

PUBLIC ANNEX B.2

ICC Assembly of States Parties Rundown

By [Beth Van Schaack](#)

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[As previously noted](#), the 12th session of the Assembly of States Parties (ASP) has been underway in The Hague this week. A [number of items](#) of relevance to U.S. policy on atrocity prevention and response are on the agenda. An [overview of the scope and outcome of the meetings](#) so far is below; I will be focusing in more detail on some of these issues in subsequent posts. The relationship between the International Criminal Court (ICC) and some African states has been a consistent theme in the various sessions, with the situation in Kenya taking center stage.

1. Head of State Immunity

Of relevance to [our prior coverage of the Kenyan situation](#) before the Court, the ASP considered at length (5 hours) an item at the behest of the African Union entitled “Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation.” Presentations were given by:

The first President of the Assembly, H.R.H. Prince Zeid Ra’ad al Hussein (Jordan) as moderator;

Amb. Rolf Einar Fife (Norway),

Ms. Djeneba Diarra, the newly appointed African Union Commission Legal Counsel,

Honorable Mr. Githu Muigai, Attorney General of Kenya and a longtime critic of the ICC cases,

Prof. Cherif Bassiouni, Chairman of the Drafting Committee of the 1998 Rome UN Diplomatic Conference which established the ICC, and

Assistant professor Charles C. Jalloh (University of Pittsburgh School of Law).

The debate is summarized [here](#) and [here](#).

Kenya had formally proposed an amendment to Article 27 of the Rome Statute to exempt incumbent heads of state from prosecution for the duration of their time in office. Article 27 reads:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Technically, this proposal was out of order under the rules of the ASP (because it was not noticed 90 days in advance [per Article 121](#)). It remains to be seen whether a timely proposal will be submitted in advance of the next ASP gathering.

2. Amendments to the Rules

Although the ICC Statute itself escaped further amendment this time around, the same cannot be said of the Rules of Procedure and Evidence (RPE). The ASP and an informal working group also considered several proposed changes to the [RPE](#) of direct relevance to the Kenya cases. Such amendments can be proposed by any state party and require the support of a 2/3 majority of the ASP (per [Article 51](#) of the Statute). Most importantly, there were proposals (sponsored by Kenya, Botswana, Jordan, the United Kingdom, and Liechtenstein) to address the requirement that the accused be present during trial, to enable the admission of written statements and transcripts in lieu of *viva voce* testimony, and to allow defendants to be “present” in the courtroom via videolink and through their counsel. States parties ultimately adopted a package of amendments to Rules 68 (Prior Recorded Testimony) and 100 (Place of the Proceedings), and [inserted several amendments](#) following Rule 134 addressing the presence of the accused.

Rule 68 has been amended to allow pre-recorded testimony rather than *viva voce* testimony in certain circumstances, an amendment that will no doubt address witness protection concerns, but will also implicate defendants’ confrontation rights. During ASP12, Kenya and the defendants’ defense counsel [raised strong objections to the Rule 68 proposal](#). Language indicating that “Rule 68 will not be applied retroactively to the detriment of the person who is being investigated or prosecuted” was necessary to

enable Kenya to ultimately join consensus. The new rules now mirror Rules 92*bis*, 92*ter*, and 92*quater* from the [International Criminal Tribunal for the former Yugoslavia's RPEs](#), which were employed to good effect.

The amendment to RPE 100 will allow the relevant chamber (in lieu of the plenary) to recommend whether to allow *in situ* proceedings to the President, who would ultimately decide the matter. This was an issue in the Ruto/Sang cases, in which the plenary inexplicably went against the recommendation of the Pre-Trial Chamber to hold parts of the trial outside The Hague.

Finally, in the suite of Rule 134 additions, states parties agreed that the Trial Chamber should be empowered to excuse an accused from being present at trial if, upon written motion, he or she demonstrates a mandate to fulfill “extraordinary public duties at the highest national level” and it is “in the interests of justice” to excuse them from being present in the courtroom. Notably, the Trial Chamber still retains significant discretion to grant a request for excusal on a case-by-case basis; Kenya had argued that an accused should enjoy more of an automatic right not to be present. The text of Rule 134*quater* reads:

Excusal from presence at trial due to extraordinary public duties

1. An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.
2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.

NGOs and others have argued that the ICC should not make concessions for sitting heads of state, for current defendants and proceedings, for political expediency, or for diplomatic convenience in considering changes to the rules of the road. This latter set of amendments in particular [has already provoked controversy](#) given that the Rome Statute itself states at [Article 63\(1\)](#) that:

The accused shall be present during the trial.

The argument is that states parties cannot amend the Rome Statute through the RPE backdoor.

These endeavors come on the heels of a repeat [effort in the Security Council last week](#) to once again secure an Article 16 deferral of the Kenyan cases. ICYMI, the Council, in an unprecedented vote, rejected the proposal—with 8 members including 7 states parties (Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom, and the United States)—abstaining. Seven Council members, all non-parties (Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo), voted for the resolution. In her explanation of vote, Ambassador Samantha Power, anticipating that this issue would be addressed at the ASP, indicated that the Council was not the proper venue for addressing the concerns of Kenya and the African Union. Ambassador Power [applauded the package of amendments](#) achieved at the ASP.

3. Funding for the Court

The ICC has been operating under a zero growth budget for several years, despite increases in the number of cases and situations under consideration. The ICC proposed to the ASP that its institutional budget be increased by approximately €11 million, of which €7.5 million would be earmarked for the OTP. After insisting for years on zero growth, the ASP's [Committee on Budget and Finance](#) (CBF)—an expert subsidiary mechanism of the ASP charged with addressing the Court's finances—had [recommended a smaller increase](#). Canada, the hold out, finally agreed to the larger proposed budget, indicating that it would monitor spending and aim for zero growth in 2015.

This new funding will bring the Court's total annual budget to approximately €126 million. The Office of the Prosecutor (OTP) insisted on an increase to its budget, arguing that its ability to carry out its mandate is jeopardized if it does not have adequate resources to conduct independent and thorough investigations and prosecutions. In seeking additional resources, the OTP is responding to judicial rulings in the *Ngudjolo Chui* and *Laurent Gbagbo* proceedings demanding that the OTP's cases be closer to trial ready by the time of the confirmation of charges. In addition, the OTP is now conducting [preliminary examinations in 10 situations](#), which requires it to determine whether there is a reasonable basis to proceed with an investigation taking into account the following factors:

jurisdiction (which has three components: temporal, territorial/personal, and material),

admissibility (which encompasses complementarity and gravity) and

the interests of justice, which are a countervailing factor requiring consideration of grounds to abstain from moving forward even if there is jurisdiction and the case is admissible.

There has also been an uptick in the prosecutorial and judicial activities, with an anticipated 18 live cases (from 8 situations) in 2014, including 12 cases in the

pre-trial (Ntaganda, Gbagbo, Gaddafi, Al-Senussi, Banda, Kenyatta);
trial (Katanga, Bemba, Ruto, Sang), or
appellate stages (Ngudjolo Chui, Lubanga).

[The situation in Mali remains under investigation](#), but charges have not yet been pursued; this situation is listed as one of the main new cost drivers. The [Registry](#) has also asked for a budget increase to devote to [the protection of victims and witnesses](#), a problem that has plagued several cases including those in the Kenya and CAR situations.

As a non-party, the United States does not contribute to the Court's budget. Even if it wanted to make a voluntary contribution to support one or more of the Court's cases, such as the Kony prosecution, it is likely barred from doing so because of the Foreign Relations Appropriation Act of 2001, [22 U.S.C. § 7401](#), and the American Servicemembers Protection Act of 2002 ([ASPA](#)), [22 U.S.C. § 7421 et seq.](#)

Mark Kersten, whose [excellent blog Justice in Conflict](#) is a must-read for ICL aficionados, [tweets](#) that the omnibus resolution adopted by the ASP may invite a discussion of United Nations funding for Security Council referrals to the Court. At the behest of members of the P-5, language is included in both Resolutions [1593](#) (referring the situation in Darfur) and [1970](#) (referring the situation in Libya) to the effect that:

none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily...

I have not been able to confirm that the draft resolution opens up this issue for discussion or whether France and the United Kingdom have consented to a reconsideration of this position.

In addition to discussing these budgetary matters, [the ASP filled six vacancies on the CBF](#), which is composed of representatives from 12 states. The new members are from Estonia, Burundi, Mexico, France, Germany, and the UK. The CBF prefers to elect members by consensus; the open African seat was contested until [Burkina Faso withdrew its candidate](#).

4. Victims

The gathering also witnessed the first plenary session dedicated to victims since the 2010 Review Conference in Kampala (summary [here](#) and [here](#)). The session is expected to generate a resolution voicing diplomatic support to the involvement and rights of victims at the ICC. The ICC is unique among international criminal tribunals in allowing victims to have an autonomous voice in the proceedings and also to receive reparations.

The [Trust Fund for Victims](#), which was also created by the Rome Statute but is a separate institution from the Court, reported that it is now serving over 110,000 beneficiaries. It offers support in three main areas: physical rehabilitation, psychological rehabilitation, and material support. The Fund was recently evaluated by the [International Center for Research on Women](#), which determined in its [report](#) that the Fund's assistance interventions were highly successful based on the following factors:

1. effective translation of theory into practice;
2. an integrated approach to promote a holistic approach to problems;
3. community participation in identification of victim beneficiaries for support;
4. a focus on capacity building and institutional strengthening; and
5. working with community resources and promoting local ownership.

Pledges totaling almost €6 million were made to the Trust Fund during the general debate.

5. Aggression

The issue of the crime of aggression was not central to this gathering, although Belgium did announce its ratification of the Kampala amendments. This brings the [total number of states that have ratified the aggression amendments to 12](#).

6. The Judges

ASP members [elected a replacement for the judge from Trinidad & Tobago](#), who resigned upon his election as President of his country. Two GRULAC (Group of Latin American and Caribbean states) candidates were in the running: Mr. Geoffrey Henderson (nominate by T&T) and Mr. Leslie Van Rompaey (Uruguay). Uruguay [subsequently withdrew its candidate](#), who had less experience in criminal law and procedure. The nominations were “vetted” by a newly established [Advisory Committee on Nominations](#). Judge Henderson—a former prosecutor and high court judge with extensive criminal law experience—will serve until March 2021. The election of a new ASP president, to replace Estonian [Tiina Intelmann](#), has been deferred to the next ASP in the hopes that a consensus candidate will emerge.

7. Side Events

A number of side events were held on complementarity (with a particular focus on Libya, including the release of a [formal statement by Qaddafi’s legal counsel](#)), Syria, mutual legal assistance, [the quest for universal ratification](#), and state cooperation with the Court.

Tags: [ICC](#), [International Courts](#), [Kenya](#)

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