

INTERNATIONAL CRIMINAL COURT

**FIVE RECOMMENDATIONS TO
THE 14TH SESSION OF THE
ASSEMBLY OF STATES PARTIES
(18 TO 26 NOVEMBER 2015)**

**AMNESTY
INTERNATIONAL**



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FIVE RECOMMENDATIONS TO THE 14TH SESSION OF THE ASSEMBLY OF STATES PARTIES

INTRODUCTION

The 14th session of the Assembly of States Parties of the International Criminal Court (Assembly) will take place in The Hague on 18 to 26 November 2015. During the session, the Assembly will:

- Hear reports from senior International Criminal Court (ICC or Court) officials, including the President, the Prosecutor and the Registrar of the ICC;
- Conduct a General Debate about the ICC and the Rome Statute system;
- Hold plenary discussions on cooperation; complementarity; and the efficiency and effectiveness of Court proceedings.
- Adopt the 2016 budget for the ICC;
- Consider a proposal to delete Article 124 from the Rome Statute;
- Elect nine members of the Advisory Committee on Judicial Nominations; five members of the Board of Directors of the Trust Fund for Victims; and one member of the Committee on Budget and Finance; and
- Adopt a number of resolutions regarding the work of the ICC and the Assembly of States Parties.¹

In advance of the session, the governments of Kenya and South Africa have also made requests to include three additional issues in the agenda.² Kenya has requested the inclusion of a supplementary agenda item entitled “Review the application and implementation of amendments to Rules and Procedure and Evidence introduced at the 12th Assembly”. It has also requested that allegations against the Office of the Prosecutor and concerns raised in a petition signed by Kenyan parliamentarians be taken up in the formal agenda of the session. South Africa has proposed a supplementary agenda item entitled “Application and Implementation of Article 97 and Article 98.”

This paper sets out Amnesty International’s five priority recommendations for the session which it believes are essential to ensure the effectiveness of the ICC, including its compliance with human rights, and effective oversight by the Assembly.

¹ See Provisional Agenda, ICC-ASP/14/1.

² See List of supplementary items requested in the agenda of the fourteenth session of the Assembly, ICC-ASP/14/35, 27 October 2015.

RECOMMENDATION 1: STATES PARTIES SHOULD MAKE STRONG STATEMENTS IN SUPPORT OF THE ICC AND HIGHLIGHT KEY ISSUES DURING THE GENERAL DEBATE

The General Debate is a forum for states to discuss a range of issues concerning the Rome Statute system. It presents an important opportunity for all states parties to: affirm their support for the ICC and commitment to the Rome Statute system; present their views on key issues on the agenda; and report on steps that they have taken or are planning to take to support the work of the ICC, the Trust Fund for Victims and the Rome Statute system generally.

At this session, in accordance with Amnesty International's other recommendations below, our organization urges states parties in their statements to:

- Affirm their commitment to international justice, including their support for the ICC's work and commitment to protect the integrity of the Rome Statute;
- Recognize the important role that the Assembly must play in providing effective oversight of the ICC, but emphasising that the Assembly must never interfere with the judicial independence of the Court;
- Commit to cooperate promptly and fully with the ICC, including in the execution of all arrest warrants, and urge all states to do the same;
- Support the deletion of Article 124 and commit to ratify the amendment promptly, if it is adopted;
- Raise concerns regarding the current capacity crisis the ICC is experiencing and urge the ICC and the Assembly to work towards achieving the Court's optimal capacity as soon as possible in order to ensure access to international justice for victims in all regions; and
- Pledge or announce voluntary contributions to the ICC Trust Fund for Family Visits and the ICC Trust Fund for Victims.

RECOMMENDATION 2: STATES PARTIES SHOULD OPPOSE AGENDA ITEMS THAT THREATEN THE INDEPENDENCE OF THE ICC AND THE INDEPENDENT OVERSIGHT MECHANISM

Amnesty International is seriously concerned that the agenda items proposed by Kenya and South Africa go beyond the mandate of the Assembly as defined in Article 112 of the Rome Statute and deal with purely judicial matters. For the reasons set out below, our organization therefore calls on states parties to oppose the inclusion of these items. If necessary, at the opening of the session, states parties should insist on a vote to delete the items from the agenda in accordance with Rule 20 of the Rules of Procedure of the Assembly of States Parties.³ States should also object if these topics are formally incorporated or otherwise introduced in other parts of the agenda.

³ Rule 20 states: "Items on the agenda may be amended or deleted by the Assembly by a majority of the members of the Assembly present and voting."

A. KENYA'S PROPOSAL TO "REVIEW THE APPLICATION AND IMPLEMENTATION OF AMENDMENTS TO RULES AND PROCEDURE AND EVIDENCE INTRODUCED AT THE 12TH ASSEMBLY"

In a note verbale to the President of the Assembly dated 4 September 2015,⁴ the government of Kenya set out its concerns regarding the Trial Chamber's 'Decision on Prosecution Request for Admission of Prior Recorded Testimony' issued on 19 August 2015 in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*.⁵ In particular, it criticized the retroactive application of amendments to Rule 68 adopted at the 12th session and opined that the current implementation of the Rule infringes on the rights of the accused. It proposed that:

during the forthcoming Assembly, States Parties review the implementation of the amended Rule 68 as a thorough analysis shall ensure that the interpretation and implementation of this and other amended rules, does not go against the Statute, basic tenets of law and practices and/or the wishes of the Assembly whilst setting the attendant negative precedents in this regard.

Amnesty International considers that Kenya's request must be rejected because the subject matter of the concerns raised is currently under consideration by the Appeals Chamber.⁶ The text and drafting history of Article 112(2)(b), clearly illustrates that the Assembly's management oversight of the ICC relates to the administration of the Court and excludes judicial matters.⁷ The discussion proposed by Kenya would cross this line and could amount to political interference in the current judicial proceedings.

That is not to take a position on the legitimacy of Kenya's concerns. Amnesty International has no information beyond the text of Resolution ICC-ASP/12/Res.7 amending Rule 68, and therefore has no opinion, on whether Kenya was provided with specific assurances during the 12th session regarding its retroactive application. However, our organization is concerned about some elements of amendments to Rule 68 and stresses that the rights of the accused must be fully respected when the Rule is applied.

Nevertheless, concerns relating to non-retroactivity and the right to a fair trial in on-going cases must be addressed by the relevant Chambers. Both these questions are currently under judicial consideration by the Appeals Chamber in the *Ruto/Sang* trial. In addition, the African Union has submitted an *amicus curiae* to the Appeals Chamber, which speaks to these issues and reflects the concerns raised by Kenya.⁸ The Appeals Chamber must decide these matters without any interference by the Assembly.

⁴ List of supplementary items requested in the agenda of the fourteenth session of the Assembly, ICC-ASP/14/35, 27 October 2015, Annex II.

⁵ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1938-Corr-Red2.

⁶ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 'Public Redacted Version of Decision on the Defence's Application for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony"', ICC-01/09-01/11-1953-Red, 10 September 2015.

⁷ See S. Rama Rao 'Article 112: Assembly of States Parties' in O. Triffterer (Ed.) *Commentary on the Rome Statute of the International Criminal Court*, second edition, CH. Beck, Hart, Nomos (München 2008), 1691.

⁸ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 'The African Union's Amicus Curiae Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties', ICC-01/09-01/11-1988, 19 October 2015.

B. KENYA'S REQUEST THAT THE ASSEMBLY CONSIDER ALLEGATIONS AGAINST THE OFFICE OF THE PROSECUTOR RAISED IN A PETITION BY KENYAN PARLIAMENTARIANS

In a second note verbale dated 16 October,⁹ the Kenyan government forwarded a petition signed by 190 Kenyan parliamentarians to the President of the Assembly. The petition cites “credible revelations” that a number of prosecution witnesses in the *Ruto/Sang* trial “were allegedly procured, prepared, facilitated and instructed to implicate H.E. William Ruto and Joshua Sang”. It requests the President of the Assembly “to immediately appoint an independent mechanism to audit the Prosecutor’s witness identification and recruitment process”. It also calls for the ICC to suspend the cases while awaiting the determination of the audit.

The note verbale states:

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.

Amnesty International considers that the proposed audit of the Office of the Prosecutor would be inconsistent with the independence of the Prosecutor and potentially undermine the security of its procedures relating to witnesses. It should therefore be rejected.

In relation to the serious allegations of misconduct made against ICC staff, Kenya should urge those making them to submit complaints to the Independent Oversight Mechanism (IOM) established pursuant to Article 112(4) of the Rome Statute and Assembly Resolutions ICC-ASP/8/Res.1 and ICC-ASP/12/Res.6. The IOM is mandated by the Assembly to consider such complaints and, if it decides it is appropriate, to conduct an investigation. While the IOM is a subsidiary body of the Assembly, it is independent. It conducts investigations *proprio motu* – not on the direction of the Assembly.¹⁰ It is therefore essential that the Assembly does not take any measures that undermine its independence or seek to influence its decision making process. It would be inappropriate for the Assembly to discuss the allegations cited in the petition, especially before the IOM has reviewed them and completed its process.

C. SOUTH AFRICA'S PROPOSAL TO DISCUSS THE “APPLICATION AND IMPLEMENTATION OF ARTICLE 97 AND ARTICLE 98”

On 5 October, the South African government submitted a note verbale to the Registrar of the ICC requesting for inclusion of a supplementary item on the agenda of the 14th session entitled “Application and Implementation of Article 97 and Article 98 of the Rome Statute.”¹¹ The request sets out South Africa’s concerns regarding the ICC’s proceedings conducted around Omar al-Bashir’s visit to

⁹ List of supplementary items requested in the agenda of the fourteenth session of the Assembly, ICC-ASP/14/35, 27 October 2015, Annex II.

¹⁰ Establishment of an independent oversight mechanism, ICC-ASP/8/Res.1, Annex, para. 6(b).

¹¹ List of supplementary items requested in the agenda of the fourteenth session of the Assembly, ICC-ASP/14/35, 27 October 2015, Annex I.

Johannesburg in June 2015 to attend an African Union Summit. It questions the Pre-Trial Chamber's decision that South Africa had an obligation to arrest him. The request also proposes a draft decision:

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.

This requested supplementary agenda item should be deleted as it threatens to undermine the judicial independence of the ICC. Alternative measures exist that South Africa should be encouraged to take to seek to raise its concerns without threatening such interference.

(i) The development of clear rules and procedure on the application of Article 97

Amnesty International considers that, while the Assembly has a clear mandate under Article 51 to consider amendments to the Rules of Procedure and Evidence, it should not engage in discussions that could amount to political interference with the Court. Amendments to the Rules should only be considered when strictly necessary to achieve the objectives of the Rome Statute system, should be compatible with the Rome Statute and must be considered on the merits of specific proposals. Rather than hold a general discussion seeking to review the only application of Article 97 to date, South Africa should be encouraged to present a formal proposal for consideration by the Working Group on Amendments in 2016 together with a clear explanation of how it would strengthen the Rome Statute system.

Without a formal proposal, it is difficult to comment further on the merits of South Africa's initiative. It should however be emphasized that the process set out in Article 97 is designed to ensure that states parties fulfil their legal obligation to cooperate with the Court. Article 97 provides for a useful consultation process to address problems encountered by states in executing requests. However, it must also be applied consistently with Article 119(1), which clearly states "any dispute concerning the judicial functions of the Court shall be settled by decision of the Court."¹² The ICC must be able to make urgent judicial decisions if necessary to ensure cooperation, including clarifying a state's obligations when a person subject to an ICC arrest warrant visits their country. Any new rules must be consistent with the Statute and not weaken the ICC's ability to exercise its powers in Article 119(1).

(ii) Interpretation of Article 98 and its relationship with Article 27

Amnesty International opposes in the strongest terms South Africa's proposal for the

¹² See Claus Kreß and Kimberly Prost 'Article 97: Consultations' in O. Triffterer (Ed.) *Commentary on the Rome Statute of the International Criminal Court*, second edition, CH. Beck, Hart, Nomos (München 2008), 1599 "[i]n a case where such a cooperative approach does not yield a result, the Court will have to rely on its power under article 87 para. 7 and article 119 para. 1 of the Statute to authoritatively settle the dispute.'

Assembly to provide a legal interpretation of Article 98 and its relationship with the Article 27. While personal immunities for crimes under international law and the interpretation of Article 98(1) may be contested, there are appropriate judicial forums, particularly the ICC itself, for the determination of such disputes. The Assembly of States Parties - which has an oversight function that excludes judicial management of the Court - must not be used as a forum for states that disagree with judicial decisions to politically review and influence them.

The judges of the ICC have a clear mandate to interpret the Statute. Although to date, different Pre-Trial Chambers have reached different conclusions on this specific issue, it does not justify political interference by the Assembly. Currently, South Africa has the opportunity to present its arguments on Article 98(1) to the ICC Pre-Trial Chamber when it submits its views to the Chamber in relation to on-going non-cooperation proceedings. It should be encouraged to do so.

RECOMMENDATION 3. STATES PARTIES SHOULD SUPPORT THE PROMPT DELETION OF ARTICLE 124 FROM THE ROME STATUTE

Article 124 allows states upon ratification of the Rome Statute to declare that they do not accept the jurisdiction of the International Criminal Court (ICC) over war crimes committed by its nationals or on its territory for seven years after the Statute enters into force for that state. It was adopted as a 'transitional provision' to be reviewed at the first Review Conference. However, the 2010 Review Conference decided to defer a decision on whether to delete the Article until the 14th session of the Assembly after a small number of mostly non-states parties argued that it could be a potentially useful tool to promote further ratifications of the Rome Statute. Further discussions on the issue in the Working Group of Amendment this year have led to a proposal to delete Article 124, which we understand enjoys consensus support by those states participating in the intersessional process.

Amnesty International strongly supports the deletion of Article 124 because it is inconsistent with the object and purpose of the Rome Statute "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." The Rome Statute must not enable opt outs that permit impunity for the most serious crimes of concern to the international community.

As an organization that has campaigned globally for ratification of the Rome Statute for 17 years, Amnesty International is convinced that Article 124 is neither a desirable nor an effective tool for promoting universality and that now is the right time to delete it. It has only been used by two states. Since Kampala, no state has made an Article 124 declaration when ratifying the Statute. Most non-states parties that supported its retention have not taken any notable steps towards ratification.

Even if there exists a remote possibility that one or two states could be influenced to ratify the Statute by the possibility of making an Article 124 declaration, this should be outweighed by the importance of strengthening the Rome Statute and the overall fight against impunity. Supporters of the ICC are now in a very different position than they were when the Statute was adopted in 1998. The ICC has been established and is now fully functional. The Rome Statute has 123 states parties. While efforts must continue to increase ratifications and ultimately achieve universality, this should not be at the price of retaining this problematic temporary provision, which may lead to impunity.

Amnesty International urges all states parties to support the proposal and to pledge either during the General Debate or at other appropriate times during the 14th session to promptly ratify the amendment. States parties should also ensure that proposed language in the 'omnibus resolution' calling on states parties to ratify the amendment is retained.

RECOMMENDATION 4: STATES PARTIES SHOULD TAKE URGENT MEASURES TO ENSURE SUFFICIENT FUNDING FOR FAMILY VISITS OF INDIGENT PERSONS IN ICC DETENTION

Amnesty International is seriously concerned by the apparent failure of the voluntary system of funding family visits for indigent persons in ICC detention and calls on states parties to take urgent measures to resolve the issue.

All persons in ICC detention have a right to family visits. As the Presidency has ruled in one case "a positive obligation to fund family visits must be implied in order to give effect to a right which would otherwise be ineffective." It emphasised that this does not create an entitlement to unlimited family visits.¹³ Nevertheless, the Assembly decided at its ninth session to stop funding family visits for indigent persons through the ICC budget and to establish a special fund for the purpose of funding family visits for indigent detainees "entirely through voluntary donations".¹⁴

Five years later, only two states parties have made donations and the fund is close to exhaustion. Spending by the Registry on family visits has dramatically reduced from €34,287 for seven visits by 18 persons in 2014 to €9,369 for one visit by three persons in 2015, which raises concern that the rights of indigent persons to a reasonable number of family visits are not being respected.¹⁵ This threatens the fairness of the proceedings and the credibility of the ICC.

Amnesty International calls on all states parties to make or pledge urgent voluntary contributions to the special fund before or during the 14th session in order that the ICC can meet its human rights obligations. A call for further voluntary contributions emphasising that the ICC must respect the rights of indigent persons to family visits should also be included in the 'omnibus resolution' adopted by the Assembly. Recognizing the shortcomings of the voluntary fund system, states parties should ensure that an effective back up funding mechanism is established in case the fund is exhausted in the future.

¹³ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC, Case No. ICC-01/04-01/07, "Decision on Mr. Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008," March 10, 2009.

¹⁴ ICC-ASP/9/Res.4, X.

¹⁵ Information provided to Amnesty International by the ICC.

RECOMMENDATION 5: STATES PARTIES SHOULD ACKNOWLEDGE THE ICC'S CURRENT CAPACITY CRISIS, URGE THE ICC TO DEVELOP ITS OPTIMAL CAPACITY MODEL AND PROMOTE A DISCUSSION OF THE MODEL BEFORE AND DURING THE NEXT SESSION¹⁶

Amnesty International is deeply concerned that, with the current capacity to conduct only four active investigations in 2015, the ICC is falling behind in the fight against impunity and that victims in a large number of situations in regions around the world have no access to international justice.

This year, the Prosecutor has put forward a proposal to expand to a new basic size of six active investigations within three years and has requested an initial resource increase of €6.48 million in 2016 to achieve this.¹⁷ The other organs of the ICC are expected to develop their basic size proposals in 2016 to meet this higher level of activity.

Amnesty International believes the basic size initiative by the ICC is an important first step towards expanding the Court's capacity in a transparent manner. However, with backlogs of investigations in its current nine situations, a new request to open an investigation in Georgia and eight other situations under preliminary examination, two additional investigations are unlikely to be enough.

Even so, some states have apparently voiced opposition to increasing the ICC's budget at all and the Committee on Budget and Finance has requested that the Office of the Prosecutor's budget request for 2016 be reduced by €2.64 million.¹⁸ Even achieving the basic size therefore appears to be a major political challenge.

Amnesty International is convinced that the budget debate in the next years will largely define the ICC's ability to advance the fight against impunity. Put simply, if the ICC does not significantly expand its activities soon it will become irrelevant in many regions of the world and the subject of criticism.

The debate therefore needs to move beyond the shortsighted annual budget negotiations to establish a clear and shared vision of what a highly efficient and effective ICC can achieve and how to get there. It is vital that the ICC define not only its basic size but also its optimal capacity, including the ability to scale up and down activities as necessary with transparent costs. The Assembly should request the ICC to develop its optimal capacity model in the omnibus resolution and decide that the Assembly will review and discuss the proposal during 2016 and at the 15th session. At a time when the costs of the ad hoc tribunals are decreasing as they complete their work, there is an important opportunity for states to consider how the resources that have been freed up could be rechanneled effectively back into international justice to further advance the fight against impunity.

¹⁶ For a further analysis of this issue and details of Amnesty International's calls, see: Elizabeth Evenson and Jonathan O'Donohue, Still falling short: the ICC's capacity crisis, to be published on Open Democracy on 3 November 2015: <http://www.opendemocracy.net/openglobalrights/international-criminal-court>.

¹⁷ See Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, 2 September 2015, para. 130.

¹⁸ Report of the Committee on Budget and Finance on the work of its Twenty-Fifth session, ICC/14/15, 22 October 2015, paras. 50-52.

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