



Assembly of States Parties

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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 requests 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: Note verbale from Kenya no. 561/14, dated 3 November 2014

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 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.

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.¹

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 2004² were discussed during the Assembly’s sixth session and an amended scheme was adopted on 14 December 2007,³ 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”.⁴ 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”.⁵

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.⁶ 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”⁷ (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.⁸

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.

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

² Resolution ICC-ASP/3/Res.3, annex.

³ Resolution ICC-ASP/6/Res.6.

⁴ *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.

⁵ *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.

⁶ *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.

⁷ ICC-ASP/10/17, 13 June 2011, previously issued as CBF/16/11.

⁸ *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.⁹

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”.¹⁰ 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 €52,493 as at June 2011.¹¹ 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: | €21,802; |
| Renewal premium: | €6,624 |
| Derived interest on payments: ¹² | €8,237 |
| Compensation for the lower pension payments in the past: | €8,750 |
| Interest on the compensation: | €39 |
| Total cost: | €1,015,552 |

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

| | |
|--|-----------------|
| Single premium: | €72,127 |
| Derived interest on payments: | €5,601 |
| Compensation for the lower pension payments in the past: | €5,557 |
| Interest on the compensation: | €1,175 |
| Total cost: | €756,460 |

Appendixes I-III

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

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

¹⁰ 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.

¹¹ ICC-ASP/10/17, 13 June 2011, para. 31.

¹² Based on the standard tariffs by Dutch law for consumer transactions.