



Assembly of States Parties

Distr.: General
5 December 2014

Original: English

Thirteenth session

New York, 8-17 December 2014

List of supplementary items requested for inclusion in the agenda of the thirteenth session of the Assembly

1. Pursuant to rule 12 of the Rules of Procedure of the Assembly of States Parties¹, the Secretariat received two requests for inclusion of supplementary items in the agenda of the thirteenth session of the Assembly. The proposed supplementary agenda items have been submitted for consideration by the Bureau:
 - (a) Request by Kenya for inclusion of a supplementary agenda item **‘Special Session to discuss the Conduct of the Court and the Office of the Prosecutor’**.
 - (b) Request by the Court for inclusion of the supplementary item **‘Applicability of the former Court’s pension regime to former Court’s judges Cotte and Nsereko’**.
2. Explanatory memoranda on the supplementary agenda items, which were submitted pursuant to rule 18 of the Rules of Procedure of the Assembly of States Parties, are included in annexes I and II.

¹ Rule 12: “Any State Party, the Court or the Bureau may, at least thirty days before the date fixed for the opening of a regular session, request the inclusion of supplementary items in the agenda. Such items shall be placed on a supplementary list, which shall be communicated to the States Parties, to Observer States, the Court and the United Nations at least twenty days before the opening of the session.”

Annex I

Explanatory memorandum to supplementary agenda item 1:

I. Note verbale from Kenya no. 514/14, dated 16 October 2014, addressed to the President of the Assembly, Ambassador Tiina Intelmann

1. The Permanent Mission of the Republic of Kenya to the United Nations presents its compliments to the President of the Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court and has the honour to inform that the Republic of Kenya requests the inclusion of a supplementary agenda item at the Thirteenth Session of the ASP scheduled for 8th to 17th December 2014 in New York.

2. The Permanent Mission of Kenya to the United Nations further informs that Kenya intends to raise concerns regarding the conduct of the Court in relation to the Situation in Kenya and items relating to the management oversight provided by the Assembly to the Presidency and the Prosecutor regarding the administration of the Court. Details of these concerns demonstrating gross violation(s) of the letter and spirit of the Rome Statute shall be communicated in due course. The Republic of Kenya proposes that this item with an important and urgent character, be discussed by the ASP with a view to proposing immediate remedial solutions.

3. The Permanent Mission of the Republic of Kenya to the United Nations avails itself of this opportunity to renew to the President of the Assembly of States Parties to the Rome Statute of the International Criminal Court the assurances of its highest consideration.

II. Note verbale from Kenya no. 561/14, dated 3 November 2014, addressed to the President of the Assembly, Ambassador Tiina Intelmann¹

1. The Permanent Mission of Kenya to the United Nations further recalls our Note reference number 514/14 dated October 16, 2014 on the inclusion of a supplementary agenda item to the provisional agenda of the Thirteenth Session of the ASP scheduled for 8th to 17th December 2014 in New York. The proposed agenda item, "**Special Session to discuss the Conduct of the Court and the Office of the Prosecutor**", is informed by the deep concern of Kenya regarding the conduct of the Court and of the Office of the Prosecutor in relation to the Situation in Kenya. In particular, Kenya is concerned with:

A. Prosecutorial conduct

2. In the situation in Kenya the Office of the Prosecution continues to exhibit a lack of strict adherence to the Prosecutorial Strategy, the Strategic Plan of the Office of the Prosecutor 2012-2015 that *inter alia* provide, as objectives and strategic goals thereof, for focussed investigations and prosecutions, an improvement of the quality and efficiency of prosecutions and conduct impartial, independent, high quality, efficient and secure preliminarily examinations, investigations and prosecutions. This is informed by:

- (a) Sustained prosecution of case(s) that does not satisfy the evidentiary thresholds required at trial. The Office of the Prosecutor has on several occasions, stated that the evidence available in the case against Uhuru Kenyatta is insufficient to prove alleged criminal responsibility beyond reasonable doubt.
- (b) Allegations of the commission of perjury by witnesses with the knowledge of and or connivance of Court officials, investigators and or intermediaries whereby the

¹ Copy of the Note verbale was sent to H.E. Dr. Nkosazana Dlamini Zuma, Chairperson of the African Union Commission and H.E. Mr. Sidiki Kaba, President Designate of the Assembly of States Parties.

witness were promised financial or material gain including relocation to third countries, should they offer evidence that is favourable to the Prosecution.

- (c) Conflating the legal personalities of the President and the Deputy, with that of an individual defendant (reference amendment to Article 27 above) and the continued failure of the OTP to distinguish between the person of the individual defendant(s) with that of the State thus undermining the rights of the accused as enshrined in the Rome Statute. On several occasions the Attorney General, the Defence, the Court, have stated that the Republic of Kenya is not on trial and further that the Kenyan defendants are before the court in their individual capacities and not as President and Deputy President. The OTP has been inconsistent in its respect for this principle.

B. Complementarity

3. The ICC is not meant to replace national Courts and the principle of complementarity expresses the will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States. The ICC is expected to have higher standards of practices and procedural adherence than those found in national jurisdictions. However, today, Kenya finds itself saddled with a Court that has lower evidentiary thresholds and prosecutorial practices and standards than those found in Kenya's national Courts. This eventuality needs to be addressed in a revised Statute.

C. Adherence to international standards

4. Furthermore, the OTP does not meet or adhere to the international standards as contained in the Guidelines on the Role of the Prosecutors adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990. These guidelines were formulated to assist member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutor in criminal proceedings and remain relevant even in regard to the ICC and the OTP. They provide for Prosecutors to act in accordance with the law while performing their duties consistently and expeditiously while respecting human rights and due process and inter alia call for Prosecutors not to initiate or continue prosecutions when the charge is unfounded.

D. Independence of the OTP

5. The independence of the OTP is called to question as we continued to witness the preferential access by some States and civil society organizations and the influence that they have over the exercise of the mandate(s) of the Court. This influence is also witnessed in other operational spheres such as the recruitment of staff, especially professional staff, which is heavily skewed in favour of a segment of the membership of the ASP rather than geographical and regional balancing reflecting the face of all States Parties.

E. Politicization of the judicial and prosecutorial functions

6. Kenya notes that there has been an increase in the interactions (conferences, workshops, briefings, media engagements) by the Prosecutor with other interlocutors that include Civil Society and Non States Parties where aspects of the cases on the Situation in Kenya and/or the legitimate actions of the Government of Kenya are discussed and characterised in a negative light.

7. For example most recently a meeting convened in the month of October 2014 where the Prosecutor briefed, at the behest of non-governmental entities, members of the Senate of the United States (a non-State Party that is on record to have lobbied Kenya not to join the ICC). During this meeting the Prosecutor levelled accusations of the lack of cooperation by the Kenyan government, ongoing witness intimidation and evidence tampering, and the substantial amount of crime-based evidence already before the Court.

F. Interpretation and Implementation of the Rome Statute

8. Kenya notes that when presented with a situation where the ASP had during the 12th Session given specific legislative guidance by amending Rule 134 of the Rules of Procedure and Evidence, the Court in recent rulings ignored and/or failed to recognize these amendments, in particular Rules 134 *bis* and *quater*. We therefore ask why should we, the legislative arm of the Rome Statute, continue to give guidance that is ignored by the judicial and prosecutorial arms of the Rome Statute?

G.

9. And further request the amendment of Article 70- Offences against Administration of Justice by inserting in the paragraph 1 the following sentence: 'The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person:'

10. The Republic of Kenya proposes that these aforementioned items (A to G above), without prejudice to further item in the future are addressed by the ASP as items of an important and urgent character, in the exercise of the management oversight provided " by the Assembly to the Presidency and the Prosecutor regarding the administration of the Court, with a view to proposing immediate remedial solutions including appropriate caution to the Court and the Office of the Prosecutor.

11. The Permanent Mission of the Republic of Kenya to the United Nations avails itself of this opportunity to renew to the President of the Assembly of States Parties to the Rome Statute of the International Criminal the assurances of its highest consideration.

III. Letter from the Principals of the Court, dated 7 November 2014, addressed to the President of the Assembly, Ambassador Tiina Intelmann, with regard to the Note verbale from Kenya no. 561/14

1. The Principals of the Court have the honour to address you with regard to the Note Verbale 561/14 of 3 November 2014, sent to you by the Permanent Mission of the Republic of Kenya to the United Nations, concerning Kenya's proposal to include a supplementary agenda item, titled "Special Session to discuss the Conduct of the Court and the Office of the Prosecutor", to the provisional agenda of the Thirteenth Session of the Assembly of States Parties (Assembly) in December 2014.

2. The Court notes with concern that many of the issues proposed to be discussed by the Assembly in the context of the referred special session relate to matters that fall within the judicial and prosecutorial competence of the Court, and are therefore governed by its judicial and prosecutorial independence, which are fundamental requirements of the Rome Statute (articles 40(1) and 42). The Statute makes specific, separate provision for the handling of any complaints about the conduct of the elected officials of the ICC.

3. The Court also notes that many of the issues raised in *Note Verbale* 561/14 appear to concern judicial matters that have already been duly adjudicated by the relevant Chambers or that are currently *sub judice* before them; or concern issues that should, as a matter of principle and procedure, be addressed before the relevant Chamber in accordance with the legal framework governing the judicial proceedings.

4. The Court fully respects the fact that the Assembly has the duty to provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court, in accordance with article 112.2 (b) of the Rome Statute. However the scope of such oversight must not interfere with the independence of the Judiciary or the Office of the Prosecutor in the performance of their respective functions. To ensure the integrity of the Rome Statute, it is crucial that the Assembly is not perceived as interfering with judicial matters which strictly belong in the courtroom. Indeed, States Parties must be vigilant to uphold the fundamental values that are enshrined in the Rome Statute and serve as custodians of the treaty's object and purpose.

5. It is in this context that the Principals of the Court strongly urge the Bureau to include in the agenda of the Assembly only items that fall within the competence of the Assembly and clearly do not undermine the Court's judicial and prosecutorial independence.

[Signature]
Sang-Hyun Song
President

[Signature]
Fatou Bensouda
Prosecutor

[Signature]
Herman von Hebel
Registrar

IV. Note verbale from Kenya no. 612/14, dated 10 November 2014, addressed to the President of the Assembly, Ambassador Tiina Intelmann²

1. The Permanent Mission of the Republic of Kenya to the United Nations presents its compliments to the President of the Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court (ICC) and has the honour to inform that the Mission has become aware of the letter dated 7 November 2014 signed by the Principals (sic) of the Court suggesting that the matters of our Note Verbale reference number 561/14 dated November 3rd 2014 are within the judicial and prosecutorial competence and are *sub judice* and therefore should not be taken up by the Assembly.

2. The Permanent Mission of Kenya wishes to inform that as a concerned State Party, Kenya, states that this position taken by the Court is most regrettable, and, in our assessment not correct. It would have been Kenya's expectation that such a pronouncement on a proposed agenda item before the Assembly, which is indeed the principal legislative body of the Rome Statute, should have been pronounced on by the Assembly or its subsidiary bodies, and its suitability for discussion in the Assembly determined by States Parties' interpretation of the Rome Statute and the Assembly's own rules and procedures. It therefore comes as a surprise that the functionaries of the Court would seek to pronounce themselves on a matter that is before the Bureau, even before the Bureau itself, pronounces itself on it. The role of the Assembly *vis a vis* the Court is more than mere "management oversight". It is the pinnacle body that has legislative powers and oversight over the Court. It cannot be therefore, that the Court determines and/or chooses items on the agenda of the Assembly. The legal and moral hazard of such an eventuality ought to be self-evident.

3. The Permanent Mission of Kenya further informs that, Kenya is not seeking to discuss matters relating to evidence nor matters that are material to any case before the Court as it has been made explicitly clear in our Note. The concerns contained in the Note Verbale are ones of process and conduct and deference to the Assembly, particularly and specifically as they relate to the interpretation and implementation of the Rome Statute. These matters are therefore a priori and by definition outside the purview of court proceedings, *per se*, and or any matters *sub judice*. Mere reference to court proceedings to substantiate conduct and process anomalies does not constitute interference with the independence of the Court nor the cases before it. Once again we see the 3 arms of the ICC coming together to frustrate the legitimate engagement of a State Party with the Assembly.

4. The Permanent Mission of Kenya to the United Nations would also like to remind that it should not be lost sight of that, the genesis of this State Party's (Kenya) pursuit of this special agenda item is to be found in the Prosecutor's own pursuit of a resolution of the challenges that they face by suggesting that Kenya should be referred to the Assembly for non-cooperation. It is therefore not only our right to anticipate that this might indeed happen but it is also our obligation to ensure that we, and the membership, are prepared to deal with this matter should it arise.

5. The Permanent Mission of Kenya to the United Nations therefore reiterates that the subject matter of the proposed supplementary agenda item is not within the judicial and prosecutorial competence nor is it *sub judice* and further reiterates that this agenda item

² Copy of the Note verbale was sent to H.E. Mr. Sidiki Kaba, President Designate of the Assembly of States Parties.

needs to be taken up and resolved with urgency and a forthrightness that reflects evenhandedness, fairplay and an adherence to the Rules and Procedures of the Assembly.

6. The Permanent Mission of the Republic of Kenya to the United Nations avails itself on this opportunity to renew to the President of the Assembly of Parties to the Rome Statute of the International Criminal Court the assurances of its highest consideration.

V. Note verbale from Kenya no. 631/14, dated 4 December 2014, addressed to the Members of the Assembly of States Parties

1. The permanent Mission of the Republic of Kenya to the United Nations presents its compliments to the Members of the Assembly of States Parties (Assembly) to the Rome Statute of the International Criminal Court and has the honour to refer to the former's Note reference number 514/14, 2014 on the inclusion of a supplementary agenda item to the provisional agenda of the Thirteenth Session of the ASP scheduled for 8th to 17th December in New York.

2. Three days before the beginning of the Assembly, Kenya continues to meet with frustration as its request for the inclusion of a supplementary agenda item is being systematically and categorically subverted by a formidable cabal of conservative and non-reformist States Parties that find change and institutional self-examination threatening and unfathomable.

3. In doing so, these States Parties of the Assembly propagate the disinformation that Kenya's request for a supplementary agenda item is quintessentially and eccentrically Kenyan.

4. The countries that are resisting and subverting Kenya's request for the inclusion of supplementary agenda, are joined at the hip by a cacophony of civil society organisations whose constituency and mandate is suspect and whose agenda has more to do with purveying the displeasure of their funders than promoting the principles of Rome Statute or human rights.

5. The permanent Mission of Kenya to the United Nations would like to state that the request for supplementary agenda item is neither essentially Kenyan nor specific to the Kenyan cases before the Court.

6. At 10 years the International Criminal Court is an institution that is old enough and strong enough to receive and respond to criticism and feedback on its performance. It is old enough to change and to reform in ways in which it can be stronger, more responsive and thereby fitter for purpose. The institution can also be better attuned to the needs of its broad membership and the promise of the Rome Statute.

7. The current state of affairs at the ICC as stated numerously by Kenya and other Member States, as well as by independent commentators, is at best below par and at worst embarrassing and even counterproductive to the pursuit of justice and peace and security in the world.

8. There is no institution that cannot do without improvement. The Assembly must rise to the challenge of doing whatever is necessary to make this sorely needed and indeed historical institution fit for purpose and better attuned to the political and human rights expectations of the 21st Century.

9. Our amendments proposals, among others, including those proposed by the African Union, are the humble beginnings of such an undertaking.

10. Kenya once again appeals to the Members of the Assembly to expeditiously facilitate the take up of the request made by Kenya for consideration of the supplementary agenda item contained in the note reference number 514/14 dated October 16, 2014. There is no other legitimate platform for the debate on these crucial agenda items than the Assembly.

11. The permanent Mission of the Republic of Kenya to the UN avails itself of this opportunity to renew to the Members of the ASP to the Rome Statute of the ICC the assurances of its highest consideration.

Annex II

Explanatory memorandum to supplementary agenda item 2

1. This explanatory memorandum and its three appendixes are submitted to the Assembly of States Parties (“Assembly”) pursuant to rule 18 of the Rules of Procedure of the Assembly of States Parties.³

A. Factual background

2. The pension scheme regulations for judges of the International Criminal Court (“Court”) adopted at the Assembly’s third session on 10 September 2004⁴ were discussed during the Assembly’s sixth session and an amended scheme was adopted on 14 December 2007,⁵ significantly lowering the pension benefits of the judges to whom it applies.

3. Judges Cotte and Nsereko were elected on 30 November and 3 December 2007 respectively during the second meeting of the Assembly’s sixth session, in order to fill two judicial vacancies. During the same meeting on 30 November 2007 the Assembly “decided, on the recommendation of the Bureau, that the judges elected during this session of the Assembly will hold office subject to the terms and conditions of office to be adopted during the sixth session”.⁶ On 14 December 2007, at its seventh meeting of the same session, the Assembly adopted by consensus resolution ICC-ASP/6/Res.6, by which it decided to amend the pension scheme regulations for judges of the Court, with entry into force as of the sixth session of the Assembly, specifying again that “these amendments thus apply to the judges elected at the sixth session”.⁷

4. In February 2010, the judges of the Court established a Pensions Committee to study the consequences of the 2007 amendments to the judges’ pension scheme. They produced a memorandum which concluded that Judges Cotte and Nsereko’s pensions should be governed by the original 2004 pension scheme regulations rather than the amended ones. On 5 October 2010, the Presidency sent copies of this memorandum to the Assembly’s Secretariat, requesting that this matter be placed on the agenda of the Assembly’s ninth session in order to be reconsidered. The memorandum (together with the Presidency cover memorandum of 5 October 2010) is attached to this submission as appendix I.

5. At its ninth session, the Assembly decided to refer the issue of the regime that should apply to the two judges elected at the sixth session of the Assembly to the Committee on Budget and Finance (“CBF”) for its opinion.⁸ The CBF, at its sixteenth session, based its consideration of the issue on the “Report of the Court on the applicability of the former pension regime to Judges Cotte and Nsereko”⁹ (attached to this submission as appendix II). The CBF noted that the report set out legal principles of the issue and in this connection recalled that its mandate was solely related to administrative and budgetary questions. It concluded that it was therefore not in position to provide any views on the legal basis of the argument presented by the Presidency.¹⁰

6. The issue was not further addressed at the Assembly’s tenth session in December 2011, nor at any of the subsequent sessions, and has so far remained unresolved. In the meantime, both Judges have terminated their respective mandates at the Court.

³ ICC-ASP/1/3, p.156 (“Rules of Procedure of the Assembly”).

⁴ Resolution ICC-ASP/3/Res.3, annex.

⁵ Resolution ICC-ASP/6/Res.6.

⁶ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (ICC-ASP/6/20), Vol. I, Part I, para. 33.

⁷ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (ICC-ASP/6/20), Vol. I, Part II, para. 19. See also *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (ICC-ASP/6/20), Vol. I, Part I, para. 44.

⁸ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Ninth session, New York, 6 - 10 December 2010* (ICC-ASP/9/20), Vol. I, Part II, para. 35.

⁹ ICC-ASP/10/17, 13 June 2011, previously issued as CBF/16/11.

¹⁰ *Report of the Committee on Budget and Finance on the work of its sixteenth session* (ICC-ASP/10/5), paras. 104-106.

7. On 12 March 2012 Judges Cotte and Nsereko lodged their respective complaints with the International Labour Organization Administrative Tribunal (ILOAT) against what they considered to be an implied decision of the Assembly at its tenth session not to complete the reconsideration of the question of whether the original or the amended pension scheme regulations should apply to them.¹¹

8. On 9 July 2014 the ILOAT delivered in public its Judgment No. 3359, in which it decided that Judges Cotte and Nsereko “are entitled to have the Assembly complete its reconsideration” of its decision to apply the amended pension scheme regulations to them. For this purpose, it held that the Court “shall take such steps as are necessary to resubmit the Presidency’s 5 October 2010 memorandum to the Assembly”.¹² The Judgment is attached to this submission as appendix III.

B. Financial implications

9. Rule 62 of the Rules of Procedure of the Assembly stipulates that before the Assembly takes a decision having financial implications relating to the Court, it shall receive and consider a report on such implications.

10. In its 2011 Report to the Assembly the Court informed the Assembly that if the Judges’ Pension Committee’s position on the matter were to be accepted, the total cost of Judges Cotte and Nsereko’s transfer to the pension scheme preceding the adoption of the amended regulations would amount to €852,493 as at June 2011.¹³ Since then, further costs would have been incurred by the Court in application of the old pension scheme to Judges Cotte and Nsereko. In order to establish the exact amount of costs incurred, the Court requested a renewed estimation from the insurer Allianz with updated figures. Pursuant to the costing received from the insurer, the currently estimated overall costs would amount to an approximate total of **€1.78 million**.

11. According to the insurer’s estimation, the overall amount can be broken down as follows:

(a) Broken down per judge, the estimated costs for Judge Cotte (6 years full-time service) are:

Single premium:	€921,802;
Renewal premium:	€66,624
Derived interest on payments: ¹⁴	€8,237
Compensation for the lower pension payments in the past:	€18,750
Interest on the compensation:	€139
Total cost:	€1,015,552

(b) For Judge Nsereko (3 years 9.33 months full-time service) the estimated costs are:

Single premium:	€672,127
Derived interest on payments:	€5,601
Compensation for the lower pension payments in the past:	€75,557
Interest on the compensation:	€3,175
Total cost:	€756,460

Appendixes I-III

[see ICC-ASP/13/34/Add.1]

¹¹ *Case of Hon. Daniel David Ntanda Nsereko and Hon. Bruno Cotte V. International Criminal Court*, 9 March 2012, Complainants Opening Brief.

¹² ILOAT, 118th session, Judgment No. 3359, adopted on 15 May 2014 and delivered in public on 9 July 2014, para. 30 and ‘Decision’, p. 18.

¹³ ICC-ASP/10/17, 13 June 2011, para. 31.

¹⁴ Based on the standard tariffs by Dutch law for consumer transactions.