

7 January 2021

To the attention of the Bureau of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC)

Your Excellencies,

1. The Undersigned Organizations have been closely following the election process for the next ICC prosecutor and most recently, the extension of the shortlist of candidates for the next ICC prosecutor, as produced by the Committee on the Election of the Prosecutor (CEP).
2. On 13 November 2020, the Bureau of the Assembly of States Parties decided that the list of candidates considered in the consultation process to identify a consensus candidate for the Prosecutor shall be expanded.¹
3. Hearings with the expanded list of candidates were held on 9 and 10 December 2020 respectively. On 18 December 2020 at the fifth plenary meeting of its resumed nineteenth session, the Assembly decided to defer the election of the Prosecutor to a second resumed session in early 2021.²
4. As noted in the Modalities for Consultations and Focal Points relating to the Election of the Prosecutor produced by the Bureau of the Assembly of States Parties *“in the spirit of transparency, all communications received by the Committee on the Election of the Prosecutor from external parties shall be shared with members of the Bureau and with the focal points.”*³
5. In this spirit, the Undersigned Organizations would like to draw the attention of the Bureau of the Assembly of States Parties to the inclusion of Mr. Karim Khan, a British lawyer, in the expanded list of candidates. In particular, we write to draw your attention to some possible implications of Mr. Khan being considered as a potential candidate for ICC prosecutor.
6. At the outset, it is important to note that in no way does this communication aim to denigrate the vital role of defence counsel or suitability of candidates as ICC prosecutor who have worked in a primarily defence counsel role. Indeed, we believe that a strong defence is a vital component of a fair trial and that defence counsel represent and protect the rights of the defendant.
7. Mr. Khan acted as defence counsel before the ICC in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, a case in which the Kenyan Deputy President William Ruto and co-accused, Joshua Sang, faced charges of crimes against

¹https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/Election%20of%20the%20Prosecutor%20-%20Way%20Forward%20-%20ENG.pdf

²https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-SP-79-ENG.pdf

³https://asp.iccpi.int/iccdocs/asp_docs/ASP19/Prosecutor%20consultation%20modalities%2011Dec2020.1600.pdf

humanity before the ICC. On April 5, 2016, ICC judges declared that there had been a mistrial in the *Ruto & Sang* case which they terminated over what the presiding judge, Chile Eboe-Osuji, characterized as a “troubling incidence of witness interference and intolerable political meddling.”⁴

8. As defence counsel in the case, Mr. Khan’s actions in relation to a specific witness, Meshack Yebei, who disappeared from his hometown on 14 December 2014 before his body was found four months later, at another location several hundred miles away in a national park, are of interest.
9. In an interview with *The Independent* in November 2013, Mr. Yebei said that he intended to quit the defence after receiving repeated threats to his life and alleged that he joined the defence case after promises of financial reward.⁵ When the body of a person mistakenly thought to have been Mr. Yebei was discovered, Mr. Khan wrote a letter to the head of Kenya’s Criminal Investigation Department claiming that Mr. Yebei had been a “critical witness” for the defence and demanded an investigation to determine if the body discovered indeed belonged to Mr. Yebei.⁶
10. However, when the mutilated and tortured body of Mr. Yebei was indeed found in March 2015, Mr. Khan remained silent on the matter and appeared to have dropped his public demands for an investigation. Mr. Yebei’s family have questioned why Mr. Khan did not raise the alarm when Mr. Yebei first disappeared, but only when a body had been found, given that he was a critical defence witness.⁷
11. To date, Mr. Khan has not spoken publicly about the need for the Kenyan government to carry out an investigation into the death of Mr. Yebei, his witness, despite the former ICC Registrar’s expression of willingness to assist the Kenyan authorities with its investigations regarding Mr. Yebei’s death.⁸

⁴ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Public redacted version of: Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr 16-06-2016 1/259, para. 464

⁵ ‘The case against Kenya’s powerful vice-president, William Ruto, that the ICC must win to vindicate itself,’ *The Independent Newspaper*, Catrina Stewart, 15 February 2015, available at: <https://www.independent.co.uk/news/world/politics/case-against-kenya-s-powerful-vice-president-william-ruto-icc-must-win-vindicate-itself-10046724.htm>

⁶ ‘Discovery of witness’s mutilated body feeds accusations of state killings’, 6 January 2015, *The Guardian Newspaper*, available at: <https://www.theguardian.com/world/2015/jan/06/witness-mutilated-body-kenya-government-killing-meshack-yebei-william-ruto>

⁷ Interview with Meshack Yebei’s brother, available at: <https://www.youtube.com/watch?v=Y0Ms0byhQV8>

⁸ Press Release, 6 January 2015, ‘ICC deeply concerned with death of Mr Meshack Yebei; stands ready to assist Kenyan investigations’, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1082&ln=en>

12. Furthermore, the ICC Prosecutor noted that Mr. Yebei was deeply involved in attempts to bribe and interfere with witnesses for the ICC prosecution.⁹ The circumstances surrounding the discovery of Mr. Yebei's body suggested there was a campaign of obfuscation of the truth relating to how and why he may have been killed. To date Mr. Yebei's death remains an unsolved crime.
13. We stress that we are not imputing negative intent or actions to Mr. Khan in this incident, but rather pointing to the potential for a conflict of roles if there were indeed to be any future investigation and information were to be sought from him. At the very least, however, his attitude towards the fate of a witness whom he had claimed seems troubling and would appear to need clarification.
14. The *Ruto & Sang* case was declared a mistrial by the relevant chamber and therefore could become an active case should relevant evidence emerge. Furthermore, the currently on-going case of *The Prosecutor v. Paul Gicheru* (ICC-01/09-01/20) relates to suspected offences against the administration of justice committed in Kenya in 2013, consisting of corruptly influencing witnesses of the ICC Prosecution in the *Ruto & Sang* case. Mr. Gicheru surrendered himself to the ICC in November 2020 and his initial appearance was held on 6 November 2020.
15. This case is extremely important for the ICC in terms of setting a precedent for those who attempt to bribe or interfere with witnesses. Mr. Khan, if elected as ICC Prosecutor would have to recuse himself from this important case as well as any future trial proceedings in the *Ruto & Sang* case.
16. In relation to the *Ruto* case, according to Judge Eboe-Osuji "the first element that contributed to the creation of an atmosphere of intimidation was the open generation and promotion within Kenya of a strong current of hostility against the ICC processes."¹⁰
17. As defence counsel in the *Ruto* case, Mr. Khan represented the Deputy President, the second most powerful person in Kenya. In this capacity he received great attention from the Kenyan media. From time to time, Mr. Khan gave interviews on Kenyan television and his media activities attracted a large viewership.¹¹ In addition, the Kenyan public watched the proceedings of the

⁹ Statement of the Office of the Prosecutor regarding the reported abduction and murder of Mr. Meshack Yebei, 9 January 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-09-01-2015>

¹⁰ *Ibid*, para. 162.

¹¹ See for example, a profile on Kenya Citizen TV, April 17 2016, "This Man, Karim Khan", <https://www.youtube.com/watch?v=PjW1lxyfXo>, and 'ICC Cases Made Me Fall In Love With Kenya- Karim Khan QC, Capital News, 6 April 2016, available at: <https://www.capitalfm.co.ke/news/2016/04/icc-cases-made-fall-love-kenya-karim-khan-qc/>

Ruto case on television, and court filings by the defence usually received huge media attention in Kenya, further enhancing his image in the country.

18. Mr. Khan used his elevated status to publicly disparage those that stood in support of the case against his client, and, for example, talked about “so-called legal experts and victims’ lawyers” in reference to some of these parties.¹²
19. In his media interviews, Mr. Khan was not just ordinary defence counsel. He was also a spokesman for the country’s second most powerful man, who was viewed as angry and under significant political pressure because of the case he was facing before the ICC.
20. Mr. Khan’s positions, including the frequent rebukes against those perceived to be in opposition to his client, came to be viewed as an extension of the anger of his powerful client and of the Kenyan establishment against the ICC, and may well have contributed, wittingly or unwittingly, to the deliberately fomented climate of “political hostility” against the court.¹³
21. The ICC cases had long raised a debate in Kenya on the connection between accountability and democracy. The political establishment portrayed the ICC cases as an attempt, by external interests, at regime change in Kenya and, when the cases ended, this was also explained as further proof of the integrity of the country’s electoral process. This view branded the ICC cases as an attempt to achieve through other means, what had failed through the ballot. In a triumphal television interview, soon after the declaration of a mistrial in the *Ruto* case, Mr. Khan reinforced this contentious characterization of the cases saying, “they thought that there would be regime change in Kenya.” Mr. Khan also embraced the view that the cases were only an attempt to remove his client from power declaring:

They thought that Kenyans were so weak that they would say that choices have consequences they would get a different set of leaders that were amenable to outside interests. Kenyans were not naïve. They made the right decision and the court process fortunately, after a lot of work by the defence teams showed by the independent review by experienced judges... that the evidence was distinguished by gaping holes, contradictions, fallacies and lies....¹⁴

¹² See ‘Deputy President’s lawyer Karim Khan’s statement on political interference,’ KTN News, available at: https://www.youtube.com/watch?v=km7APT_zM98

¹³ See also KPTJ’s Advocacy Brief on Kenya- at the 14th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 18-26 November 2015, which refers to highly charged political landscape and incendiary anti-ICC rhetoric in Kenya. Available at: <https://kptj.or.ke/advocacy-brief-on-kenya/>

¹⁴ See ‘Deputy President’s lawyer Karim Khan’s statement on political interference, KTN News, available at: https://www.youtube.com/watch?v=km7APT_zM98

22. Mr. Khan and other defence counsel personally attended a ‘thanksgiving’ political rally held by President Kenyatta and Deputy-President William Ruto in April 2016 in order to ‘celebrate’ the termination of the two Kenya cases.¹⁵ Mr. Khan addressed the crowd where President Kenyatta made the following statement “*I will not allow any other Kenyan to be tried in a foreign court. As a country, we have closed the ICC chapter.*”¹⁶ Kenyatta’s statement was made despite three pending ICC warrants of arrest for individuals suspected of witness interference in the two cases.
23. Arguably, Mr. Khan went beyond his duty as defence counsel by attending a political rally where such statements were made. In thanking Kenyans for ‘their support,’ he seemed to ignore that the country was deeply divided regarding the decision to terminate the two Kenya cases. Indeed, many victims of the post-election violence believed that the two cases should not have been terminated and participation in public celebrations was potentially disrespectful to both victims and a large number of Kenyans who believed that witness interference and political meddling had resulted in the collapse of the two cases, and not necessarily the innocence of the accused persons.¹⁷
24. As a contrast, while Mr. Uhuru Kenyatta also faced charges before the ICC, his defence team seems to have refrained from courting the Kenyan media and venturing into the political arena.
25. In these circumstances, considering Mr. Khan as ICC prosecutor, while a case is pending in which he acted and which failed on account of political interference and witness tampering, would affect the future credibility of the Office of the Prosecutor.
26. We note the comments of the CEP regarding a coordinated write-in campaign by civil society on Mr. Khan’s behalf, promoting his candidacy (despite the confidential nature of the process),¹⁸ however Mr. Khan would struggle to

¹⁵ ‘Kenya ICC Suspects Defence Teams Paraded at Nakuru Rally’, 16 April 2016, *The Daily Nation*, available at: <https://allafrica.com/stories/201604181202.html> . See also ‘IN PICTURES: Jubilee’s thanksgiving rally at Afraha Stadium, Nakuru’, 16 April 2016, *Citizen Digital*, available at: <https://citizentv.co.ke/news/in-pictures-jubilees-thanksgiving-rally-at-afraha-stadium-nakuru-122889/>

¹⁶ ‘Uhuru: I will never allow another Kenyan to be tried at the ICC’, 17 April 2016, *The Standard Newspaper*, available at: <https://www.standardmedia.co.ke/kenya/article/2000198499/no-kenyan-will-ever-again-face-icc-says-president-uhuru-kenyatta>

¹⁷ For example, the victims’ lawyer in the Ruto case stated that the declaration of a mistrial was a disappointment to victims, see ‘International criminal court abandons case against William Ruto’, 5 April 2016, *The Guardian*, available at: <https://www.theguardian.com/world/2016/apr/05/international-criminal-court-william-ruto-kenya-deputy-president-election-violence>. See also the views of victims participating in the *Kenyatta* case regarding its termination, ‘Annex to Victims’ response to the ‘Prosecution’s notice of withdrawal of the charges against Uhuru Muigai Kenyatta’, ICC-01/09-02/11-984-Anx, *The Prosecutor v. Uhuru Muigai Kenyatta*, 9 December 2014, available at: https://www.icc-cpi.int/RelatedRecords/CR2014_09984.PDF .

¹⁸ Para. 18, Report of the Committee on the Election of the Prosecutor, Addendum, ICC-ASP/19/INF.2/Add.3.

attract the unmitigated support and confidence of many other civil society organizations in Kenya and across Africa, without which it would be difficult to succeed in his role.

27. We, therefore, respectfully urge you to take all measures within your powers to ensure that the most highly qualified, competent leader who embodies an uncompromising commitment to the principles on which the Court was founded be elected as prosecutor of the International Criminal Court.

With our highest regards,

Africa Center for Open Governance (AfriCOG), Nairobi, Kenya

African Defenders (Pan-African Human Rights Defenders Network), Kampala, Uganda

Center for Strategic Litigation, Dar es Salaam, Tanzania

Community Advocacy and Awareness Trust (CRAWN), Nairobi, Kenya

Constitution Reform Education Consortium (CRECO), Nairobi, Kenya

Haki Africa, Mombasa, Kenya

Haki Yetu, Mombasa, Kenya

Independent Medico Legal Unit (IMLU), Nairobi, Kenya

Inform Action, Nairobi, Kenya

International Centre for Policy and Conflict (ICPC), Nairobi, Kenya

Inuka ni Sisi, Nairobi, Kenya

Kenyans for Peace with Truth and Justice (KPTJ), Nairobi, Kenya

Kenya Human Rights Commission (KHRC), Nairobi, Kenya

Kenya Land Alliance (KLA), Nakuru, Kenya

Kenyan Section of the International Commission of Jurists, (ICJ-Kenya), Nairobi, Kenya

Kenya Transitional Justice Network, (KTJN), Nairobi, Kenya

Muslims for Human Rights, (MUHURI), Mombasa, Kenya

National Victims and Survivors' Network, Nairobi, Kenya

Pan African Lawyers Union (PALU), Arusha, Tanzania

Samwel Mohochi Advocate, Mohochi and Company Advocates, Nairobi, Kenya

Social Justice Centre Working Group, Mathare-Nairobi, Kenya

TrustAfrica, Dakar, Senegal