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## International Center for Policy and Conflict

Our Ref: ICPC/03/23-11/11

Your ref:

23<sup>rd</sup> November, 2011

Mr. Keriako Tobiko  
The Director of Public Prosecutions  
NSSF Buildings, 19<sup>th</sup> Floor  
Milimani Road  
Nairobi

Dear Sir,

### Re: Public Duty to Prosecute Post-Election Violence (PEV) Cases

The above subject-matter and related reports on status of PEV cases refer.

As you will recall, Kenya as a state party to the Rome Statute has on several occasions affirmed its obligations to compliment the workings of the International Criminal Court (ICC) in relation to the present situation. In fact, the President and the Prime Minister, in their capacity as Principals of the Coalition Government publicly pledged this in their meeting with the Prosecutor of the ICC in September 2010. Subsequent pronouncements from within the ranks of government have equally confirmed that the government understands its duties within the context of the principle of complementarity that binds it in national criminal prosecutions.

It is for this reason, amongst others, that the Kenyan people endorsed the Constitution that created your independent office, the Directorate of Public Prosecutions (DPP). The expectation, therefore, is that your office has exclusive powers to conduct impartial and expedited investigations and prosecutions so as to reorder the country's criminal justice system.

In that regard, it is the responsibility of your office to curtail official impunity that continues to prevail and accord justice to victims of the Post-election violence (PEV). This includes your complimentary role to bring to justice persons who bear 'lower' criminal culpability in the PEV cases.

Indeed, this is not an entirely challenging task as previous reports by the Police and the office of the Attorney General, which are now constitutionally in your custody, detail all the cases and potential suspects. Government of Kenya is on record claiming competence and will to prosecute this group of perpetrators.

We are, therefore, surprised that to date no prosecutions of this calibre of suspects has commenced well over four (4) months since you assumed office. This unfortunate state of affairs has prevailed despite the International Criminal

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Court(ICC) itself concluding the pre-trial stage, which itself implies that direct co-perpetrators of PEV crimes are indeed in the country and have never been made to account. Furthermore, this obvious laxity to prosecute flies on the face of victims of the PEV who continue to languish in deplorable conditions. In fact, a number of victims have since lost their lives without any sense of justice being meted out on those who directly inflicted injuries including rape and destruction of property upon them.

Moreover, this glaring state condoned impunity gap and the failure of your office to prosecute puts the country at risk of recurrence of criminal violence and gross human rights violations as the country approaches the 2012 elections for which your office will be directly accountable to the Kenyan people. These lower level PEV suspects continue to pose threat to security and safety of victims and are serious destabilizing elements to society's cohesion and peaceful coexistence.

This is a history that the country can ill-afford and therefore ICPC **DEMANDS** your immediate action in commencing local prosecutions of these PEV cases.

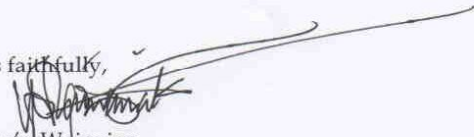
The incessant requests to the ICC for 'evidence' in custody of the Prosecutor can no longer hold as an excuse for failure to conduct local prosecutions. Indeed, it defeats basic foundations of prudence, human rights and good governance as enshrined in the Constitution to continue to engage exorbitant foreign counsels using public funds on a matter that the Appeals Chamber of the ICC has dispensed with.

By this letter, we warn that the victims of PEV demand action and shall not hesitate to pursue justice for atrocities visited on them within the context Kenya's complementary obligations to the ICC and Kenyan Situation, for which your office is directly responsible.

Accordingly, your office is hereby put on **NOTICE** that should you fail to fulfil your public duties to conduct meaningful, independent and expedited prosecutions within reasonable time from the date hereof, then victims will be left with no option but to initiate proceedings under Articles 22 and 48 of the Constitution of Kenya.

We further **DEMAND** urgent concurrent action in offering credible protection to the victims and witnesses of the PEV who will be core to the success of the local prosecutions.

Yours faithfully,

  
Ndung'u Wainaina  
Executive Director

C.c.

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