

Kenya Continues Push for ICC Changes

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Nairobi is confident that proposed amendments will pass, but participating states are unlikely to allow major revisions to Hague court's founding statute.

The Kenyan government is pressing ahead with its bid to change sections of the treaty that underpins the International Criminal Court (ICC), even though many of the proposals appear to stand little chance of success.

Attorney-General Githu Muigai, and Permanent Secretary for Foreign Affairs Karanja Kibicho have both told IWPR they are confident about being able to push through changes to the Rome Statute that include a clause granting legal immunity to sitting heads of state.

The proposal was one of five which Kenyan representatives presented to the ICC's amendments committee in May.

European and South American members of the court have previously voiced concerns about providing immunity to any leader.

The ICC prosecutes individuals suspected of committing war crimes, crimes against humanity or genocide, regardless of their official capacity or any immunity they may be afforded under national laws.

Kenya is proposing to amend the statute to explicitly state that sitting presidents and their deputies "may be exempt from prosecution during their current term of office". It wants to make this change even though no such exemption exists in its own domestic court system.

The idea of granting immunity to national leaders stems from a resistance in Kenya and the wider African Union to the Hague cases against President Uhuru Kenyatta and his deputy William Ruto for their alleged role in post-election bloodshed in 2007-08.

Ruto's trial got under way last September and Kenyatta's is scheduled to start this October.

In October 2013, the AU issued a resolution saying that heads of state should not face trial at international courts as long as they were in office. In November, Kenya followed that resolution with a formal proposal to amend the Rome Statute to provide immunity for top officials. It lodged the proposal directly before the annual meeting of the 122 state members of the court, known as the Assembly of States of Parties (ASP).

With the ICC investigations in Kenya dating back to 2010, the proposals are not seen as a serious bid to enact immediate change or to prevent either Ruto or Kenyatta's case from going ahead.

Nonetheless, Kenyan officials say they are serious about the changes. Kibicho told IWPR that he was "not just attempting" to push them through, he was also confident they would get the necessary level of support from other ASP members.

"We have not said anything about dropping them [the proposed amendments]," Kibicho said. "There is a follow-up meeting of the ASP later in the year to follow up on our proposals as presented. We believe they will sail through," he added, referring to the annual ASP summit scheduled to take place in New York in December.

ALLOWING DEFENDANTS TO BE ABSENT FROM TRIAL

Besides the clause on immunity, Kenya also wants to change Article 63 of the statute which relates to the presence of a defendant at trial. The statute currently says that a defendant "shall be present" during the trial.

Kenya wants the article to reflect changes made to the ICC's rules in November last year, which give judges discretion to permit defendants "in highest national office" to absent themselves from proceedings.

Under pressure from Kenya and other AU states, the ASP agreed to change the rules so as to enable the ICC's judges to grant Ruto and Kenyatta leave from their trials when they saw fit. (For more, see [Kenyan Officials Welcome Changes on ICC Trial Attendance](#).)

Kenya is also seeking changes to the section of the statute that covers offences against the administration of justice. It wants a clause added that would explicitly include the Office of the Prosecution itself, in addition to outside parties, among those that can be held accountable for such an offence.

It has also asked for regional courts to be recognised under the Rome Statute as bodies that can potentially handle cases which would otherwise be tried by the ICC. Under a process known as “positive complementarity”, the statute currently provides for national courts, but not regional ones, to take on such cases from the court. (This issue is examined in **African Court No Substitute for ICC.**)

LONG ROAD TO AMEND TREATY

The ASP first acknowledged the proposed amendments on March 17, when its president, Tiina Intelmann, informed members that the United Nations Secretary General, Ban Ki-Moon, had circulated them to the states parties.

Under the court’s treaty, a period of three months must pass before proposed changes are formalised and the ASP takes them up for discussion.

The ASP has now passed the proposed amendments to its technical committee dealing with such matters. All 122 states parties sit on the committee, which is chaired by Switzerland.

Following a meeting earlier this month, the committee will meet again in June to discuss the amendments further. There will then be another meeting before the annual ASP conference in December in order to decide whether or not the proposals should be discussed at that forum.

Pushing through the changes would be a long process. Each change requires either the consensus of the ASP or, if that is not possible, the backing of a majority of at least two-thirds of states. Any change would then need to be ratified by 87.5 per cent of ICC member states before being approved by the UN Secretary General. After that, changes would take one year to come into effect.

The only exception would be the amendment relating to complementarity, which falls under Article 5 of the Rome Statute. This could take effect in individual states which have accepted it, one year after they ratify it.

“Amending the statute is quite different from amending the rules of procedure,” said Elise Keppler, associate director of Human Rights Watch’s international justice programme, pointing to the November rule change which came into force immediately. “It’s a different ballgame altogether, mainly because it’s a much bigger deal. It would have to go through the [committee] on amendments first.”

The first hurdle will be getting the proposed changes high enough up on the ASP’s agenda to warrant consideration at the annual states parties meeting in December.

Despite Kibicho’s insistence that the changes will be discussed in New York, the Kenyan proposals may not make it that far. IWPR understands that it is still unclear whether the technical committee will forward them for further consideration by the ASP.

According to Keppler, the statute is seen as a “finely” negotiated document, and there would be a lot of resistance within the ASP to revisit it.

She said that some of the proposed amendments – particularly the one on official immunity – would be “a massive retreat” from what the majority of ASP members wanted when they drew up the statute in Rome in 1998.

During the ASP meeting last November, the immunity issue was the subject of a special debate after Kenya initially proposed the change.

During that debate, AU members like South Africa and Namibia voiced support for immunity. But the European Union made a statement on behalf of its 28 court members opposing any steps to grant immunity based on official capacity. South American states were similarly opposed.

“Lack of immunity where international crimes are involved is an entrenched principle,” Keppler said. “It was not even debated a lot at the Rome negotiations.”

If no consensus on the proposed changes is reached at committee level, Kenya could ask for the changes to be put to a vote, if it was confident of securing the required number of votes.

Kenya remains vocal on its opposition to the ICC and pushing through the amendments. But an alternative view is that these efforts are principally a bid to register displeasure with the court. As the proposed changes would not impact the Ruto or Kenyatta cases, Kenya’s efforts appear to reflect its wider misgivings with the Rome Statute system, as opposed to a desire to drive through real change.

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