



Assembly of States Parties

Distr.: General
27 October 2015

Original: English

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

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 fourteenth session of the Assembly. The proposed supplementary agenda items have been submitted for consideration by the Bureau:
 - (a) Request by South Africa for inclusion of a supplementary agenda item ‘**Application and Implementation of Article 97 and Article 98 of the Rome Statute**’.
 - (b) Request by Kenya for inclusion of the supplementary item ‘**Review of the Application and implementation of amendments to the Rules of Procedure and Evidence introduced at the 12th Assembly**’.
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

Request by South Africa for the inclusion of a supplementary item in the agenda of the fourteenth session of the Assembly titled ‘Application and Implementation of Article 97 and Article 98 of the Rome Statute’.

I. Note verbale from South Africa no. 57/2015, dated 5 October 2015, addressed to the Registrar of the International Criminal Court

1. The Embassy of the Republic of South Africa to the Kingdom of The Netherlands presents its compliments to the Registrar of the International Criminal Court and has the honour to request for the inclusion of a Supplementary Agenda item on the Fourteenth Meeting of the Assembly of States Parties to the Rome Statute, The Hague, 18 - 26 November 2015.

2. The Embassy has the honour to herewith submit to the Registrar such a request from the competent authorities of the Government of the Republic of South Africa for onward transmission to the Secretariat of the Assembly of States Parties in terms of the applicable Rules and Regulations of the Court.

A. Proposed agenda item

3. Application and Implementation of Article 97 and Article 98 of the Rome Statute.

B. Draft decision

4. That clear rules and procedures be developed on the application of Article 97 requests by States Parties to the Court for consultations to resolve problems that they may experience which may impede or prevent the execution of cooperation requests by the Court, and that an interpretation be done of the nature and scope of Article 98 and its relationship with Article 27.

C. Explanatory memorandum

5. From 14 - 15 June 2015, South Africa served as host of the African Union Summit of Heads of State and Government.

6. Prior to the Summit, acting on the possibility that President Al Bashir of Sudan may attend the Summit, the Registrar of the International Criminal Court submitted a *Note Verbale* dated 28 May 2015 to the Government, reminding it of its obligation to cooperate with the Court in the arrest of President Al Bashir and also of its obligations to consult the Court should it face any difficulties in implementing the request for cooperation. The Government responded by requesting to consult the Court in terms of Article 97 of the Statute. Article 97 provides that where a State Party receives a request for cooperation to which it identifies problems which may impede or prevent the execution of the request, the State shall consult with the Court in order to resolve the matter.

7. A preliminary meeting between the Government and the Court took place on the 12 June 2015. The understanding of the Government was that the official Article 97 consultations were to take place on Monday, 15 June 2015.

8. However, on 13 June 2015, at 22h49 the Prosecutor made an urgent request to the Court for clarity regarding the status of the Article 97 consultations, without any prior warning or notice of that request to the Government. In response to this request, Pre-Trial Chamber II issued the *Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Al Bashir* on 13 June 2015 (hereinafter the "13 June 2015 Decision."). In this decision, the Pre-Trial Chamber held that there are no unclarity regarding the applicable law and that South Africa was under the obligation to arrest President Al-Bashir and

surrender him to the Court and that the Article 97 consultations have therefore ended. This request from the Prosecutor, had the result that Article 97 consultations were turned into a legal process. This is clearly inconsistent with the terms of Article 97 and would also discourage States from using this tool designed to create an open channel of communication and diplomatic dialogue.

9. It is submitted that the "13 June 2015 Decision" highlighted the fact that there are no clear procedures on the implementation of the provisions of Article 97, and that there are indeed uncertainty as to the nature and scope of the provisions of Article 98 of the Statute, and its relationship with Article 27. It is therefore essential that the purpose and nature of Article 97 consultation be fully understood in view thereof that South Africa was the first State Party to make use of this provision.

10. The consultations provided for in Article 97 are clearly meant to be political and diplomatic consultations. They are intended to be without prejudice and are undertaken with a view to assist a State Party to address whatever problems it may have with respect to cooperation with the Court.

11. Thus what was intended to be a diplomatic process under Article 97, was merged with a legal process based on an *ex parte* application by the Office of the Prosecutor in terms of Article 87 (7). It was during this legal process that the Government was not granted the opportunity to present arguments on this legal process and consequently the *audi alterem partem* rule was not adhered to.

12. It is submitted that there is no clear procedure regarding the structuring of the consultations under Article 97, while for other provisions on consultation such as Article 93, which deals with cooperation requests other than requests for arrest and surrender, Regulation 108 of the Regulations of the Court provides for specific procedures and timelines which will apply in cases where there may be a dispute regarding the legal issues around a cooperation request under Article 93. Regulation 108 provides that a specific ruling must be made by the competent Chamber, but only after a declaration has been made by the requesting body that consultations have been exhausted, and then within a specific period of fifteen days following such a declaration.

13. In respect to the application and interpretation of Article 98, the duty to arrest and surrender a sitting Head of State, it is submitted that an exception can be found in Article 98 of the Statute. Article 98(1) of the Statute provides as follows:

"The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third for the waiver of the immunity."

14. It is important for State Parties to discuss how Article 98 should be interpreted. The exception under Article 98 is based on the recognition that while Article 27 may imply a waiver of immunities between States Parties, such a waiver would not apply to the relationship between States Parties and non-State Parties like Sudan.

15. This discussion should take into consideration that the obligation in respect of immunities flow from customary international law, under which Heads of State have immunity from the exercise of jurisdiction, including from arrest, by national authorities, treaty law and domestic legislation.

16. The clear terms of Article 98 are part of the Statute, and cannot be ignored. The legitimacy of the Court as an impartial judicial institution requires that clarity be obtained as to the nature and scope of the provisions of Article 98, and its relationship with Article 27, which purports to lift the customary international law immunity of Heads of State and Government.

17. In this respect it is further submitted that there appear to be fundamental differences on the issue of immunities of Heads of State and Government, and on the relationship between Article 98 and Article 27, between the Pre-Trial Chambers of the Court with equal status, and that a full understanding of the nature and scope of Article 98 and its relationship with Article 27 should be developed.

Annex II

Request by Kenya for the inclusion of a supplementary item in the agenda of the fourteenth session of the Assembly titled ‘Review of the Application and implementation of amendments to the Rules of Procedure and Evidence introduced at the 12th Assembly’.

I. Note verbale from the Permanent Mission of Kenya to the United Nations no. 384/15, dated 13 October 2015, addressed to the President of the Assembly, H.E. Mr. Sidiki Kaba

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 to the Rome Statute (of “the Assembly”) of the International Criminal Court and has the honour to acknowledge, with gratitude, receipt of your note verbale No. ICC-ASP/NY/077 of 7 October 2015 informing of the action taken by the Bureau of the Assembly at its Ninth meeting held on 1 October 2015.

2. Kenya wishes to reiterate our recollection, that at the 12th Session of the Assembly held in The Hague, 20-28 November 2013, the Assembly when adopting Resolution ICC-ASP/12/Res.7 (adopted at the 12th Plenary Meeting, on 27 November 2013), agreed, by consensus, that the amendments to Rule 68 shall not be applied retroactively and further with the understanding that the amended rules were without prejudice to Article 67 of the Rome Statute related to the rights of the accused.

3. It has come to our attention that, presently, the amended Rule 68 is being interpreted and implemented in a manner that is not consistent with the aforementioned Resolution of the Assembly.

4. From the foregoing and owing to the gravity of the issue(s) in question for Kenya, Kenya requires that this matter be included on the formal agenda of the forthcoming meeting of the Assembly, in order to afford its members, in the exercise of their legislative oversight role, an opportunity to reaffirm and clarify their understanding of the agreement(s) and aforementioned Resolution.

5. In this regard, and in accordance with Rule 12 of the Rules of Procedure of the Assembly of States Parties, the Mission has the honour to convey to you, Your Excellency, and by a copy of this Note to the Secretariat of the Assembly, Kenya's formal request for the inclusion of an agenda item regarding the issue(s) raised hereinabove, on the agenda of the 14th Meeting of the Assembly scheduled to be held in The Hague, November 18-26, 2015. Kindly find attached an explanatory note to aid common understanding and resolution of the matter in the Assembly.

A. Proposed agenda item

6. Review of the Application and implementation of amendments to the Rules of Procedure and Evidence introduced at the 12th Assembly.

B. Draft decision

7. That the 14th Assembly reasserts its decision arrived at by consensus during the 12th Assembly that the implementation of the new rule 68 will not negatively affect the rights of an accused person and therefore establishes a monitoring/review mechanism to review and report to the 15th Assembly the practical impact on enhancing the efficiency and effectiveness of the Court and the fair trial guarantees of an accused on the application of the rule by the Court and recommend/propose remedial measures.

C. Explanatory memorandum

8. The Assembly has embarked on a process of reviewing the Rules of Procedure and Evidence (RoPE) with a view to enhancing the efficiency and effectiveness of the Court. In this regard, Rules 68, 100, 134*bis*, 134*ter* and 134*quater* were introduced into the RoPE at the 12th Assembly in November 2013.

9. The newly introduced/amended rules have been applied in the different cases before the Court. Kenya is of the considered view that a reflection on the practical application of these rules and the impact on the efficiency and effectiveness of the Court and proceedings before it, is prudent and of utmost importance and would be extremely useful in guiding the further work of the Assembly in this regard.

10. Rule 68 (2) (d) of the RoPE was introduced in December 2013, after the commencement of the Kenyan cases. The Previous Rule 68 required that for prior recorded testimony to be introduced in lieu of oral evidence, both the Prosecutor and Defence should have had an opportunity to cross examine or question the maker. This requirement for cross examination was removed in the amendment that was opposed by Kenya and other African countries. The amendments passed after assurances were given to the Assembly of State Parties that the amended Rule 68 would not be applied to ongoing cases; and that in any case, the amendment coming during the currency of the Kenyan trials, would not apply retroactively to the detriment of an accused person.

11. The ICC Statute not only mandates that the Court's application and interpretation of the law "must be consistent with internationally recognized human rights",¹ but provides that the Accused's rights under Article 67 (1), including the right to confront witnesses,² are 'minimum guarantees'. In this regard, the Pre-Trial Chamber has stated that "protection of the right to a fair hearing, pursuant to Article 67 (1) of the Statute, in appropriate circumstances may require that the competent Chamber exceed the specific terms of article 67 of the Statute. This is clear from the express reference to 'minimum guarantees' in the chapeau of Article 67 (1) of the Statute. It is also consistent with the interpretation of the European Court of Human Rights of the general right to a 'fair hearing' with a view to filling some of the gaps in Article 6 (3) of the European Convention on Human Rights and Fundamental Freedoms".³

12. Whereas the main aim behind the rule amendments was "reduc[ing] the length of ICC proceedings and streamlin[ing] evidence presentation",⁴ it is doubtful if in fact this is being achieved by the rule. The complexity of the new statutory scheme has been acknowledged by the Court,⁵ raising the spectre for prolonging the trial as a result of highly contentious and costly appeals. To trade off an illusory possibility of judicial efficiency against the real likelihood of abridgment of fair trial rights of accused persons is highly disingenuous and undermines the credibility of the statute itself.

13. The alacrity with which the rule was called to aid the prosecutor's case in the Kenyan situation⁶ runs counter to many participants' call that the rule be applied only in exceptional circumstances.⁷

¹ Rome Statute, Article 21 (3).

² Rome Statute, Article 67 (1) (e).

³ ICC-01/04-01/06-102, para. 97.

⁴ *Study Group on Governance, Cluster I: Expediting the Criminal Process, Working Group on Lessons Learnt, Proposed Amendment to Rule 68 of the Rules of Procedure and Evidence* – Report of 27 September 2013, page 1, para. 2; page 5, para. 6; page 6, para. 8; page 21, para. 43.

⁵ ICC-01/09-01/11-1971, 18-September 2015, at para 6.

⁶ ICC-01/09-01/11 *Public Redacted Version of Prosecution's Request for Admission of Prior Recorded Statements* (29th April 2015).

⁷ The International Bar Association (IBA) was categorical that, "These proposals raise a number of concerns about the potential admission of untested evidence that goes directly to establishing the acts and conduct of the accused." Calling for the application of the provision only in exceptional circumstances, the IBA contended that "Any provision that might facilitate the admission of evidence against an individual – particularly evidence central to the case against them – in the absence of affording that person an opportunity to test the evidence, should be applied in the most exceptional of cases. In fact, it is difficult to conceive of a case in which such evidence could be used as the (unique) basis for conviction (or indeed to establish an instrumental adverse fact) without resulting in an unsafe verdict." Based on these concerns, IBA committed to closely monitor the use of these new provisions "to ensure that they are applied only in exceptional circumstances that do not erode fundamental fair trial guarantees."

II. Note verbale from the Permanent Mission of Kenya to the United Nations no. 398/15, dated 16 October 2015, addressed to the President of the Assembly, H.E. Mr. Sidiki Kaba, conveying a petition from the National Assembly of Kenya, dated 13 October 2015

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 to the Rome Statute (“the Assembly”) of the International Criminal Court and has the honour to refer to our previous communication culminating with the Note verbale 384/15 dated October 13, 2015.
2. The Mission is in receipt and hereby forwards a self-explanatory petition from the National Assembly of the Republic of Kenya, duly signed by 190 legislators, that requires the urgent attention of you, Your Excellency, and the Bureau of the Assembly.
3. In light of the issues raised in the petition, Kenya further requires that the matters and concerns contained in the petition be duly taken up in the appropriate formal agenda of the 14th meeting of the Assembly; to afford the members of Assembly an opportunity to exercise their management oversight role pursuant to Article 112 of the Rome Statute and thereafter give guidance on the way forward.
4. This unprecedented petition to the Assembly should send a clear and unambiguous signal that this matter of the Kenya case requires the direct, unfettered and decisive attention of the Assembly, its Bureau and its Executive. It should also be clear by now, 6 years into the debate and dialogue on these matters, and following an exhaustive exchange of communication, that Kenya’s resolve to remain engaged with the Assembly on this matter is being sorely tested.
5. In this regard, and in accordance with Rule 12 of the Rules of Procedure of the Assembly of States Parties, the Mission has the honour to convey to you, Your Excellency, and by a copy of this Note to the Secretariat of the Assembly, Kenya’s formal request for the inclusion of an agenda item regarding the issues raised in the petition on the agenda of the 14th Meeting of the Assembly scheduled to be held in The Hague, November 18-26, 2015.

See IBA’s Legal Opinion on the amendment to Rule 68 (12th November 2013) available at http://www.ibanet.org/IBA_coverage_of_12th_ASP_meeting_The_Hague_.aspx>

Appendix

Petition, dated 13 October 2015, from Hon. David Pkosing Losiakou, MP, Member of the National Assembly of the Republic of Kenya, on behalf of 190 Parliamentarians, addressed to the President of the Assembly, the International Criminal Court and the United Nations Security Council, respectively

Republic of Kenya
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Parliament Buildings K.I.C.C. 20th Flr. Rm. 2014/15
Tel: + 254 20 2221291
P.O. Box 47842 – 00100 Nairobi,

Petition of Kenyan parliamentarians to the United Nations Security Council and the presidency of the Assembly of States Parties of the Rome Statute

Your Humble Petitioner, Hon. David Pkosing Losiakou, Member of the National Assembly of the Republic of Kenya, on behalf of the undersigned elected parliamentarians of the Republic of Kenya:

A. *Hereby states that:*

1. *Whereas* the Petitioner and supporters (whose names are annexed to this Petition) are members of Kenya’s Parliament, the constitutional organ that exercises and protects the sovereign power of the People of Kenya in terms of Articles 1 (2) & (3) and 94 (2) and (4) of Kenya’s Constitution pursuant to the representational role of Parliament enshrined in Articles 95 and 96 of Kenya’s Supreme Law;
2. *Mindful* of the provisions of Article 94 (2) and (4) of Kenya’s Constitution which allow Parliamentarians to protect the sovereignty of the people and their rights under this Constitution, including rights provided under Article 50 (4) where any evidence against an accused person should be obtained in a manner that does not violate his other rights of fundamental freedoms, or any evidence that would render the trial unfair and would otherwise be detrimental to the administration of justice;
3. *Aware* that the proceedings at the ICC in the case of *The Prosecutor v. William Samoel Ruto and Joshua Arap Sang*, Case Number ICC-01/09-01/11, have since commencement been tainted by allegations of witness tampering, coaching and various forms of interference.
4. *Deeply concerned* by the recent credible revelations in Kenya that a number of prosecution witnesses in the case of *The Prosecutor v. William Samoel Ruto and Joshua Arap Sang*, Case Number ICC-01/09-01/11, were allegedly procured, prepared, facilitated and instructed to implicate H.E. William Ruto and Joshua Sang;
5. *Alarmed* that these revelations unless addressed through an urgent but open international process will permanently impair the perceived and substantive outcomes in the case of *The Prosecutor v. William Samoel Ruto and Joshua Arap Sang*, Case Number ICC-01/09-01/11 including other proceedings before the court, hence eviscerating any remaining credibility of the International Criminal Court thus robbing the international community of an important anti-impunity institution;
6. *Noting* that Article 112 of the Rome Statute of the International Criminal Court establishes and mandates the Assembly of States Parties (ASP) to *inter alia* provide “Management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court”;

7. *Further aware* that Article 112 (4) of the Rome Statute and Rule 83 of the Rules of Procedure of the Assembly of States Parties empower the ASP to set up subsidiary bodies “including an independent oversight mechanism for inspection, evaluation, investigation and audit of the Court in order to enhance its efficiency and economy”;

8. *Cognizant of the fact that* the United Nations has a standing participation in the ASP and any of its subsidiary bodies, and should work towards promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion pursuant to Article 1 (3) of the UN Charter and Rule 35 of the ASP Rules of Procedure;

B. Now, your Humble Petitioners pray that:

1. The President of the ASP, through his office, invokes the provisions of Article 112(4) of the Rome Statute and Rule 83 of the ASP Rules of Procedure to immediately appoint an independent mechanism to audit the Prosecutors’ witness identification and recruitment processes in the case of *The Prosecutor v. William Samoel Ruto and Joshua Arap Sang*, Case Number ICC-01/09-01/11, to establish the impartiality of the process and determine the current allegations and revelations of procuring and coaching of witnesses to implicate the accused, denying them the rights to fair hearing and impartiality as guaranteed under Article 67 of the Rome Statute;

2. The ICC suspends the cases of the two Kenyans while awaiting determination of this independent audit; and

3. Further, that the United Nations agrees with and supports the prayers of these petitioners.

Signed by:

Hon. David Pkosing Losiakou, MP.

Member of the National Assembly of the Republic Of Kenya

Nairobi, this 13 day of October, 2015

[For the signatures see ICC-ASP/14/35/Add.1]
