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Amnesty International's position on proposals to amend the ICC Rules of Procedure and Evidence at the thirteenth session of the Assembly of States Parties

Proposals of the International Criminal Court's (ICC) internal Working Group on Lessons Learnt (Working Group) to amend four provisions of the ICC Rules of Procedure and Evidence (Rules) concerning language issues and absence of a trial judge have been submitted to the Study Group on Governance (Cluster I) of the ICC Assembly of States Parties. Before commenting on the proposed rule changes, as a general point, Amnesty International stresses that the rights of the accused to a fair trial must be protected in the process of seeking to enhance the efficiency and effectiveness of the ICC's judicial process. The expeditiousness of the proceedings is central to the rights of accused persons to be tried without undue delay. However, this needs to be balanced carefully against many other fair trial rights set out in Article 67 of the Rome Statute (Statute) and other international standards that must not be compromised. Inevitably, questions will arise as to whether some proposals to amend the Rules affect the rights of the accused. The Working Group and the Study Group on Governance must give these issues the utmost consideration and not proceed with amendments if they are concerned about the impact it may have on the rights of the defense. Moreover, each proposal to change the Rules must be considered in light of Article 51(4) of the Statute, which expressly provides that amendments to the Rules must in all cases be consistent with the Statute itself.

1. PROPOSALS TO AMEND RULES CONCERNING LANGUAGE

If an accused does not understand, speak or read the language used by the courts, or has difficulty doing so, accurate and clear oral interpretation and translation of documents are crucial to the fairness of the proceedings. Such assistance is vital for the effective exercise of the rights to assistance of counsel, adequate facilities to prepare and present a defence, equality before the law and courts and the principle of equality of arms. Without such assistance an accused may not be able to participate fully and effectively in the preparation of their defence and during the proceedings. Because documents may contain information essential to the preparation of the defence and an accused may be questioned about the contents of documents, the right to translation of important documents is vital to a fair trial.

- Amnesty International, "Interpretation and Translation", *Amnesty International's Fair Trial Manual* (Index: POL 30/002/2014), 2nd edition, chapter 23.1.

Rule 76(3) – translation of prosecution witness statements

Amnesty International opposes the proposal to amend Rule 76(3) to enable a Trial Chamber to authorize translation of only excerpts of prosecution witness statements because this would be inconsistent with internationally recognized fair trial rights, including those set out in the Rome Statute, to:

- the right to adequate time and facilities to prepare a defense (Article 67(1)(b)); and,
- examine, or have examined, the witness against him or her (Article 67(1)(e)).

The right to adequate facilities to prepare a defense is an essential component of ensuring the equality of arms and includes the right of the accused and their counsel to have timely access to relevant information upon which the prosecution may rely (inculpatory material), as well as information which may affect the credibility of witnesses presented by the prosecution and any potentially exculpatory material.¹ While it is not disputed that international fair trial standards do not provide for unlimited free translations of all materials disclosed to the defense, the accused does have a right to have translated free of charge documents that are necessary for a fair trial.² Prosecution witness statements are key documents which may contain facts upon which the prosecution intends to rely and other vital

¹ See Amnesty International, *Fair Trial Manual* (2nd ed.), AI Index POL 30/002/2014, at chapter 8.4 (Disclosure).

² See European Court: *Luedicke, Belkacem and Koç v Germany* (6210/73, 6877/75 and 7132/75), (1978) §48, *Kamasinski v Austria* (9783/82), (1989) §74, *Diallo v Sweden* (13205/07), Section N(4)(d) of the Principles on Fair Trial in Africa, and Article 67(1)(f) of the Rome Statute.

information that the defense may seek to rely on. It is vital that these statements can be reviewed by the accused so that they can instruct their counsel appropriately. The statements therefore must be made available in a language the accused fully understands.³ This is precisely the reason why Rule 76(3) currently provides that “statements of prosecution witnesses shall be made available in original and in a language that the accused fully understands and speaks. Similarly, another fundamental component of the equality of arms, namely the right to examine prosecution witnesses and the concomitant right to be able to prepare for such cross-examination, may be undermined if the accused is not in a position to fully understand the written testimony submitted to a Trial Chamber and to work with their counsel to prepare to challenge its probity and credibility.

Although the Rule 76(3) proposal requires a Chamber to consider the “requirements of fairness” in determining whether full or partial translations are required, Amnesty International questions whether a Chamber will be in a position to assess the relevance of information that should rather be determined by defense counsel in consultation with their client. Judges play the central role in upholding fair trial rights, but they should not supplant the proper role of the defense in criminal proceedings. The organization is further concerned that the proposal does not provide that the defense may appeal a decision to partially translate statements.

Rule 144(2)(b) – translation of certain decisions of the Trial Chamber

Amnesty International has serious concerns about the proposal to amend Rule 144(2)(b) to allow a Trial Chamber to provide only partial translations of decisions on admissibility, jurisdiction, the criminal responsibility of the accused, sentencing and reparation. In its current form, it may undermine the rights of an accused person or his or her defense to:

- (i) be fully informed of the essential facts and legal bases of decisions concerning the proceedings against him or her; and,
- (ii) to appeal, as the accused must know the reasons for the judgment in order to be able to instruct their counsel.

The proposed amendment to Rule 144(2)(b) does not provide that any refusal of a request by the defense for a full translation would be subject to a right of appeal.⁴

Amnesty International acknowledges the time and cost involved in translating decisions of the Trial Chamber. Nevertheless, the accused has a right under Article 67(1)(f) of the Statute “to be provided with translations, free of any cost, as are necessary to meet the requirements of fairness.” Rule 144 expressly names decisions on admissibility, jurisdiction, the criminal responsibility of the accused, sentencing and reparation as those which must be provided in a language an accused fully understands because they are of fundamental importance to their interests and likely to be appealed. These decisions should be considered to fall within the scope of judicial determinations for which translations into a language the accused fully understands are necessary to meet the requirements of fairness.

At the very minimum, the proposed amendment to Rule 144(2)(b) must include safeguards to ensure that the “requirements of fairness” are understood to guarantee that the accused is effectively informed of the factual and legal basis for key decisions and the reasons behind them. This must avoid the possibility that the defense will receive random or insufficient excerpts of decisions. It must also be made subject to the right of appeal. It should be questioned whether this proposal will achieve efficiency, given the amount of work that developing effective partial translations may involve and the potential for disputes to arise over what portions of decisions should be translated.

Rule 101(3) – time limits for translations

Amnesty International supports the proposed amendment to Rule 101(3), which will permit a Chamber to order that certain decisions will be considered notified to the parties on the day of its translation, as this will provide clarity on when applicable time-limits are triggered. This appears to recognize that an accused or his or her defense has the right to fully understand a decision before being required to decide how to respond to it. However, the organization is concerned that under the proposed rule, time limits may commence from the date of notification of *partial* translations of critically important decisions referred to in Rule 144(1), without sufficient safeguards to ensure that defense counsel is provided the full text of the decision in the working language of the Court that they are fluent in and that the accused is fully informed of the factual and legal bases of decisions in the proceedings against him or her.

Amnesty International accordingly recommends the removal of the language “or parts thereof” from the proposed amendment to avoid this rule being inconsistent with fair trial standards and the Statute’s “requirements of fairness” in Article 67(1)(f).

³ *Ibid.*

⁴ Article 3(5) of the EU Directive 2010/64 (2010) on the right to interpretation and translation in criminal proceedings.

2. PROPOSAL TO PROVIDE FOR HEARINGS IN THE ABSENCE OF A TRIAL JUDGE

New rule 140 bis – temporary absence of a judge

Amnesty International is concerned that the proposed new Rule 140 *bis*, which would allow a Trial Chamber to continue to sit during the temporary absence of a judge for exceptional reasons in order to complete a “specific matter which has already commenced within a short timeframe,” is inconsistent with Article 74(1) of the Statute. This article explicitly requires that: “All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations.” Article 51(4) of the Statute expressly provides that amendments to the Rules of Procedure and Evidence must in all cases be consistent with the Statute itself.

The requirement for judges to be continually present at all stages is in place to guarantee that each respective judge has “*direct* knowledge about what evidence has been presented and what else has occurred during all relevant stage of the trial proceeding.”⁵ The requirement of continuous presence is also fundamentally linked with the Statute’s numerous guarantees of procedural fairness, including the obligation in Article 74(2) that: “The Trial Chamber’s decisions shall be based on its evaluation of the evidence and the entire proceedings” – which presupposes that each judge is directly familiar with every moment of the trial. Triffterer notes that trial proceedings must be suspended if a judge needs to leave the courtroom.⁶ Amnesty International is particularly concerned that:

- (i) the Rule may permit proceedings to continue even if the absent judge objects;
- (ii) that the proposal appears to allow the remaining judges to decide an issue without clear provisions on the role for the absent judge; and,
- (iii) safeguards are not proposed to ensure that they do not miss key information during their absence or to limit the amount of time the proceedings may continue in the absence of the judge.

Furthermore, the requirement that the remaining judges must determine that it is in the interests of justice to continue is vague. Noting that continuing in the absence of the judge may only relate to “exceptional circumstances”, Amnesty International questions whether the proposal will achieve a significant impact in expediting the judicial process.⁷

⁵ Triffterer ed., *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (2008) at Article 74 - Requirements for the decision by Otto Triffterer, at 1391-2. Triffterer notes that the requirements of continuous presence are such that trial proceedings must be suspended if a judge needs to leave the courtroom. Moreover: “Violations of this high demand on permanent presence during the trial can only be compensated for by a repetition of those stages at which a respective judge, taking part in the finding the decision, was not present; otherwise his or her absence is a reason for appeal.” At 1392.

⁶ *Ibid.*, at 1392.

⁷ Amnesty International notes the additions to the text proposed by Germany, dated 10 July 2014, namely adding conditions to the exercise of the rule such that: at least one of the remaining judges has not been temporarily absent before in the case; the absent judge is given the opportunity to make him or herself familiar with the entirety of the proceedings conducted in his absence by means of video-recording and the transcript; and clarifying that a compelling reason in the interests of justice would include “inter alia in order to preserve evidence that will otherwise be lost or endangered”. These additions address some but not all of Amnesty International’s concerns.