



## HUMAN RIGHTS IN INTERNATIONAL JUSTICE

### Amendments to Rule 165 of the International Criminal Court's Rules of Procedure and Evidence must ensure fair trials and the rights of the accused<sup>1</sup>

On 10 February 2016, the judges of the International Criminal Court (ICC) provisionally amended Rule 165 of the ICC's Rules of Procedure and Evidence. As explained in the ICC's Report on the provisional amendments,<sup>2</sup> they seek to simplify and expedite the prosecution and trial of offences against the administration of justice in Article 70 of the ICC Statute. In particular, the amendments:

- Reduce the number of judges at pre-trial and trial from three to one and the number of judges conducting appeal proceedings from five to three;
- Remove the separate sentencing hearing procedure in Article 76(2) to hear any additional evidence or submissions relevant to the sentence;
- Remove the interlocutory appeal procedure in Article 82(1)(d) on issues "that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial."

In accordance with Article 51(3), the provisional amendments will be considered at the 15<sup>th</sup> session of the Assembly of States Parties, which will decide whether to adopt, amend or reject them.

Amnesty International has analysed the provisional amendments and recommends that the Assembly should consider reducing the number of judges in Article 70 proceedings, subject to certain safeguards to ensure the competence, independence and impartiality of the ICC. However, the Assembly should not adopt elements of the amendments that scale back on the important procedural protections of the rights of the accused in Articles 76(2) and 82(1)(d) which should apply in all ICC cases.

#### The scope of Article 70(2)

Article 70(2) of the Statute provides that "[t]he principles and procedures governing the Court's exercise over the offences shall be those provided for in the Rule of Procedure and Evidence". This raises the possibility that the Rules may be amended to reflect specific principles and procedures that will be applied to Article 70 proceedings or to exclude the application of certain principles and procedures in the ICC Statute. However, this is not without restriction. There are fundamental principles in the Rome Statute and procedures to implement them that must not be breached or undermined. These include the principle that the law shall be applied and interpreted consistent with internationally recognized human rights and without discrimination in Article 21(3). The rights of the accused in Article 67 must also be fully respected in all cases, including offences against the administration of justice. Any deviation from these principles would threaten the human rights compliance of the Court and severely undermine the credibility of international criminal justice.

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<sup>1</sup> This paper has been developed with legal research and analysis support provided by Jennifer Keene, who is a Juris Doctor student of Melbourne Law School's International Criminal Justice Clinic. The Clinic is run in partnership with Amnesty International to promote the human rights compliance of international criminal courts: <http://law.unimelb.edu.au/students/jd/enrichment/pili/subjects/international-criminal-justice-clinic>

<sup>2</sup> Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence, 29 February 2016, paras. 1-3.

It is through this lens that Amnesty International has analysed the three main elements of the provisional amendments:

### **(1) Reducing the number of judges in Article 70 proceedings**

There is no requirement in international human rights law and standards for a specific number of judges to hear criminal proceedings. However there is a requirement that criminal courts must be competent, independent and impartial.<sup>3</sup> These factors should be taken into account in deciding how many judges are appointed to specific proceedings. Reducing the number of judges in ICC pre-trial and trial proceedings to one and the appeals chamber to three in Article 70 cases allows the ICC more flexibility to allocate its judicial resources to the prosecution of crimes listed in Article 5. However, the President of the Pre-Trial Division or the Presidency should also have flexibility to constitute chambers composed of more judges if necessary to safeguard the competence, independence and impartiality of the ICC and perceptions thereof, for example in highly complex or highly politicized cases.

#### *Recommendation*

Rule 165 and Regulation 66 *bis* should be amended to establish a Pre-Trial or Trial Chamber of “*at least* one judge” and an panel of “*at least* three judges” to decide appeals with respect to Article 70 offences.

### **(2) Excluding sentencing hearings**

Amnesty International is concerned that the removal of separate sentencing hearings in accordance with Article 76(2) may preclude a convicted person from presenting mitigating evidence and submissions to a Chamber that are relevant to sentencing and undermine their rights in the trial itself, if that is the only time mitigating circumstances can be presented. As one commentary notes:

...[F]ailure to hold a separate sentencing hearing may put the accused at a real disadvantage during the trial. He or she may be in the position to submit relevant evidence in mitigation of sentence, for example concerning the individual’s specific role in the crimes vis-à-vis accomplices, or efforts by the offender to reduce the suffering of the victim. The only way to introduce such evidence may be for the accused to renounce the right to silence and the protection against self-incrimination. Providing the accused with the right to a separate sentencing hearing, where new evidence and submissions maybe presented, thereby enhances the right to silence of the accused at trial.<sup>4</sup>

The ability of the defence to initiate a sentencing hearing in Article 76(2) is an important procedural protection to ensure that the right not to be compelled to testify or to confess guilt and to remain silent (Article 67(1)(g)) is fully respected and that an onus of rebuttal (Article 67(1)(i)) is not imposed on the accused during their trial. It should be applied in all ICC trials, including of offences against the administration of justice. Indications in the ICC’s Report that such hearings may still be permitted at the discretion of the single judge is not sufficient to address this concern.<sup>5</sup>

#### *Recommendation*

Article 76(2) should be deleted from the list of Articles of the ICC Statute that shall not apply to Article 70 proceedings in provisional Rule 165(2).

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<sup>3</sup> See for example: Article 10, Universal Declaration of Human Rights; Article 14(1), International Covenant on Civil and Political Rights; Articles 7(1) and 26, African Charter on Human and Peoples’ Rights; Articles 8(1) and 27(2), American Convention on Human Rights; Articles 12 and 13, Arab Charter on Human Rights; Article 6(1) European Convention on Human Rights.

<sup>4</sup> William A. Schabas and Kai Ambos, ‘Article 76’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (Hart Publishing, 3<sup>rd</sup> ed, 2016), 1873-1874.

<sup>5</sup> Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence, 29 February 2016, para. 14.

### **(3) Excluding Article 82(1)(d) appeals**

The ability of the parties to appeal a decision under Article 82(1)(d) is clearly discretionary requiring leave of the Pre-Trial or Trial Chamber. It states:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Nevertheless, Article 82(1)(d) provides an important procedural protection by allowing for the defence to seek and obtain prompt remedies to violations of the rights of the accused or for the parties to seek other measures to ensure the fairness and expeditiousness of the trial. If such appeals are not permitted in Article 70 proceedings it could lead to further violations of the rights of the accused or other parties and delay any possible resolution of important issues until post-trial. In extreme circumstances, it could prevent the prompt resolution of fair trial issues that go on to undermine or affect the outcome of the whole trial. The interlocutory appeal is an important safeguard against miscarriages of justice.

As the Article 82(1)(d) is expressly aimed at immediately resolving issues that significantly affect the expeditious conduct of the proceedings, in order to “materially advance the proceedings”, it is difficult to understand the justification given by the Court that excluding its application would “further expedite Article 70 proceedings”.<sup>6</sup> The ICC’s Report indicates that its concern relates specifically to the leave to appeal procedures and presumably the ability of the parties to make numerous applications. However, this is not a sufficient basis to preclude such appeals altogether in light of the benefit that such appeals may contribute to the fairness and expeditiousness of proceedings as a whole.

#### *Recommendation*

Article 81(1)(d) should be deleted from the list of Articles of the ICC Statute that shall not apply to Article 70 proceedings in provisional Rule 165(2).

### **Consistency of the provisional amendments with Article 51(3)**

Finally, Amnesty International considers that the provisional amendments to Rule 165 drawn up and applied by the Court do not fall within the scope of Article 51(3), which requires that provisional amendments can only be adopted “in urgent cases where the Rules do not provide for a specific situation before the Court”. Although the amendments are arguably urgent in light of the current judicial capacity of the Court, the requirement that the Rules do not provide for a specific situation before the Court does not appear to be met. Existing rules clearly set out principles and procedures that have been applied to current Article 70 proceedings, which could have been applied until amendment proposals were submitted to the 15<sup>th</sup> session or a special session of the Assembly in accordance with Article 51(2). Given the importance of the Assembly’s oversight of the changes to the Rules, Article 51(3) should only be used in exceptional circumstances.

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<sup>6</sup> Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence, 29 February 2016, para. 14.