International Criminal Court ICC-ASP/15/24/Add.2

Assembly of States Parties

Distr.: General
21 November 2016

Original: English and French

Fifteenth session
The Hague, 16-24 November 2016

Report of the Working Group on Amendments

Addendum

Annex VI

Letter from the Attorney General of Kenya to the President of the Assembly, dated 17 March 2016[1]

Your Excellency,

The Government of the Republic of Kenya ("GoK") has the honour to address this letter to you regarding the recent provisional amendments made to rule 165 of the Rules of Procedure and Evidence ("Rules") by the judges of the International Criminal Court ("ICC' or "Court"), purportedly acting in plenary and under the powers set out in article 51(3) of the Rome Statute ("Statute"). The GoK respectfully submits that these provisional amendments are *ultra vires* and wishes to notify the Court of its formal and principled objection thereto.

As is apparent from the terms of article 51 of the Statute, the drafters intended that, in contrast to the position at the *ad hoc* tribunals, legislative power at the ICC remain primarily with States. To give effect to this intention but, at the same time, to ensure a measure of flexibility, article 51(3) of the Statute provides that judges may only draw up provisional rules in: (i) "urgent cases"; and (ii) "where the Rules do not provide for a specific situation before the Court". Further, article 51(4) requires that provisional rules be consistent with the Statute. As explained more fully below, the GoK respectfully submits that these three conditions were not satisfied when the judges provisionally amended rule 165 on 10 February 2016.

First, the GoK submits that the provisional amendments were not necessitated by urgency. The GoK understands that the proposal for a reduced number of judges to address article 70 offences at each of the pre-trial, trial and appeal phases was discussed by the judges at the Nuremberg retreat in June 2015 and, thereafter, sent to the Advisory Committee on Legal Texts in July 2015. Therefore, the fact that the issue was known and the proposed solution identified, at the latest, in June last year but was not considered sufficiently urgent to warrant a proposal being submitted to the session of the Assembly of States Parties ("ASP") held in November 2015 demonstrates that the urgency condition has not been satisfied. This is particularly so when, according to the information publicly available, there has been no change in circumstance between November 2015 and February

[1] This is an exact copy of the letter reproduced in annex III of the Report of the Study Group on Governance Cluster I in relation to the provisional amendments to the Rules of Procedure and Evidence (ICC-ASP/15/7), as noted in footnote 11 of the present Report of the Working Group on Amendments.

2016 which would require the judges to exercise their exceptional legislative power, *e.g.,* no new cases or Situations have come before the Court in this limited period. In these circumstances, the GoK submits that the proposed amendments should have been submitted in the normal manner to the Court's primary legislative body, the ASP, for consideration at its next session.

Second, the GoK submits that recourse should not have been made to article 51(3) to provisionally amend rule 165 because the Rules do provide for the specific situation before the Court.

Chapter 9 of the Rules deals with "Offences and misconduct against the Court". Rule 163(1), which forms part of Chapter 9, states that "[u]nless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* the Court's investigation, prosecution and punishment of offences defined in article 70." This Rule is important because it clarifies that, to the extent there are any perceived gaps in the procedure to be followed in article 70 proceedings as laid out in the Rules, those gaps should be filled in the first instance by the relevant provision of the Statute. This is common sense given that the Statute has primacy in the Court's legal framework.

Therefore, while the Rules are silent on the number of judges required to conduct article 70 proceedings, this purported gap is addressed by article 39 (Chambers) of the Statute. Therefore, the Rules and the Statute read in combination do provide for the specific situation, namely the composition of the bench at all stages of article 70 proceedings.

Applying the same logic, removing the separate sentencing hearing procedure under article 76 and the leave to appeal procedures under article 82(1)(d) from article 70 proceedings is clearly not addressing any "gap" in the Rules. Therefore, dis-applying these statutory articles via provisional rule amendments cannot be said to fall within the second condition which must be satisfied for the judges to exercise their exceptional article 51(3) powers.

Third, the provisional amendments to rule 165 are inconsistent with the new articles added to rule 165(2) and, thus, fail to satisfy article 51(4) of the Statute. Of particular concern is the inclusion of articles 39(2)(b) of the Statute (except in relation to the Pre-trial Chamber), 76(2) and 82(1)(d). The inconsistency between the amendments and the Statute is expressly recognized in the provisional rule because one of the amendments states that, *inter alia,* articles 39(2)(b), 76(2) and 82(1)(d) shall not apply. As a matter of principle, the GoK submits that action which seeks to circumvent statutory articles *via* secondary legislation is problematic, particularly when the action is not taken by the Court's primary legislature - States. The GoK recognizes that various provisions in Chapter 9 of the Rules state that certain articles of the Statute shall not apply to article 70 proceedings (e.g. rule 163(2) and (3) and rule 165(2)). However, these Rules were drafted and adopted by the States Parties.

Of added concern regarding the provisional amendments at issue is the fact that the drafting history of the Rules reveals that it was suggested during the discussions on the procedure for article 70 offences that in dealing with such offences, a single judge would suffice for the Pre-Trial and Trial Chambers and a panel of three judges for the Appeals Chamber.[2] However, this proposal was challenged and eventually rejected by State Parties. Specifically, "[s]ome delegations argued that the proposal was incompatible with the Statute (in particular article 39, paragraph 2(b)), except regarding the Pre-Trial Chamber. This opposition could not be overcome and the rule on reduced chambers had to be deleted."[3]

Finally, while the provisional amendments to rule 165 are procedural in nature, they still set, what the GoK asserts, is a problematic precedent which gives rise to the concern that this procedure could be used in future to circumvent substantive rights enshrined in the Statute such as those set out in article 67. It is, therefore, necessary, that the judges'

[2] Hakan Fri man, "Offences and Misconduct Against the Court", Roy S. Lee (ed), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, p. 614.
[3] *Ibid,* p. 615.

purported exercise of the exceptional powers set out in article 51 (3) be properly scrutinized.

Please accept, Your Excellency, the assurance of the GoK's highest consideration.

Yours sincerely,

[Signed]
Githu Muigai, EGH, SC
Attorney General

Copy to:
Sylvia Fernandez De Gurmendi
President of the International Criminal Court

Annex VII

Statement of Belgium of 21 November 2016 relating to the withdrawal of references to the Paris Convention of 13 January 1993 from its pending amendment proposals for article 8 of the Rome Statute

Madam Coordinator,
Esteemed colleagues,

1. As you are aware, Belgium was the source of a proposed amendment to article 8 of the Rome Statute aimed at the inclusion, within the category of war crimes under the jurisdiction of the Court, of, in particular, a provision on the prohibition of the use of chemical weapons as listed in the Paris Convention of 13 January 1993 on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (the text of this instrument can also be found in the informal compilation of proposals to amend the Rome Statute distributed on 23 January 2015 – Point II – Belgium, A. Proposed Amendment 2, proposed addition of paragraph (xxviii) to article 8(2)(b) and of paragraph (xiv) to article 8(2)(e)). Belgium is of the view, however, that following the adoption of amendment 1 to the Rome Statute at the Conference held in Kampala (Uganda) on 10 June 2010, this amendment proposal which refers to the 1993 Convention is no longer necessary.

2. Belgium indeed considers that the prohibition of the use, during armed conflict, of chemical weapons is already covered by the provisions found under article 8(2)(b)(xvii) (prohibition of the use of poison and poisoned weapons) and (xviii) (prohibition of the use of asphyxiating, poisonous or other gases, and of all analogous liquids, materials and devices). This prohibition, which originally only applied to international armed conflicts, was expanded in scope on the occasion of the Review Conference of the Rome Statute, which was held in Kampala, Uganda, in 2010, to include non-international armed conflicts (new article 8(2)(e)(xiii) and (xiv) of the Rome Statute, which are already in force).

3. In a manner consistent with this position, Belgium has, over the course of its parliamentary debates leading to the ratification of amendment 1, explicitly stated that the prohibition of the use of chemical weapons, as provided for in the 1993 Convention, was of a customary character in relation to both international and non-international armed conflicts, and has welcomed the fact that the adoption of the Belgian-proposed amendment to the Rome Statute, aimed at extending the scope of the Court's jurisdiction in this regard so as to cover non-international conflicts, would serve to reinforce the customary character of this prohibition.[1]

4. Professor Clarck did not say anything different, when, in his statement of 16 March 2015 before the Working Group on Amendments – made in his capacity as an expert on the issue – he noted that the content of the provisions contained in article 8 already covered the scope of application of both the 1925 Protocol and the 1993 Convention. To deny that article 8(2)(b)(xvii) and (xviii), as well as article 8(2)(e)(xiii) and (xiv) of the Rome Statute also cover chemical weapons would have the effect of stripping them of most of their substance.

5. Lastly, Belgium is pleased that this clarification of its position, as the State at the source of amendment 1, may provide the Court with a coherent, and, so to speak, authentic, interpretation of the criminal offences laid down in its Statute.

6. In conclusion, unless there is any objection on the part of one of the co-authors of this proposed amendment, we would ask that the references be removed from all future compilations of pending amendment proposals.

---

[1] Belgian Senate, 2012-2013 session, Draft law in support of the Amendment to article 8 of the Rome Statute of the International Criminal Court, adopted in Kampala on 10 June 2010 at the Review Conference of the Rome Statute, 26 September 2013, Doc 5-2271/1, Explanatory statement, p. 8, point 2.2.2.2., paragraphs 30 to 34.