethiopia and
Chairperson of the African Union



Nkosazana Dlamini-Zuma (Dr.)
Chairperson of the African Union
Commission

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H.E. Ambassador Tiina Intelmann
President of the Assembly of State Parties
to the Rome Statute of the International Criminal Court (ICC)
NEW YORK

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