

INTERNATIONAL CRIMINAL COURT

**INITIAL RECOMMENDATIONS TO THE 16TH
SESSION OF THE ASSEMBLY OF STATES
PARTIES (4 TO 14 DECEMBER 2017)**



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Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

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INTRODUCTION

The 16th session of the Assembly of States Parties of the International Criminal Court (Assembly) will take place in New York from 4 to 14 December 2017.

It is expected that this session will be dominated by negotiations on the activation of the ICC's jurisdiction over the crime of aggression and a number of elections (including of six new ICC judges), on which Amnesty International does not take a position.¹ However, the Assembly also has a number of other important tasks on its agenda:

- Conduct a General Debate about the ICC and the Rome Statute system;
- Discuss the upcoming 20th anniversary of the adoption of the Rome Statute in 2018;
- Consider a number of proposals to amend the Rome Statute and the Rules of Procedure and Evidence;
- Consider the recommendations of the open-ended working group of the Bureau to improve the application of article 97 of the Rome Statute, which requires states parties to consult with the ICC when they identify problems that may impede or prevent the execution of a request for cooperation from the ICC;
- Adopt the 2018 budget for the ICC; and
- Adopt resolutions on strengthening the International Criminal Court and the Assembly of States Parties, cooperation and other issues.

This paper sets out Amnesty International's five initial recommendations on important issues under consideration at the 16th session. In doing so, the organization has prioritised matters that it believes are essential to ensure the effectiveness and credibility of the ICC, including its compliance with human rights and effective oversight by the Assembly. As these and other issues are still under consideration in the lead up to the 16th session, Amnesty International may update its recommendations, comment on other issues and respond to developments on its new Human Rights in International Justice website: <https://hrjj.amnesty.nl>.

¹ Amnesty International does not take a position on the crime of aggression, including its activation at this session, in order to maintain its neutrality on the use of force. As an organization that focuses on protecting civilians and exposing violations of human rights and humanitarian law in armed conflict, this neutrality is essential for the effectiveness and credibility of Amnesty International's work to address violations by all parties to conflicts.

RECOMMENDATION 1. STATES PARTIES SHOULD MAKE STRONG STATEMENTS IN SUPPORT OF THE ICC AND HIGHLIGHT KEY ISSUES DURING THE GENERAL DEBATE AND DISCUSSIONS REGARDING THE 20TH ANNIVERSARY OF THE ROME STATUTE

As 2018 marks the 20th anniversary of the Rome Statute, this year's General Debate and proposed plenary discussion on the anniversary present important opportunities for all states parties to: affirm their support for the ICC and commitment to strengthening and maintaining the integrity of the Rome Statute system; present their views on key issues facing the ICC and international justice; 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. In particular, Amnesty International encourages states in their statements to:

- Affirm their commitment to international justice, emphasizing the need to support the ICC in its work, fully respect the independence of the Court and protect the integrity of the Rome Statute;
- Recognize the high demands on the ICC to deliver justice to victims in situations around the world and call for the Court to be provided with the support, cooperation and funding required to meet these challenges;
- Emphasise the importance of the independence of the Office of the Prosecutor in conducting its preliminary examinations, investigations and cases, without political, budgetary or other interference;
- Commit to support efforts to mark the Rome Statute's 20th Anniversary, including organizing and supporting events and initiatives focussed on strengthening national, regional and international support of the work of the ICC;
- Call for the Assembly to use the occasion of the 20th anniversary to take stock of and improve its efforts to support the effective functioning of the ICC;
- Emphasise that the rights of the accused, victims and witnesses must be fully respected and implemented, and the vital role that the Assembly must play in supporting the ICC's efforts to achieve human rights compliance;
- Commit to and urge other states to cooperate promptly and fully with the ICC, including in the execution of all arrest warrants, and call for the Assembly to adopt a standing agenda item to consider and respond to any instances of non-cooperation;
- Commit to and urge other states to ratify the Agreement on Privileges and Immunities and to enter into agreements with the ICC on witness relocation, interim release, enforcement of sentences and relocation of acquitted persons;
- Pledge or announce voluntary contributions the Trust Fund for Victims; and
- Urge all permanent members of the United Nations Security Council to refrain from using their veto power to block referrals to the ICC Prosecutor and to support

the efforts of the ICC in Darfur and Libya, especially by responding to non-cooperation.

RECOMMENDATION 2. THE ASSEMBLY SHOULD ADOPT AMENDMENTS TO ARTICLE 8 EXPRESSLY DEFINING THE EMPLOYMENT OR USE OF CERTAIN WEAPONS AS WAR CRIMES

Amnesty International supports the proposal submitted by Belgium in advance of the 16th session to amend Article 8 to expressly recognize that the employment or use of the following weapons amount to war crimes in both international and non-international armed conflicts:

- Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;
- Using anti-personnel mines;
- Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;
- Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.

Under rules of customary international humanitarian law, the use of biological and chemical weapons,² weapons “the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body”³ and blinding laser weapons⁴ are prohibited in both international and non-international armed conflicts. Although the ICRC has yet to conclude that anti-personnel mines are prohibited outright by rules of customary international humanitarian law,⁵ their use violates the prohibitions of using weapons of a nature to cause superfluous injury or unnecessary suffering⁶ and weapons that are by nature indiscriminate.⁷ The vast majority of states have ratified the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction⁸ and the ICRC states that this and other practice indicates an “obligation to eliminate anti-personnel landmines is emerging”.⁹ Biological and chemical weapons are also by their nature indiscriminate. All of the weapons are of a nature to cause superfluous injury or unnecessary suffering. Amnesty International opposes their manufacture, stockpiling, transfer and use worldwide.

² ICRC, Customary International Humanitarian Law, Rules 73 and 74.

³ *Ibid.*, Rule 79; see also: Convention on Certain Conventional Weapons, Protocol I on Non-Detectable Fragments.

⁴ *Ibid.*, Rule 86; see also: Convention on Certain Conventional Weapons, Protocol IV on Blinding Laser Weapons.

⁵ *Ibid.*, Rule 81.

⁶ *Ibid.*, Rule 70.

⁷ *Ibid.*, Rule 71.

⁸ At the time of writing it has 162 states parties.

⁹ *Ibid.*, Rule 81.

RECOMMENDATION 3. PROPOSALS TO AMEND RULE 165 MUST BE CONSIDERED IN ACCORDANCE WITH THE ROME STATUTE AND ANY AMENDMENTS MUST FULLY RESPECT THE RIGHTS OF THE ACCUSED IN ARTICLE 70 PROCEEDINGS

At its 15th session, the Assembly considered and decided not to adopt provisional amendments to Rule 165 adopted by the judges in February 2016 purporting to ‘simplify and expedite’ offences against the administration of justice cases pursuant to Article 70.¹⁰ Amnesty International raised concern that elements of the provisional amendments scaled back on procedural protections for the rights of the accused in Article 70 cases and called for the Assembly to amend the proposal before it was adopted.¹¹

Article 51(3) of the Rome Statute provides that provisional amendments adopted by the judges can be applied ‘until adopted, amended or rejected *at the next ordinary or special session of the Assembly of States Parties*’ [emphasis added].¹² As the Assembly did not adopt, amend or reject the provisional amendments at its 15th session, a plain reading of Article 51(3) means that the provisional amendment is longer in force. Indeed, a leading commentary argues convincingly that where the Assembly fails to act at the next session the proposal is rejected by default,¹³ in which case, further consideration of the proposal would require a new proposal under Article 51(2) by a states party, the judges acting as an absolute majority, or the Prosecutor.

Amnesty International is therefore concerned that the current version of the Rules of Procedure and Evidence on the ICC’s website, apparently updated after the 15th session, includes the provisional amendment with a footnote that reads: “[a]s drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016; see resolution ICC-ASP/15/Res.5, para. 125.”¹⁴ It is uncertain whether the ICC would seek to apply the Rule to the detriment of the accused in future Article 70 proceedings, contrary to Article 51(3).

Amnesty International is also concerned that the Working Group on Amendments has continued to consider this proposal in the lead up to the 16th session without a clear basis under Article 51 for doing so.

To ensure that the proposal is considered in accordance with the Statute’s amendment provision as well as certainty regarding the rights of the accused, the Assembly should

¹⁰ Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence, 29 February 2016, para. 3.

¹¹ 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, IOR 53/4910/2016, 28 September 2016 available at: <https://www.amnesty.org/en/documents/ior53/4910/2016/en/>.

¹² W.A. Schabas, *The International Criminal Court: A commentary of the Rome Statute*, at 647 notes that the requirement that a provisional rule will be considered in short order by the Assembly is a safeguard against abuse.

¹³ Bruce Broomhall, ‘Article 51’ in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, (2nd ed), CH Beck, Hart and Nomos, 1033.

¹⁴ See: <https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf> at page 47.

clarify in accordance with Article 51(3) that, as it did not adopt, amend or reject the provisional amendments at its 15th session, the amendments are no longer provisionally in force. If it continues to consider the proposals, the Working Group on Amendments should clarify the basis for doing so and the procedures in Article 51 being followed.

Notwithstanding these procedural issues, Amnesty International remains concerned that the proposals scale back on the rights of the accused in Article 70 proceedings. As recommended to the 15th session, it calls on the Assembly to amend the rules as follows before they are adopted:

- Amend Rule 165 and Regulation 66 *bis* to establish a Pre-Trial or Trial Chamber of ‘at least one judge’ and a panel of ‘at least three judges’ to decide appeals with respect to Article 70 offences;
- Delete Article 76(2)) from the list of Articles of the Rome Statute that shall not apply to Article 70 proceedings to ensure that the accused can present mitigating evidence and submissions to a Chamber that are relevant to sentencing;
- Delete Article 82(1)(d) from the list of Articles of the Rome Statute that shall not apply to Article 70 proceedings to ensure that the parties can seek an interlocutory appeal of a decision involving an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

RECOMMENDATION 4. THE ASSEMBLY SHOULD FORMALLY REJECT PROPOSED AMENDMENTS TO RULE 76(3)

Amnesty International continues to oppose the amendment originally submitted in 2014 to permit partial translation of prosecution witness statements into a language fully understood by the accused. The organization reiterates its position that prosecution witness statements are key documents, which may contain important details of the allegations against the accused and other information upon which the defence may rely. It is vital that the statements are reviewed in whole by the accused in a language that they fully understand in order to instruct their counsel appropriately and present a proper defence.

Despite the serious fair trial concerns raised by civil society and some states parties, which have not been resolved in almost three years of consultations, the Working Group on Amendments continues to consider the proposal. At the Assembly’s fifteenth session the Working Group on Amendments ‘refrained from making a recommendation to the Assembly [...] regarding the proposed amendment to rule 76(3), but agreed that the issue would remain on its agenda’.¹⁵ The Working Group should recommend that the Assembly take a decision to reject the proposed amendment at this session.

¹⁵ Report of the Working Group on Amendments, ICC-ASP/15/24, 8 November 2016 at para. 28.

RECOMMENDATION 5. THE ASSEMBLY SHOULD ADOPT CLEAR AND BINDING PROCEDURES FOR STATES PARTIES TO CONSULT WITH THE ICC PURSUANT TO ARTICLE 97 AIMED AT ENSURING COOPERATION

In response to concerns raised by the government of South Africa regarding the lack of clear procedures for consultations pursuant to Article 97, the Bureau's open ended working group continues to explore means to improve the application of Article 97.¹⁶ However, the process to date has lacked transparency and informal reports of the proposals that the working group intends to make to the Assembly at its 16th session indicate that its recommendations will not be effective at ensuring states meet their cooperation obligations.

As stated during the 15th session, Amnesty International supports efforts to clarify the consultation procedures. The organization has made detailed recommendations aimed at ensuring the process is expeditious and effective in considering impediments faced by states parties so that they fulfil their obligations to cooperate with the ICC.¹⁷ To ensure that the procedures are binding and provide legal certainty, the procedures should be incorporated into the Rules of Procedure and Evidence (which set out procedures for application of the Statute) and/or the Regulations of the ICC (which set out regulations for the ICC's routine functioning) pursuant to the amendment processes in Articles 51 and 52.

Amnesty International is therefore concerned by reports that the working group intends to recommend that the Assembly take the unusual measure of setting out a procedure for Article 97 consultations in the form of 'understanding' or agreement attached to an Assembly resolution. The legal basis for this approach is questionable and its legal effect is unclear. It may indeed be counterproductive to the aim of clarifying the procedures and further confuse matters.

According to informal reports, a number of concerns also arise from the form and content of the procedures that the working group intends to propose:

- The current understanding applies only to consultations on the basis of Article 97(c), i.e. 'the execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation'. This is overly restrictive as Article 97 (c) is only one illustrative ground of problems that states may experience requiring consultation.
- The participation of the judiciary in non-judicial consultations on issues that may ultimately require a judicial determination is highly inappropriate and may lead to conflicts of interest. Amnesty has recommended that such consultations should be conducted with the Office of the Prosecutor (in relation to a request by the Office) or the Registry (in relation to a request by the registry or a chamber);

¹⁶ ICC-ASP/15/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties, Annex 1: Mandates of the Assembly of States Parties for the intersessional period, para. 3(c).

¹⁷ See Amnesty International, Recommendations to the 15th session of the Assembly of States Parties, IOR 53/5130/2016, at 8-12, available at: <https://www.amnesty.org/en/documents/ior53/5130/2016/en/>.

- The understanding fails to provide for procedures to ensure that a judicial determination is taken to clarify a state party's obligations in the event that the impediments to cooperation are not resolved through consultation or; to settle any disputes regarding the legality of a request that arise between the ICC and the state party during or following consultations in accordance with Article 119(1)¹⁸.

At a minimum, these weaknesses in the procedures should be addressed and any 'understandings' submitted by the working group should be transmitted to the ICC and Working Group on Amendments to consider whether amendments to the Rules of Procedure and Evidence or the Regulations of the ICC are necessary.

¹⁸ Article 119(1) – Settlement of Disputes – ‘Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court’.

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INITIAL RECOMMENDATIONS TO THE 16TH SESSION OF THE ASSEMBLY OF STATES PARTIES

This paper sets out Amnesty International's initial recommendations for the 16th session, which will take place in New York on 4 to 14 December 2017. It explains why Amnesty International does not take a position on the activation of the crime of aggression, which will be key issue at the session, and sets out five initial recommendations on other important issues to be considered. As these and other issues are still under consideration in the lead up to the 16th session, Amnesty International may update its recommendations, comment on other issues and respond to developments on its new Human Rights in International Justice website: <https://hrij.amnesty.nl>.