
1. Agenda items proposed by Kenya and South Africa

Parliamentarians for Global Action (PGA) considers that, without expressing itself on the legitimacy of the concerns underpinning the mentioned proposals, the inclusion of the agenda-items requested by Kenya and South Africa, if discussed by the ASP, a political organ, could threaten the independence of the International Criminal Court (ICC). Indeed, the requests of Kenya and South Africa to discuss the judicial interpretation of Rules that are under current litigation in concrete cases and situations before the Court go beyond the mandate of the Assembly of States Parties (ASP) as defined in Article 112 of the Rome Statute, which provides that the ASP shall provide management oversight to the Court regarding its administration and shall decide on the normative framework of the ICC1. Article 21 of the Statute attributes the function of interpretation of the law to the Judges and Prosecutor of the Court, in accordance with their respective mandates.

The agenda items proposed by the two African States are the following:

(I) Review the application and implementation of amendments to Rules of Procedures and Evidence introduced at the 12th Assembly, in particular the amended rule 68

It is important to highlight in relation to this matter that the very core of the concern expressed by Kenya, i.e. the retroactivity of the application of the Rule 68 and right to a fair trial is currently the object of judicial proceedings before the Appeals Chamber in the Ruto and Sang case. This is a judicial matter that is thus excluded from the general mandate of management oversight over the administration of the Court and of law-making that the ASP has, and the discussion proposed by Kenya could amount to political interference that would impair the independence of the Court.

(II) Inclusion of the concerns raised in a petition signed by Kenyan Parliamentarians regarding allegations against the OTP

This proposal relates to alleged practices of the Office of the Prosecutor (OTP) regarding the preparation and ‘facilitation’ of witnesses in the Ruto case. Kenya also calls on the President of the ASP to appoint an independent mechanism to audit said witnesses and on the ICC to suspend the case while awaiting the determination of the audit.

Without going to the merits of the allegations, it is important to remember that those concerns could be raised by the parties in the proceedings, i.e. the defence of Mr. Ruto (currently the Vice-President of Kenya, who an MP at the time of the 2007-08 post-electoral violence in Kenya) could raise the issue before the Court Judges, as the OTP has done it regarding similar allegations regarding the defence practices towards witnesses. Moreover, there is already a mechanism mandated to consider such complaints, the Independent Oversight Mechanism (OIM)2.

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1 Article 112(2)(b) of the Rome Statute
2 Article 112(4) of the Rome Statute, ASP Resolutions ICC-ASP/8/Res.1 and ICC-ASP/12/Res.6
It is important that the ASP, as legislative body, does not dictate what the IOM or, above all, the Judges should decide if such allegations are brought to them. It is fundamental that IOM and Court Judges remain autonomous and independent and not be influenced by any potential measure of the ASP.

(III) Application and implementation of Article 97\(^3\) and 98\(^4\) of the Rome Statute

This supplementary item relates to key cooperation provisions to avoid impunity for those sought by the ICC. As stated in the Rome Statute, every State Party commits to cooperate fully with the ICC upon ratification or accession, and the Court has a mandate to make urgent judicial decisions in order to ensure cooperation.

It is important to note that any dispute concerning the judicial functions of the Court shall be settled by decision of the Court\(^5\). Moreover, amendments to the Rules of Procedure and Evidence – as suggested by South Africa, to be developed on the application of Article 97 – should be envisioned only to ensure a more effective and efficient functioning of the Court, and should be consistent with the Rome Statute system. As such, any new or amended rule must be compatible with the Rome Statute and not impair the exercise of the Court’s powers under article 119(1).

We consider that discussing this issue in the ASP, a political setting, threatens the judicial independence of the ICC and that it should not be included in the ASP formal agenda, without prejudice for States to hold relevant informal consultations with the aim of addressing the underlying concerns expressed by South Africa, a State within which there is an ongoing dispute between the national judiciary and the national executive concerning the failure of the latter to give effect to a valid and binding order of the High Court of Pretoria that related to the presence of a prominent ICC-fugitive in the territory of South Africa and the consequent obligation of South African authorities to arrest and surrender him to the ICC.

2. General debate on cooperation

The Rome Statute system is designed to fight impunity and hold accountable perpetrators of the most serious crimes of concern to the international community as a whole. However, as the ICC has no territory or police unit under its direct control, it is fully dependent on the cooperation and support of States, which under Part IX of the Rome Statute have the obligation to cooperate fully with the Court in its investigations and prosecutions, including through appropriate law-enforcement operations. This obligation does not include several key sectors also necessary to the effective, fair and independent functioning of the Court, such as the enforcement of sentences or the relocation of witnesses.

We wish to underline that without State cooperation, the ICC cannot fulfil its mandate and the Rome Statute system risks collapse. Cooperation is necessary to ensure the integrity of the proceedings and the global functioning of the Court, and prompt cooperation even more so considering that delays from States in responding to cooperation requests reduce the Court’s efficiency, increase its costs and is more time consuming.

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3 Article 97, Consultations
Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:
(a) Insufficient information to execute the request;
(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

4 Article 98: Cooperation with respect to waiver of immunity and consent to surrender
1. 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 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 State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

5 Article 119(1) of the Rome Statute
We would like to request our Ministry of Foreign affairs to **pledge, on the Cooperation Debate, to fully cooperate with the Court and to promote the adoption of national cooperation mechanisms as well as the signature of Voluntary agreements on Cooperation with the ICC.**

3. Article 124 of the Rome Statute

We would like to express our support to the suggestion of deletion of Article 124 of the Rome Statute. We consider that this article is not anymore consistent with the object and purpose of the Rome Statute, which is to put an end to impunity for the perpetrators of the most serious crimes of international concern. Indeed, Article 124 can be considered as an opt-out for newly ratifying States that may impede the exercise of the Court’s jurisdiction on war crimes for the first seven years after ratification, hence weakening the overall system of accountability created by the Rome Statute.

We are aware that is has been argued by one or two States Parties that retaining the provision could attract additional ratifications and thus contribute to the universality of the Rome Statute, but this affirmation is not supported by facts: While this provision has been put at the disposal of States since the adoption of the Rome Statute in 1998, no State has made use of it in the last 13 years.

Most importantly, when this Article 124 was included in the Rome Statute, it was significantly entitled “Transitional Provision”, to reflect the position expressed by some States that there should have been a transitional period of 7 years to observe the correct application of the law of war crimes by the ICC and not be subjected to the Court’s jurisdiction in order to avoid any sort of potential abuse by Court’s organs. Now, 17 years after the adoption of the Rome Statute, it is time to recognise that the ICC has proven itself as a reliable and prudent organ of justice and that it is not anymore necessary to maintain such a transitional provision.7

Therefore, States shall have no hesitation on adopting the proposal presented by Norway to delete the “Transitional Provision” of Article 124 from the Rome Statute.

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6 Article 124. Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

7 Upon invitation of Norway, on 16 March 2015 the Secretary-General of PGA made a presentation in his capacity as individual-expert before the Working Group on Amendments of the Assembly of States Parties in order to present in greater detail the arguments summarized in this position paper (cf. www.pgaction.org/pdf/campaigns/2013-03-23-WGA2ExpertMeetingProgramme16march.pdf).