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**AMNESTY  
INTERNATIONAL**



H.E .The Permanent Representative

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**To all members of the United Nations Security Council**

**African Union's request for the United Nations Security Council to defer the trials of President Uhuru  
Kenyatta and Deputy President William Ruto**

Dear Ambassador,

I am writing on behalf of Amnesty International to urge the United Nations Security Council (UN SC) to decline the request by the African Union (AU) for the deferral of the International Criminal Court's (ICC) trials of Kenya's President Uhuru Muigai Kenyatta and Deputy President Samoei William Ruto. President Kenyatta and Deputy President Ruto are accused by the ICC of being responsible as "indirect co-perpetrators" for crimes against humanity committed during the 2007-2008 post-election violence. More than 1000 Kenyans were killed and more than 600,000 displaced during the violence. In its letter of request dated 12 October, the AU stated that a deferral of the trials under Article 16 of the Rome Statute of the International Criminal Court (Rome Statute) will provide the President of Kenya and his Deputy "...with the time required for the enhancement of the effort aimed at combating terrorism and other forms of insecurity in the country and the region." This request is the latest in a series of requests made since 2010 by the AU and Kenya for the deferral of the ICC's investigations and prosecutions.

The AU and Kenya made the deferral request following the siege of the Westgate shopping mall in Nairobi from 21 to 24 September by suspected al-shabab militants. The attack claimed at least 68 lives, and left over 175 injured.

Amnesty International recognises the very serious attacks committed against people in Kenya from 21 to 24 September, and the challenges faced by the Kenyan government. However, Amnesty International urges the UN SC not to defer the ICC's proceedings. A deferral will: delay justice and reparations for victims of the 2007-2008 election violence; amount to the political interference in the ICC's management of its cases; and expand the use of Article 16 to situations where it was never intended to be used.

Victims of crimes committed during the post-election violence in 2007-8 have had to wait for almost six years while the Kenyan authorities promised and failed to deliver justice. Following its intervention, the ICC's trials are now ready to proceed and should not be delayed. The current Kenya cases have

been marred by significant witness intimidation. The significant delays that will result from a deferral are likely to lead to further witness interference, adversely affecting the ICC trials and the ends of justice.

It is also likely that the UN SC will be requested to renew repeatedly the deferral, further entrenching impunity for crimes under international law committed in Kenya in 2007-2008. In the Decision of its October Extraordinary Summit, the AU tellingly stated: "...no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity..." This declaration is contrary to Article 27 of the Rome Statute, to which Kenya is a state party, and to other rules of international law. Amnesty International is particularly concerned that the deferral request seeks to trump the ICC's efforts to address impunity for crimes against humanity committed in 2007-8 with concerns about terrorism. Efforts to combat terrorism must be consistent with, and must not override, Kenya's obligations under international law to: (a) address impunity and respect human rights; and (b) uphold the rights of victims of the 2007-2008 electoral violence to justice and reparation.

The trials of President Kenyatta and his Deputy must proceed as scheduled under the management of the Trial Chamber. In the event that conflicts arise between the responsibilities of the President and Deputy President and their obligations to attend their trials, these should be raised with the Trial Chamber, which will consider them on a case by case basis. The Trial Chamber can, among other measures, consider adjourning proceedings or excusing the accused from attending certain hearings. A deferral will amount to improper political interference by the UN SC in the ICC's management of its caseload.

It is notable that, following the Westgate Shopping Mall attack, the ICC granted Deputy President Ruto's request for the adjournment of his trial. On 25 October, the ICC Appeal Chamber confirmed that Article 63(1) grants the Trial Chamber discretion, allowing it, in exceptional circumstances, to permit an accused person to be absent from Court during the proceedings. On the same day, Deputy President Ruto made an application to be excused from his trial for three days. His application was granted. These decisions demonstrate that the ICC is balancing on the one hand, the need for speedy and fair trials and the interests of victims and witnesses, and on the other hand, the rights as well as the responsibilities of these two accused.

Furthermore, the drafting history of Article 16 shows that it was intended to enable the UN SC to undertake delicate peace negotiations in situations where the prospect of investigations or prosecutions by the ICC would impede such negotiations. It was never intended, as the current request seeks, to shield senior political officials from prosecution while they hold office.

The legal requirement that the UN SC may apply Article 16 only within the framework of a resolution adopted under Chapter VII of the UN Charter constitutes a further limitation to the Council's ability to take action on the deferral request. The AU's deferral request does not demonstrate how it meets the requirements of Articles 39 and 41 of the UN Charter.

A deferral on this basis would have a devastating impact on the Rome Statute system and on the credibility of the UN SC's resort to Chapter VII of the UN Charter. It would open the floodgates to annual deferral applications by Kenya and other states that seek to protect senior officials, who are accused by the ICC, from international criminal justice. In some cases, it may incentivize senior

politicians suspected of committing serious crimes under the Rome Statute, never to leave office or to try to blackmail the UN SC to make deferrals or renewals.

For these reasons, Amnesty International urges members of the UN SC not to defer these cases and instead to encourage the President, Deputy President and the government of Kenya to continue to engage and cooperate fully with the ICC so that the criminal trials can continue and be brought to a just end without undue delay.

Yours sincerely,

Netsanet Belay

Director – Africa programme