



Fourteenth session

The Hague, 18-26 November 2015

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

Addendum

Annex III

**Submission made by Kenya on 3 November 2015 for the
inclusion of two supplementary items in the agenda of the
fourteenth session of the Assembly**

A. Request 1

1. Kenya requests that the legislative intent of rule 68 be placed before the Assembly for discussion and that a decision of the Assembly be taken to reaffirm the non-retroactive application of the rule to situations commenced before the 27 November 2013. Kenya requests the President of the Assembly thereafter convey the decision of the 14th session on rule 68 to the President of the Court.

Proposed text clarifying resolution on the application of rule 68

Noting that article 51 of the Rome Statute empowers the Assembly of State Parties established under article 112 as the court's legislative and management body to amend the Rules of Procedure and Evidence guiding the conduct of any trial in the International Criminal Court.

Recalling that pursuant to article 51 of the Rome Statute the 12th Assembly of States Parties amended rule 68 of the Rule of Procedure and Evidence to provide for admission of "prior recorded testimony" as evidence in exceptional circumstances.

Recalling further that in amending rule 68, the Assembly of States Parties was mindful of article 51(4) of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused.

Noting the application by the Prosecutor to apply rule 68 (as amended) to the Kenyan situation and noting further the Trial Chamber's ruling allowing the application on the grounds inter alia that no evidence of the non-application of the rule to the Kenyan situation was discernible from the text of the amended rule 68 (Decision ICC-01/09-01/11 of 19th August 2015).

Desirous of safeguarding the independence and impartiality of the Court as well as protecting the legislative and oversight mandate of the Assembly of States Parties in the common pursuit of justice.

This 14th Assembly decides and clarifies that rule 68 as amended by the 12th session of the Assembly of State Parties (by resolution ICC-ASP/12/Res.7) has no retroactive applicability and cannot apply to situations commenced before the 27th November 2013.

B. Request 2

2. Kenya and other members of the Assembly are deeply concerned that the Independent Oversight Mechanism is yet to be operationalized as its absence undermines the Assembly's oversight over the Court. In light of the emerging credible concerns on witness procurement in the Kenyan cases highlighted in the petition by 190 members of Parliament of the Republic of Kenya, Kenya urges the Assembly **to appoint an ad hoc mechanism of 5 independent jurists (one from each diplomatic grouping and a chair) to audit the Prosecutors' witness identification and recruitment processes in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case Number ICC-01/09-01/11, and establish and determine the veracity of allegations of irregular procuring and coaching of witnesses in the case within 6 months.** The President of the Assembly is urged to convey the Assembly's decision to establish an audit process/mechanism to the President of the Court for further action.

Proposed text of the Independent Audit resolution

Noting that article 112 of the Rome Statute of the International Criminal Court establishes and mandates the Assembly of States Parties to inter alia provide "Management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court".

Mindful that article 112(4) of the Statute and rule 83 of the Rules of Procedure of the Assembly of States Parties empowers the Assembly to set up subsidiary bodies "including an independent oversight mechanism for inspection, evaluation, and investigation of the Court in order to enhance its efficiency and economy".

Aware that in order to protect the credibility of the Court, serious allegations of witness tampering, coaching and various forms of interference made in the Kenyan cases must be examined through a dependable mechanism.

Aware that the Independent Oversight Mechanism as envisioned in article 112 is yet to be fully operational.

Decides to appoint an ad hoc independent mechanism of 5 independent jurists to audit the Prosecutors' witness identification and recruitment processes in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case Number ICC-01/09-01/11, and establish and determine the veracity of allegations of irregular procuring and coaching of witnesses In the case.

Decides further that the ad hoc mechanism shall report to the Assembly within 6 months of its establishment.