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# **THE INTERNATIONAL CRIMINAL COURT:**

## **Drafting effective Rules of Procedure and Evidence concerning the trial, appeal and review -**

### **Memorandum for participants at the Siracusa intersessional meeting, 22 to 26 June 1999**

#### **INTRODUCTION**

This memorandum is being distributed to the participants at the intersessional meeting organized by the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy from 22 to 26 June 1999 to discuss issues concerning Rules of Procedure and Evidence (ICC Rules) implementing Parts 6 (The Trial) and 8 (Appeal and Revision) of the Rome Statute of the International Criminal Court (Statute). Persons invited to the meeting include representatives of governments, intergovernmental organizations, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Tribunals), and non-governmental organizations, all of whom are attending in their personal capacity. The recommendations of participants will be provided to the delegates at the second session of the Preparatory Commission at the United Nations (UN) Headquarters in New York (26 July to 13 August 1999). Under Resolution F of the Diplomatic Conference and General Assembly Resolution 53/105 of 8 December 1998, the Preparatory Commission has the task of preparing draft ICC Rules for adoption by the Assembly of States Parties after the Statute enters into force.

The Siracusa meeting is one of three important intersessional meetings concerning the International Criminal Court since the first session of the Preparatory Commission in February 1999 bringing together representatives of each of the three groups involved in the establishment of the Court: governments, intergovernmental organizations and non-governmental organizations. The French government organized an intersessional seminar on the role of victims in the Court in Paris (26 to 29 April 1999) and it plans to submit the recommendations of participants to the Preparatory Commission at its second session as a working document. The British Institute of International and Comparative Law and the United Kingdom NGO Coalition for an International Criminal Court organized an intersessional meeting in cooperation with the United Kingdom Foreign and Commonwealth Office on 5 June 1999 in London on certain aspects of evidentiary rules. The report of this meeting will be provided to delegates at the Preparatory Commission in July.

The Preparatory Commission is scheduled to consider ICC Rules concerning Part 4 (Composition and Administration of the Court - Articles 34 to 52, Part 5 (Investigation and Prosecution - to the extent not yet considered), Part 6 (The Trial - Articles 62 to 76) and Part 8 (Appeal and Revision - Articles 81 to 85). The Preparatory Commission is also scheduled to discuss ICC Rules which affect the role of victims and involve other parts of the Statute and the

Elements of Crimes with respect to war crimes other than grave breaches of the Geneva Conventions of 1949 and crimes against humanity. It is also expected to consider the report of the rapporteur on the crime of aggression. This memorandum addresses only Amnesty International's concerns with respect to Rules of Procedure and Evidence for Parts 6 and 8. Although the Siracusa meeting is not planning to duplicate the work of the Paris seminar concerning the role of victims, it will necessarily have to take the role and rights of victims into account in its discussions of the ICC Rules related to trials, appeals and revision. Amnesty International addressed these issues in its paper, *The International Criminal Court: Ensuring an effective role for victims - Memorandum for the Paris seminar, April 1999*, April 1999 (AI Index: IOR 40/06/99), copies of which are being provided to participants at the Siracusa meeting.

The delegates to the Preparatory Commission will need to learn from the experience of the four previously established *ad hoc* international criminal tribunals in preparing draft ICC Rules of Procedure and Evidence for adoption by the Assembly of States Parties. In particular, it will need to look at the Rules of the International Military Tribunal at Nuremberg, the Rules of Procedure and Evidence of the Yugoslavia Tribunal (Yugoslavia Rules) and the Rules of Procedure and Evidence of the Rwanda Tribunal (Rwanda Rules). Nevertheless, the Rome Statute is significantly different from the Charter of the Nuremberg Tribunal and the Statutes of the Yugoslavia and Rwanda Tribunals. Therefore, the Rules will need to take into account those differences. The delegates should also take into account the extensive commentaries by non-governmental organizations published over the years on issues concerning procedure and evidence.<sup>1</sup>

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<sup>1</sup> See, for example, American Bar Association, *Draft Rules of Procedure and Evidence for the International Criminal Court: Prepared by a Working Group of the American Bar Association Section of International Law and Practice* (1999); Amnesty International, *The international criminal court: Making the right choices - Part II: Organizing the court and guaranteeing a fair trial*, July 1997 (AI Index: IOR 40/11/97); British Institute of International and Comparative Law and United Kingdom NGO Coalition for an International Criminal Court, *Report on Conference on Rules of Evidence on 5 June 1999* (forthcoming); Human Rights Watch, *Commentary to the Preparatory Commission: Rules of Evidence and Procedure for the International Criminal Court, Part 1*, February 1999; Lawyers Committee for Human Rights, *Pre-Trial Rights in the Rules of Procedure and Evidence: International Criminal Court Briefing Series*, Vol. 2, No. 3 (February 1999); Women's Caucus for Gender Justice in the International Criminal Court, *Priority Concerns of the Women's Caucus in the Preparatory Committee for the International Criminal Court: 16-26 February 1999* (1999); *Suggestions Relating to the Rules of Procedures and Evidence - Protective Measures* (1999) and *Victim Participation* (1999).

The Preparatory Commission has before it two different proposed approaches for the structure of the ICC Rules. One proposal, submitted by Australia “to assist the Preparatory Commission in its work” on the ICC Rules and designed to “provide a starting point for the work of the Commission on this element of its mandate” (Australian draft Rules), is modelled on the Yugoslavia Rules, but modified to take into account the Statute.<sup>2</sup> However, the proposal states that the approach taken in any particular draft rule “does not necessarily reflect the final view of the Government of Australia”. The parts of the Australian draft Rules concerning trial, appeal, revision and compensation are to be addressed at the Siracusa meeting.<sup>3</sup>

A second proposal, presented by France (French draft Rules), generally follows the structure of the Statute, except that it places “all questions dealing with the conduct of proceedings before the Court” in a single section rather than leaving them scattered throughout the ICC Rules, as these matters are in the Statute.<sup>4</sup> This proposal is designed to ensure that the ICC Rules will be “a practical guide” for Court staff in their routine work and to “serve as an operational basis for conducting the proceedings assigned to them”.<sup>5</sup> The French approach is significantly different from the Yugoslavia Rules in a number of respects.

Amnesty International takes no position on which approach is preferable, but it believes that the ICC Rules should be as short, simple and flexible as possible, should not repeat the text of the Statute and should be in a logical order so that they are easy to understand by all involved in proceedings before the new Court. Such an approach would help to ensure that the ICC Rules will not require frequent amendments, which will be difficult to adopt.<sup>6</sup> This memorandum generally follows the sequence of the articles in the Statute and discusses some of the government and non-governmental organization proposals which have been made so far concerning ICC

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<sup>2</sup> U.N. Doc. PCNICC/1999/DP.1, 26 January 1999. The Rwanda Rules are generally the same as the Yugoslavia Rules, but differ from them in a number of important ways. See John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998); Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

<sup>3</sup> Part 6 (The trial: Australian draft Rules 74 to 102); Part 9 (Appeal: Australian draft Rules 108 to 126); and Part 13 (Revision and compensation: Australian draft Rules 144 to 149).

<sup>4</sup> U.N. Doc. PCNICC/1999/DP.2, 1 February 1999.

<sup>5</sup> The French proposal would divide the ICC Rules into seven parts: 1. General provisions; 2. Organization and administration of the Court; 3. Proceedings; 4. Offences against the functioning of the Court; 5. Penalties; 6. Enforcement; and 7. International cooperation. Four of the sections of Part 3 on proceedings are relevant to this memorandum: 1. Provisions common to all phases of the proceedings (French draft Rules 35 to 45); 4. Trial proceedings (French draft Rules 67 to 83); 5. Appeal (French draft Rules 84 to 90); and 6. Revision (French draft Rules 91 to 97). However, the French government has proposed texts concerning trial, appeal, revision and compensation only for French draft Rules 35 to 36 (U.N. Doc. PCNICC/1999/DP.10/Add.1, 22 February 1999), 37 (U.N. Doc. PCNICC/1999/DP.10, 22 February 1999) and 57 (U.N. Doc. PCNICC/1999/DP.7/Add.2, 23 February 1999) at the first session of the Preparatory Commission.

<sup>6</sup> The Yugoslavia Rules have been amended 15 times since they were adopted in 1994. The Rwanda Rules have been amended five times since they were adopted in 1995 and are undergoing further revision in June 1999.

Rules. The suggestions for participants at the Siracusa meeting are preliminary in nature and may be modified in the light of their recommendations when Amnesty International submits its recommendations to the Preparatory Commission concerning the ICC rules for the trial, appeal, revision and compensation.

## **I. THE NEED FOR THE RULES CONCERNING THE TRIAL TO BE CONSISTENT WITH INTERNATIONAL LAW AND STANDARDS**

It is essential that all ICC Rules concerning trials be fully consistent with the right to fair trial as reflected in the Statute and in other international law and standards. The ICC Rules must also give due regard to the role of victims in the proceedings and their rights.

### **A. The right to fair trial (Articles 64, 66 to 68)**

The starting point for drafting the ICC Rules concerning the trial is Article 67 (1), which provides that “[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially” and to certain minimum guarantees listed in that paragraph. This provision is buttressed by Article 64 (2), which requires the Trial Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of witnesses”.

The wording of these provisions makes clear, first, that the right to a fair trial, in contrast to the right to a public trial, is not limited by other provisions of the Statute. Second, it makes clear that the duty of the Trial Chamber to ensure that a trial is “fair and expeditious” is not limited to the minimum guarantees expressly listed in Articles 66 and 67 (1). Therefore, it follows that the Trial Chamber must look at other international law and standards concerning the right to a fair trial.<sup>7</sup> Third, it states that, although the Trial Chamber must give “due regard for the protection of victims and witnesses”, it must not be at the expense of the Trial Chamber’s duty to ensure that the trial is “fair and expeditious and is conducted with full respect for the rights of the accused”. The balance struck in the Statute between the rights of the accused and protection of victims is emphasized in Article 68 (1), which provides that measures to protect victims and witnesses “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and

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<sup>7</sup> Relevant provisions and instruments include Articles 9, 10 and 11 of the Universal Declaration of Human Rights; Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR); the UN Standard Minimum Rules for the Treatment of Prisoners; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Articles 7 and 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers and the UN Guidelines on the Role of Prosecutors. The four Geneva Conventions of 1949 and their Protocols have important guarantees of the right to fair trial, including for persons charged with war crimes or crimes against humanity.

impartial trial”. This rule is reiterated in Article 68 (3) and (5). Therefore, the ICC Rules must fully respect these provisions.

### **B. Place of trial (Article 62)**

There is no need for a rule concerning the manner or criteria for deciding whether to hold the trial at a place other than the seat of the Court. This is a matter which could easily be left to the Regulations, which under Article 52 (1), the Court may adopt when “necessary for its routine functioning”. There is no Australian draft Rule implementing this article. French draft Rule 37 sets out a detailed procedure for deciding whether the Court should meet in a state other than the Netherlands. It proposes that in a particular case the Court may meet in another state “where it appears that for reasons relating to travel by members of the Court it would be simpler and less costly to do so.” A less restrictive and preferable alternative is suggested in a footnote: “where it appears that the interests of justice would be better served by so doing”. This would permit the Court to take into account other and more important considerations. For example, if the Pre-Trial Chamber or Trial Chamber were to sit in a state in another continent where a significant number of cases before the Court arose, this move could help demonstrate the international community’s concern, increase public support and cooperation in the states concerned for the Court’s work and act as a catalyst for the reconstruction of national judicial systems able to conduct fair trials.

### **C. Trial in the presence of the accused (Article 63)**

There is no need for a rule to implement this article, as the Court could provide for disruption by the accused during trial through its Regulations, which it may adopt under Article 52 (1) when “necessary for its routine functioning”. Any rule should leave the Court sufficient flexibility to take into account unforeseen developments in technology and be consistent with the presumption of innocence. There is no Australian draft Rule specifically on the subject of disruption by the accused. For principles concerning the treatment of the accused generally, see the discussion below under Article 64.

### **D. Functions and powers of the Trial Chamber (Article 64)**

There are a number of matters concerning the functions and powers of the Trial Chamber, apart from the general duty in Article 64 (1) to ensure a fair trial, where ICC Rules could be helpful.

#### **1. Orders relating to the release or detention of the accused person**

Australian draft Rule 74, which implements Article 64 (6) (a), provides that “the Trial Chamber shall be responsible for determining whether the accused person is detained in custody and shall carry out this function as it would be discharged by the Pre-Trial Chamber”. There is no French draft Rule concerning any role for the Trial Chamber in decisions on detention or release. French draft Rule 60 (b) (for which there is yet no text) provides for such decisions to be taken by the Pre-Trial Chamber. If this were adopted, the Trial Chamber could not take into account changed circumstances on the eve of trial or during trial, even if that trial were prolonged, unless the Trial Chamber were to refer the matter to the Pre-Trial Chamber or another Judge in the Pre-Trial



Division pursuant to Article 64 (4). The Yugoslavia Tribunal has had to modify pre-trial detention and release orders throughout the course of the proceedings, as in decisions concerning the scope of the house arrest of the accused in and the decision to detain the accused during the trial in the *Blaski\_* case. If French draft Rule 60 (b) is adopted, it should provide for a speedy referral process.

Australian draft Rule 75 (a) provides that within a to-be-determined number of days after the Trial Chamber has been constituted it should hold a hearing to review the order of the Pre-Trial Chamber concerning release or detention at which the Prosecutor and the accused may make a submission. The comment to this provision states that the Trial Chamber should do so “as soon as possible after being constituted”. However, it would be more effective for the rule itself to require the Trial Chamber to conduct such a review as soon as possible after being constituted and in no case later than 48 hours after being constituted.

Article 68 (3) provides that the “views and concerns” of victims “may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”. Therefore, the ICC Rules must provide for notification to victims or their legal representatives of the constitution of the Trial Chamber, their opportunity to make submissions at the hearing (if the Trial Chamber determines that such submissions would be appropriate at this stage in a particular case) and the manner for making such submissions. Such submissions could be useful on the question whether the Trial Chamber has been implementing as a *general practice* the criteria in Article 58 (1) and other international law and standards for determining whether to release an accused or keep the person in detention correctly. In a *particular case*, if the victims have provided information to the Prosecutor relevant to implementation of these criteria and they are concerned that the Prosecutor has not taken this information properly into account, then a submission to the Court concerning the accused might be appropriate. However, the ICC Rules should ensure that submissions at this stage of proceedings are limited to matters relevant to release or continued detention.

Australian draft Rule 75 (b) provides that the Trial Chamber may confirm the order of the Pre-Trial Chamber or modify the order “if satisfied that changed circumstances so require”. The Trial Chamber should not be limited to these grounds, however, since the order of the Pre-Trial Chamber may have been based on an error of law or inadequate information concerning circumstances at the time of the order which was not then available to the accused. The ICC Rules should permit the Trial Chamber to vacate or modify the order of the Pre-Trial Chamber if it was based on an error of law or on inadequate information at the time of the order which was not the fault of the accused.

Australian draft Rule 75 (c) requires the Trial Chamber to review its order regularly, leaving the timing to be decided in the ICC Rules, and authorizes it to review the order “at any time on the request of the Prosecutor or the accused person”. The ICC Rules should require the Trial Chamber to review the order frequently, especially if it calls for continued detention rather

than release, to determine whether it will be possible through alternative measures to avoid the lengthy periods of pre-trial detention which have plagued the Yugoslavia and Rwanda Tribunals.<sup>8</sup>

## 2. Control of preparations for trial

Australian draft Rule 76, which is based on Yugoslavia Rule 65*bis*, requires the Trial Chamber “to confer with the parties by holding status conferences on a regular basis prior to the commencement of the trial” and states that “[t]he purpose of these conferences shall be to facilitate expeditious preparation for trial by, *inter alia*, keeping under review matters arising under part 5”. The draft rule does not require notice to victims or their legal representatives or provide for their attendance at such conferences. To the extent that there is no general rule requiring notice to victims or their legal representatives concerning stages of the proceedings, Australian draft Rule 76 should provide for such notice. This draft rule should also provide for victims to be able to make known their views and concerns through their legal representatives at such a status conference to the extent that the Trial Chamber determines pursuant to Article 68 (3) in a particular case that it would be appropriate. The draft rule should also clarify whether the reference to Part 5 is to the Australian draft Rules, dealing with disclosure, or the Statute, dealing with investigation and prosecution.

## 3. Motions before, during and after trial

The ICC Rules should govern motions before, during and after trial. In the interests of simplicity and ease of application, it would be better to have a single rule governing motions made any stage of the trial, with any necessary modifications for the relevant stage. Australian draft Rule 77, which is based in part on Yugoslavia Rule 72, provides in paragraph (a) that either party may move in writing before trial “for appropriate relief or ruling by way of preliminary motions” and paragraph (c) provides that “the other party shall be afforded an opportunity to respond to it”, except, according to paragraph (d) when the motion is to be heard on an *ex parte* basis. Although the comment to the draft rule states that “[c]onsideration needs to be given to the question of whether a list of the types of preliminary motions needs to be included in the Rules or Regulations”, it would be better to avoid such a list as the variety of motions which may be necessary in practice cannot be anticipated at this stage. Any list should be merely illustrative, not exclusive. Consideration should also be given to permitting an oral pre-trial motion, at least in an urgent matter, such as a motion for measures to prevent flight of an accused or to protect an accused who alleges ill-treatment in custody. The party making such an urgent motion could be required to put it in writing at the earliest possible opportunity. Australian draft Rule 78 permits oral motions during trial. Paragraph (e) requires the Trial Chamber to decide preliminary motions “as expeditiously as possible” and provides that a preliminary motion “may be summarily denied on the grounds that insufficient allegations of fact or law have been set forth to justify further inquiry by the Trial Chamber”. Paragraph (f) provides that “[t]ime limits relating to preliminary

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<sup>8</sup> See, for example, the proposal for using house arrest, submission to the care of a third party or limits on movement to the territory of a state in Report of the Preparatory Committee on the Establishment of an International Criminal Court, 51 U.N. GAOR Supp. (No. 22A), U.N. Doc. A/51/22, vol. II (1996), p. 139.

motions shall be established in the Regulations”. Both paragraphs (e) and (f) could be included in the ICC Rules.

Paragraph (b), which provides that “[d]ecisions on preliminary motions are without interlocutory appeal except where such appeals are permitted in accordance with article 82” appears to be too restrictively worded. Although Article 82 (1) and (2) expressly identify a number of decisions which may be the subject of an interlocutory appeal, these provisions do *not* state that they are the *only* decisions which may be subject to an interlocutory appeal. It will be up to the Appeals Chamber to determine whether it has the power under the Statute to entertain an interlocutory appeal in other circumstances, for example, in an urgent case where the Trial Chamber is unable to act or has grossly abused its discretion in refusing to certify that its decision requires an immediate resolution by the Appeals Chamber pursuant to Article 82 (1) (d). Paragraph (b) should be deleted or amended to provide that decisions may be subject to an interlocutory appeal in accordance with the Statute.

Australian draft Rule 78 governing motions during trial is virtually identical to the draft Rule for pre-trial motions, except that oral motions are permitted. The commentary above concerning pre-trial motions applies with equal force to this draft rule. The two draft rules could be combined.

The ICC Rules should provide for post-trial motions for any issues which continue to fall within the jurisdiction of the Trial Chamber under the Statute after the decision and sentence, either before the notice of appeal is filed or with respect to any matters remanded to the Trial Chamber by the Appeals Chamber under Article 83 (2). There is no Australian draft Rule governing such motions.

#### **4. Treatment of the accused, apart from an accused disrupting proceedings**

The ICC Rules will need to ensure that prompt, independent, impartial and professional medical examinations of the accused are conducted whenever necessary. In particular, examinations will need to be conducted if the accused complains that he or she was tortured or ill-treated in the custody of national authorities, an international peace-keeping operation or the Court. Such medical examinations will need to satisfy international standards for such investigations.<sup>9</sup> Examinations will also be needed to determine whether the accused understands the nature of the charges against him or her and whether the accused is fit to stand trial. In some cases, the behaviour of the accused during the trial may require the Trial Chamber on its own motion, even

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<sup>9</sup> These include the Principles for the Medical Investigation of Torture and Other Cruel, Inhuman or Degrading Treatment in Amnesty International, *Prescription for change: Health professionals and the exposure of human rights violations*, May 1996 (AI Index: ACT 75/01/96). In addition, health professionals and representatives of non-governmental organizations and intergovernmental organizations are preparing a detailed set of standards for medical examinations in cases where a person is believed to have been tortured or ill-treated to be called the Istanbul Protocol.

if the issue is not raised by the Prosecutor or the counsel for the accused, to order a medical examination to determine if the accused is still competent to stand trial.<sup>10</sup>

Australian draft Rule 79 (a), which is based upon Yugoslavia Rule 74 *bis*, provides that “[t]he Trial Chamber may, *proprio motu* or at the request of a party, order a medical, psychiatric or psychological examination of the accused” and shall entrust any such examination to experts on a list previously drawn up by the Registrar. This provision is a useful one, but it would be too restrictive to require the expert in all cases to have been on a list drawn up beforehand by the Registrar since some medical, psychiatric or psychological problems may require a specialist who is not on such a list or a specialist who speaks the language of the accused fluently. Therefore, the Trial Chamber should have some flexibility in its choice. Australian draft Rule 79 (b) authorizes the Trial Chamber to order a medical examination “to satisfy itself that an accused understands the nature of the charges against him or her”. It would appear that paragraph (a) would authorize an examination in these circumstances, so this provision may not be strictly necessary, but it could be a helpful reminder to the Trial Chamber of its duty under Article 64 (8) (a).

France has also provided for medical, psychological and psychiatric examinations, but only in the pre-trial phase. French draft Rule 57.3 provides a somewhat duplicative set of provisions for obtaining such examinations in the Pre-Trial Chamber and provides that a person may refuse to undergo such an examination. However, as in the case of Rudolph Hess, the Trial Chamber will need to be able to determine on the eve of trial or even during trial whether an accused is fit to stand trial. If the French draft Rule 57.3 is adopted, it should be amended to provide for a referral of requests for such examinations by the Trial Chamber to the Pre-Trial Chamber pursuant to Article 64 (4) and for a prompt decision on the request. This approach, however, seems somewhat more cumbersome than having the Trial Chamber itself order an examination.

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<sup>10</sup> The International Military Tribunal at Nuremberg ordered a medical examination of Rudolf Hess before trial to determine whether he was competent to stand trial, even though Hess considered himself fit to plead, but the medical commission did not report until after the trial had begun. Despite bizarre behaviour during the trial, the medical commission and the Tribunal determined that Hess was sane and fit to remain on trial. See Eugene Davidson, *The Trial of the Germans* (1996), 119-124; Telford Taylor, *The Anatomy of the Nuremberg Trials* (1992), 151-152, 177-180; Ann & John Tusa, *The Nuremberg Trial* (1995), 131, 137, 161-163, 294-295.

The ICC Rules must ensure that the accused is treated consistently with the presumption of innocence in the courtroom and consistently with international law prohibiting torture and ill-treatment. Australian draft Rule 80, based on Yugoslavia Rule 83 as in effect until 10 December 1998, provides that “[i]nstruments of restraint, such as handcuffs, shall not be used except as a precaution during transfer or for security reasons, and shall be removed when the accused appears before a Chamber.” Australian draft Rule 80 should be amended to reflect the amendments to Yugoslavia Rule 83 made on 10 December 1998 to require that instruments of restraint only be used on an order by the Registrar and to include the more precise grounds of protecting the accused from self-injury or injury to others or to prevent serious damage to property.<sup>11</sup> However, instruments of restraint should only be used as a last resort and only for the duration of the danger. The necessity for such restraints should be kept under constant review by the Registrar and be subject to judicial supervision. The amended rule should also be supplemented in the Rules of Detention by forbidding the use of prohibited forms of restraint in other places than the courtroom, such as chains and leg irons, which are expressly prohibited by Rule 33 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, and stun-belts, which can inflict extreme pain and suffering, amounting to torture.<sup>12</sup>

## 5. Joint and separate trials

Article 64 (5) provides that “[u]pon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.” Any ICC Rules concerning joinder and severance must ensure that reasons of judicial economy and burdens on witnesses not lead to joinder of accused at the expense of the accused’s right to a prompt and fair trial. For example, if an accused is one of seven persons charged with war crimes in a single incident and none of the others have been apprehended, particularly if there is no immediate likelihood of their apprehension, then the trial of that accused should proceed without waiting for the arrest of the other seven accused. Although severance of the accused would impose an additional burden on the Court and witnesses, Article 67 (1) (c) guarantees the right of the accused to a prompt trial and Article 64(2) requires the Trial Chamber to ensure that the trial is “expeditious”.

Australian draft Rule 81, which is based upon Yugoslavia Rule 82 (B), respects these principles. It provides that “[t]he Trial Chamber may order that persons accused jointly be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice”. Australian draft Rule 82

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<sup>11</sup> As amended on 10 December 1998, Yugoslavia Rule 83 provides: “Instruments of restraint, such as handcuffs, shall be used only on the order of the Registrar as a precaution against escape during transfer or in order to prevent an accused from self-injury, injury to others or to prevent serious damage to property. Instruments of restraint shall be removed when the accused appears before a Chamber or a Judge.”

<sup>12</sup> See Amnesty International, *United States of America: Cruelty in control? The stun belt and other electro-shock equipment in law enforcement*, 8 June 1999 (AI Index: AMR 51/54/99).

(a), which is based on Yugoslavia Rule 82 (A), states that “[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately”, and Australian draft Rule 82 (b) provides that “[i]n joint trials, evidence which is admissible against only some of the joint accused may be considered only against the accused concerned.” Both provisions provide useful guarantees of the rights of the accused and should be included in the ICC Rules. There is no French draft Rule expressly dealing with joinder.

## 6. Maintaining records and evidence

In the interests of simplicity, any ICC Rules which are deemed necessary concerning the duty of the Registrar to maintain records of the trial proceedings and to retain and preserve custody of all physical evidence offered during the trial should be included in the ICC Rules concerning the Registrar. Australian draft Rule 83, which is modelled on Yugoslavia Rule 81 (A), (B) and (D) requires the Registrar to “cause to be made and preserve a full and accurate record of all proceedings”, authorizes the Trial Chamber to order the disclosure of all or part of the records when confidentiality is no longer necessary and permits the Trial Chamber to authorize photography, video-recording or audio-recording of the trial by persons other than the Registrar. This draft rule serves a number of useful purposes and could be included in the ICC Rules. Australian draft Rule 84 requires the Registrar to retain and preserve all physical evidence offered during the trial, subject to the Regulations or order by the Court. Australian draft Rules 83 and 84 could be made applicable to all stages of the proceedings.

## 7. *Amicus curiae* submissions

The ICC Rules should provide for submissions by *amici curiae* both in a particular case and on more general issues applicable in a range of cases. Such submissions have proved invaluable in both the Yugoslavia and Rwanda Tribunals.<sup>13</sup> Australian draft Rule 85, which is based on Yugoslavia Rule 74, provides in paragraph (a) that “[t]he Trial Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit a brief on any issue specified by the Chamber” and, if a brief has been submitted, “to make submissions to it at the hearing of the case”. Paragraphs (b) governs filing procedure and (c) and (d) leave the time limits and other matters to the Regulations. The draft Rule is basically satisfactory, but it should permit the Trial Chamber to invite or grant leave for submissions by *amici curiae* not limited to a particular case before the Trial Chamber whenever it determines that such submissions would be of assistance, for example, with respect to possible amendments of the Regulations or with respect to suggestions to the Court that it make recommendations to the Assembly of States Parties pursuant to Article 51 (2) for amendment of the ICC Rules. There is no French draft Rule specifically addressing submissions by *amici curiae*.

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<sup>13</sup> For example, there were numerous submissions by *amici curiae* in the *Blaski* case on the question of the power of the Yugoslavia Tribunal to issue subpoenas and binding orders. Submissions by *amici curiae* in the *Akayesu* case played a role in determining whether charges of sexual assault should be included. See Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 Am. J. Int'l L. (1999), 97, 106 note 45.

### **8. Control of proceedings (apart from disruption by the accused)**

The Trial Chamber has inherent power to maintain control over its proceedings, supplemented by Article 64 (9) (b), which expressly provides that it has the power, *inter alia*, on the application of a party or on its own motion to “[t]ake all necessary steps to maintain order in the course of a hearing”. Australian draft Rule 86, which is based upon Yugoslavia draft Rule 80, provides that in the exercise of this power, “the Trial Chamber may exclude a person from the courtroom in order to protect the right of an accused to a fair and public trial, to protect a witness or to maintain the dignity and decorum of proceedings”. This is a useful rule and should be included in the ICC Rules. There is no French draft Rule expressly dealing with this question.

### **E. Proceedings on an admission of guilt (Article 65)**

The procedures for consideration of admissions of guilt in Article 65 are so detailed that it is doubtful whether very many or any ICC Rules will be necessary. There is no Australian draft Rule specifically on the subject. However, France has proposed that there be seven ICC Rules for such proceedings, but it has not yet proposed text for these rules.<sup>14</sup> If any rules are drafted they should take into account Yugoslavia Rule 62*bis*, as amended on 10 December 1998, which requires the Trial Chamber to be satisfied that a guilty plea have been made voluntarily, that it was informed, that it is not equivocal and that there is a sufficient factual basis for the plea.

### **F. The role of victims during the trial (Article 68)**

Amnesty International has indicated how the ICC Rules should provide for victims to participate in the trial and other stages of the proceedings in its paper, *The International Criminal Court: Ensuring an effective role for victims - Memorandum for the Paris seminar, April 1999*, April 1999 (AI Index: IOR 40/06/99). The ICC Rules must give due regard to the rights and interests of victims and witnesses. In particular, they must ensure that victims are kept informed of the proceedings and can participate in the proceedings in a meaningful way. The Australian draft Rules are silent on the question of how victims may participate in the trial, apart from Australian draft Rule 87 concerning the solemn undertaking which all adult witnesses should take before giving testimony (see discussion below of evidence). There is no text for Australian draft Rule 92 on the presentation of the views of victims at the trial or in post-trial proceedings, but the comment to that draft rule states that the ICC Rules need to elaborate upon Article 68 (3), “particularly in relation to the involvement of the legal representatives of victims”. There is no text for French draft Rule 42 on participation of victims. These issues are addressed in the report of the participants at the Paris seminar to be submitted by France to the Preparatory Commission in July.

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<sup>14</sup> It has suggested the following French draft Rules: 72. Preliminary questioning of the accused as to whether he wishes to plead guilty or not guilty; 78. Questioning of the accused by the President, to ensure that he understands the implications of his or her admission; 79. Decision of the Chamber on whether to accept or reject the admission; 80. Presentation by the Prosecutor of further evidence corroborating the admission; 81. Decision of the Chamber on guilt; 82. Debate on the penalty; and 83. Sentencing.

## **G. Evidentiary rules (Article 69)**

It will be necessary to draft two types of rules concerning evidence. One set of rules is needed to address the criteria for determining the relevance or admissibility of evidence; the other is required to govern the manner in which relevant or admissible evidence is considered.

### **1. Determining relevance and admissibility**

*General provisions concerning admissibility of evidence.* Australian draft Rule 96 (a), which is based on Yugoslavia Rule 89 (A), provides that Article 69 and Australian draft Rules 96 to 102 shall apply in all the Chambers of the Court and that “[t]he Chambers shall not be bound by national rules of evidence”. Similarly, French draft Rule 37.2 provides that “[t]he chambers of the Court shall not be bound by national legislation governing evidence.” These approaches could be combined to clarify that the Court is bound by neither national legislation nor rules of procedure or the words “national law” could be used to clarify that neither national legislation, rules nor jurisprudence is binding on the Court.

Australian draft Rule 96 (b), which is based on Yugoslavia Rule 89 (B), provides that in matters not otherwise provided in Article 69 or Australian draft Rules 96 to 102, “a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are derived in accordance with Article 21 [concerning applicable law]”. This draft rule is an improvement over Yugoslavia Rule 89 (B) in that Article 21 provides a more certain list of factors, but both the Yugoslavia Rules and the Australian draft Rules fail to give sufficient guidance to the Court on how to weigh different types of evidence or when to exclude certain evidence. For example, although the hearsay rule was a rule which developed in the context of jury trials in common law jurisdictions to exclude certain evidence as inherently unreliable or evidence whose reliability could not be tested, the same concerns about reliability and inability to test the veracity or accuracy of hearsay mandate exclusion of such testimony and evidence from consideration by a Judge in the Court, unless it falls within a generally recognized exception to the rule against hearsay. However, to the extent that it is determined that hearsay - which is not already admissible in accordance with generally accepted exceptions - can be admitted, the Court should be required to give it less weight than direct testimony by a witness who saw the event, unless the witness is in the courtroom and subject to examination and cross-examination. The Court should also be required in its decision to specify whenever it is relying on such evidence and the weight it is according such evidence.

France has taken a different approach to the general rule for determining admissibility and weight of evidence. French draft Rule 37.1 provides that “[a]ll evidence submitted by the parties shall, in principle, be admissible before the chambers of the Court, which shall freely assess its probative value, in accordance with article 69, paragraph 4”. A footnote explains: “One of the consequences of the principle of freedom of evidence is that the agreements reached between the Prosecutor and the defence with regard to evidence are not binding on the Court. Moreover, there is no need to provide specific rules for the substantiation of certain facts.” The implications of this proposed rule in the context of cases involving sexual violence are discussed below. If this approach were adopted, there would be no criteria for assessing the admissibility, relevance or



weight of the testimony or other evidence on a consistent basis in each case. This approach could lead to very different outcomes from case to case in different Trial Chambers based on the same type of evidence. There is a danger that such different results could undermine public confidence in the Court. Moreover, the absence of such criteria could limit the ability of the Appeals Chamber to review the decisions of the Trial Chamber.

***Rulings on the relevance or admissibility of evidence.*** The ICC Rules should implement Article 69 (4) by providing for formal rulings on the relevance and admissibility of evidence. That provision states that the Court should take into account a number of factors, including “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”. The wording of Article 69 (4) makes clear that the balance between probative value and prejudice is only one of the factors which the Court should consider and that the ICC Rules are to govern the manner in which the Court assesses these factors, but not to limit the factors which the Court can consider.

France has proposed two rules concerning the manner for ruling on admissibility of evidence. French draft Rule 37.3 would serve a useful purpose by implementing Article 69 (7), which provides for the exclusion of evidence obtained by a violation of the Statute or internationally recognized human rights in certain circumstances. It makes clear that the relevant Chamber may declare evidence inadmissible on its own motion or on written request of the parties when the grounds in Article 69 (7) are present.

French draft Rule 37.4 provides that “[t]he chambers of the Court must set forth the reasons that led them to rule on the admissibility of evidence.” Australian draft Rule 96 (c), which the comment states “is intended to facilitate the consideration of evidentiary points on appeal”, requires the Chamber concerned to “place on the record the reasons for any rulings it makes on evidentiary matters”. Either approach will avoid one of the serious problems which has emerged in the evidentiary rulings of the Rwanda Tribunal and made appeals of such rulings difficult, if not impossible.

There is no text for Australian draft Rule 98, but the comment asks whether the ICC Rules should “refer to other factors that could be taken into account or set out a standard by which to balance these factors”. Although it would not be a problem if the ICC Rules were to identify other factors which the Court could consider, it would be both an unwarranted restraint on the Court’s judicial functions and an unwise restriction on the Court’s ability to take into account developments in jurisprudence for the ICC Rules to attempt to limit the number of factors which the Court could take into account under the Statute.

***Evidence of a consistent pattern of conduct.*** Although as a general rule, evidence of a consistent pattern of conduct should not be admissible, in certain circumstances, it could serve both judicial economy and a fair trial to permit the Court to take into account evidence of a consistent pattern of conduct. In accordance with the fundamental principle of equality of arms, it is essential that the right to present evidence of a consistent pattern of conduct apply to the accused as well as to the Prosecutor. For example, an accused commander charged with superior

responsibility for a massacre carried out by his or her forces should be able to introduce evidence of a consistent pattern of conduct demonstrating a commitment to respect international humanitarian law throughout the conflict and to prevent or punish similar crimes.

Similarly, in appropriate circumstances, the Prosecutor should be able to introduce evidence of a consistent pattern of conduct. For example, it might be appropriate when a person has been charged on the basis of superior responsibility for failing to prevent or punish rapes in one district by the forces under the commander's command to permit the Prosecutor to introduce evidence that the commander had consistently failed to respond to reports that these forces had committed rapes in other districts throughout a conflict. Of course, evidence of a consistent pattern of conduct would not be enough on its own to secure an acquittal or a conviction, but in certain circumstances it could be relevant and in the interests of justice to permit it to be introduced, provided that the basic principle of the presumption of innocence is scrupulously respected and the other party has an adequate opportunity for examination of the evidence.

Australian draft Rule 99, which reproduces the text of Yugoslavia Rule 99 provides in Paragraph (a) that "[e]vidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice." The wording of the draft rule needs to be changed to take into account the broad scope of the Court's jurisdiction, which is not limited to violations of international humanitarian law. It includes violations of human rights, such as genocide and crimes against humanity, which can be committed in peacetime, and the crime of aggression, which is not a violation of the rules of international humanitarian law or the law of armed conflict (*jus in bello*), but a crime against peace in violation of other rules of international law (*jus ad bellum*). In accordance with the fundamental principle of equality of arms, it is essential that the right to present evidence of a consistent pattern of conduct apply to the accused as well as to the Prosecutor.

Paragraph (b) provides that the Prosecutor must disclose "[a]cts tending to show such a pattern of conduct" to the defence in accordance with the relevant rule concerning pre-trial disclosure. This provision is a useful reinforcement of the Prosecutor's general obligation of pre-trial disclosure now addressed in part in draft ICC Rules 5.14 to 5.16 and 5.19 to 5.21 of the Discussion paper proposed by the Coordinator<sup>15</sup> and in Australian draft Rules 66 to 67 and 71 to 73. Such rules are necessary to ensure that the right of the accused, recognized in Article 67 (1) (b), "[t]o have adequate time and facilities for the preparation of the defence", is respected.

**Confessions.** The ICC Rules should contain safeguards to ensure that any confessions or statements by the accused to national or international law enforcement authorities should be voluntary and comply with the requirements of the Statute. In particular, statements by an accused, before or after a confirmation of the charges, whether made to national authorities or to investigators in the Office of the Prosecutor, must comply with the requirements of the Statute, in particular those in Article 55. The burden to prove that the confession or statement was voluntary, of course, rests on the Prosecutor under Article 66. Article 66 provides that

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<sup>15</sup> U.N. Doc. PCNICC/1999/L.3/Rev.1, Annex II: Appendix.

“[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law”, that “[t]he onus is on the Prosecutor to prove the guilt of the accused”, and that, “[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”. Furthermore, Article 67 (1) (i) provides that among the minimum guarantees of the right to fair trial of the accused is the right “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal”. If the statement or confession was not voluntary and in compliance with the Statute, then it would be “[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights” whose admission “would be antithetical to and would seriously damage the integrity of the proceedings” under Article 69 (1). In such circumstances, the statement or confession would have to be excluded. The ICC Rules must fully respect these fundamental principles.

The comment to Australian draft Rule 100, which reproduces Yugoslavia Rule 92, indicates that the draft rule is simply “to provide a starting point for discussions”. The draft rule provides that “[a] confession by the accused given during questioning by the Prosecutor shall, provided the requirements of **rule 63 (ICTY Rules)** were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved” (emphasis in original). The comment to the draft rule states that there may be a conflict with Article 67 (1) (i). Yugoslavia Rule 63 provides important safeguards during the questioning of an accused by the Prosecutor to help ensure that any statements made to the Prosecutor are made voluntarily. Some of these safeguards are found in Article 55 (2) (d), but not all, and the other safeguards found in Yugoslavia Rule 63 should be included in the ICC Rules. Compliance with such safeguards would go far in most cases to meeting the Prosecutor’s burden of proof to show that a confession or statement of the accused was voluntary. Nevertheless, there may still be circumstances when statements made to the Prosecutor in accordance with such safeguards are not really voluntary, for example, if the accused has been threatened by a third party, such as an investigator.

In any event, Australian draft Rule 100 is not consistent with the requirements of Articles 66 and 67 (1) (i). It should be amended to provide that compliance with the safeguards in now found in Yugoslavia Rule 63 would be evidence that the confession or statement was voluntary. Alternatively, it could provide that a confession or statement by the accused to the Prosecutor in such circumstances would be presumed to be voluntary unless the defence argued that it was not. Then the Prosecutor would have to offer additional proof. This would be consistent with the approach in many criminal jurisdictions toward certain presumptions, such as the sanity of the accused, unless the defence of insanity is pleaded, or that an intentional killing is unlawful, absent a special defence, justification or excuse, such as self-defence.

***Evidence in cases of sexual assault.*** Australian draft Rule 101, which reproduces the text of Yugoslavia Rule 96 “to provide a starting point for discussion”, provides:

“In cases of sexual assault:

- (i) No corroboration of the victim’s testimony shall be required;
- (ii) Consent shall not be allowed as a defence if the victim:

(a) has been subjected to or threatened with or had reason to fear violence, duress, detention or psychological oppression, or

(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

(iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

(iv) Prior sexual conduct of the victim shall not be admitted in evidence.”

Paragraph (i) might be interpreted to suggest that the general rule is that corroboration of a victim's testimony would be required in cases not involving sexual assault. To avoid such a result, it could be transformed into a general rule applicable in all cases or, if retained here, could be qualified by some phrase indicating that, as in all other cases before the Court, no corroboration of a victim's testimony is required. Paragraph (ii) of the draft rule would be more appropriately discussed as an element of the crime rather than as a rule of evidence. France, which has proposed the adoption of the principle of freedom of evidence in French draft Rule 37.1 (see discussion above), has explained in a footnote to that proposed rule how this approach would work in cases of sexual assault:

“. . . there is no need to provide specific rules for the substantiation of certain facts. Specifically, with regard to evidence in cases of sexual assault, the principle of freedom of evidence makes it possible to respond to all of the questions raised in rule 101 of the Australian proposal . . . There is thus no need to invoke the notion of ‘corroboration of testimony’, since the principle of freedom of evidence allows the judges to attribute to each piece of evidence submitted by the parties the probative value they deem fair and relevant.”

Further clarification may be needed concerning whether the fear of “violence, duress, detention or psychological oppression” in Australian draft Rule 101 (ii) (a) has any link at all to the assault with which the accused is charged, such as being caused by the accused or an accomplice of the accused, or whether consent would not be permitted as a defence anytime a victim of sexual assault had a generalized fear of “violence, duress, detention or psychological oppression” based on the situation in the country or region which was not related to any conduct of the accused or an accomplice of the accused. The scope of the term of “psychological oppression” may also need clarification.

**Privileges.** National jurisprudence in criminal trials has evolved over the years to take into account a number of relationships other than those of lawyer and client where courts have determined that the interests of justice are served by providing that communications within that relationship are privileged from disclosure, even in serious cases such as murder trials. Various jurisdictions have recognized privileges for communications between religious leader and lay believer, doctor and patient, psychiatrist and patient and journalist and source, among others, because the value to society of protecting the confidential nature of the relationship outweighs

other considerations. The Court should be able to develop its own jurisprudence in this area, assessing when the value to the international community of the confidential nature of a particular type of relationship outweighs other considerations. Indeed, in some cases, the confidential nature of the relationship may actually help advance some of the same goals as those of the Court, such as the more effective implementation of international law, including international humanitarian law. Therefore, it is essential for the ICC Rules not to limit the Court's ability to make this sensitive determination by providing that any list of privileges an exclusive one.

Australian draft Rule 102, which is identical to Yugoslavia Rule 97, provides that all communications between a lawyer and client are privileged and not subject to disclosure at trial, except when the client consents to disclosure or the client has voluntarily disclosed the contents of the communication to a third party and the third party has given evidence of that disclosure. The draft rule does not address other privileges. However, the comment to the draft rule recalls that "[s]trong support was expressed" in the Preparatory Committee and at the Diplomatic Conference "for other relationships to be afforded a privileged status, such as those between medical practitioners and patients and those of a religious nature. Consideration also needs to be given to the psychiatric counsellor-patient relationship." There is no specific French draft Rule on privileges.

Any rule providing for one particular privilege, such as the lawyer-client privilege in Australian draft Rule 102, should not suggest in any way that the Court may not recognize other privileges. Moreover, Australian draft Rule 102 should protect confidential communications between an accused and defence investigators and communications and documents concerning defence strategy. Any limits on the scope of privileges must be carefully drawn to ensure that the right to a fair trial is not compromised. For example, although communications between a doctor, psychiatrist, psychologist or rape counsellor should be privileged, if a witness has undergone a treatment which could have affected the accuracy of the memory of the witness, fairness would dictate that the defence should be able to draw this fact to the attention of the Trial Chamber so that it can take this into account in assessing the accuracy of the testimony.

## **2. The manner of presenting evidence.**

*Means of giving evidence.* Article 69 (2) states:

"The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused."

Australian draft Rule 88 on this subject has not been written, but the comment suggests that there may need to be more than one rule to implement Article 69 (2) and notes that the jurisprudence of the Yugoslavia Tribunal has developed criteria and guidelines concerning testimony to be given

by video link. Yugoslavia Rule 90 (A) provides that “[w]itnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71 or where, in exceptional circumstances and in the interests of justice, a Chamber has authorized the receipt of testimony via video-conference link.”

Any evidence given by means of a video-link should be done under the judicial supervision of the Trial Chamber so that it will be able to give prompt rulings on relevance and on admissibility of evidence and control the questioning by the Prosecutor and defence. Such evidence should be only as a last resort when it is impossible to obtain the witness’s presence or to guarantee the safety of the witness by other means. If it proves impossible to compel a witness in the territory or jurisdiction of a state party to appear at the seat of the court because the state party has not yet enacted the necessary legislation, then the ICC Rules should provide that the Trial Chamber may request the state party to compel the witness to testify by video-link. In all other situations, as in Yugoslavia Rule 90 (A), there should be a strong presumption in favour of testimony in the courtroom so that the Trial Chamber can assess the credibility and accuracy of the witness directly, face-to-face, rather than by watching a televised image. Courtroom testimony given in the presence of judges, prosecutors, defence lawyers, a live audience and the accused can help to encourage a witness to tell the truth. Such a social framework is largely missing outside the courtroom.

If in exceptional circumstances the evidence is provided by video-link, then the witness should testify in a setting which will be most conducive to the truth. For example, it could be given before a local judge empowered to have the witness arrested if the witness commits perjury or is in contempt. In the recent trial in the United Kingdom of Anthony Sawoniuk for war crimes during the Second World War, the prosecution and defence submitted witnesses to examination and cross-examination in Belarus before local officials after warning them of the penalties of perjury under the law of Belarus and the video-taped testimony was later played back to the jury in the courtroom in London. The Prosecutor and defence counsel should be present to question the witness in person. The state where the witness testifies must have legislation in place permitting prosecution of the witness for offences against the Court or, at the very least, false statements before the national judicial officer and for contempt of the Court or the national authorities. Although states parties will have the duty to enact such legislation, non-states parties may not have such legislation.

**Conduct of proceedings in camera.** Article 67 (1) provides that “[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the Statute,” and Article 68 (2) provides that

“[a]s an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victims or witnesses.”

This provision should be interpreted in the light of the right to a public trial recognized in Article 14 (1) of the ICCPR.

There is no text for Australian draft Rule 89, but the comment notes that the matters addressed in Article 68 (2) are “important and complex” and notes that Yugoslavia Rule 75 addresses such matters. Amnesty International believes that there are a wide range of innovative measures which can be taken which are consistent with the right to a public trial to protect victims of sexual violence and children and with the right to a fair trial. Such measures, however, will not be addressed by the Siracusa meeting, but will be addressed at the second session of the Preparatory Commission.

In devising such measures, the Preparatory Commission will have to bear in mind the important role which the press plays in shedding light on the workings of the judicial system to bolster confidence in the ability of the courts to deliver justice or to expose their shortcomings so that they can be promptly redressed and public confidence restored. The press also serves a useful purpose by informing the general public of testimony and evidence, some of which members of the public may detect as false. In addition, by keeping the legal community informed of the proceedings, they can draw to the attention of courts legal issues not addressed by the prosecution or defence, such as the failure of the prosecution in the *Akayesu* case to bring charges of rape and sexual violence.<sup>16</sup> A trial in which many or all - as in the current case of *Musema* before the Rwanda Tribunal - the witnesses of both the Prosecutor and the accused, except an expert witness, are protected by confidentiality cannot engender public confidence in the judicial process. It is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>17</sup>

***Solemn undertaking by witnesses.*** Article 69 (1) requires each witness, before testifying, to give an undertaking, in accordance with the ICC Rules, “as to the truthfulness of the evidence to be given by that witness”. Any ICC Rule implementing this article may need to take into account the special concerns when children testify. Australian draft Rule 87, which is based on Yugoslavia Rule 90 (B), provides that “every witness shall, before testifying, make the following solemn undertaking: ‘I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.’” This draft rule does not address the question of child witnesses, but notes that Yugoslavia Rule 90 (C) provides for child witnesses in the following way:

“A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone.”

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<sup>16</sup> See footnote 13.

<sup>17</sup> *Rex v. Sussex, Justices, Ex parte McCarthy* [1924] K.B. 256, 259 (Howard, J.).

Yugoslavia Rule 90 (C) appears to strike an appropriate balance between the need for relevant evidence and concerns about its reliability and could serve as a model for the ICC Rules.

**Direct and cross-examination of witnesses.** Article 67 (1) (e) states that the accused has the right “[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute[.]” Australian draft Rule 90 (a), which is identical to Yugoslavia Rule 90 (G), provides that

“[t]he Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (i) Make the interrogation and presentation effective for the ascertainment of the truth; and
- (ii) Avoid needless consumption of time.”

This paragraph could be strengthened. The rule should state that the Trial Chamber may set time limits for the presentation of all or part of the case by the Prosecution or the accused when such time limits would be in the interests of justice. The rule should also provide that the Trial Chamber may refuse to permit the introduction of irrelevant evidence or repetitive evidence when such exclusions would be in the interests of justice. Many of the criminal proceedings in the Yugoslavia and Rwanda Tribunals have lasted for years, and some of the trials themselves have lasted longer than a year. In part this has been the result of the frequent failure to set time limits for the presentation of evidence and the failure to refuse the presentation of irrelevant or repetitive evidence.<sup>18</sup> The very existence of such express powers in the ICC Rules would encourage the Trial Chamber to use such techniques to exercise control over the mode and order of interrogating witnesses and presenting evidence.

Australian draft Rule 90 (b) provides that “[e]xamination-in-chief, cross-examination and re-examination of a witness shall be allowed in each case. It shall be for the party calling a witness to examine him or her in chief, but a judge may at any stage put any question to the witness.” The Court will be an international court drawing upon the experiences of a wide variety of national legal systems which differ considerably in their approaches to oral evidence, including Latin American systems where most evidence is written, rather than oral; traditional French civil law investigating magistrates who conducted most of the examination and cross-examination of witnesses, but where the prosecution and defence counsel could request the judge to ask questions; common law criminal courts in England and Wales where examination and cross-examination is conducted by the prosecution and the defence counsel, occasionally supplemented by questioning by the judge; and mixed systems, such as the Italian criminal

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<sup>18</sup> Recently, the Trial Chamber of the Rwanda Tribunal is reported to have set a time limit for the presentation of evidence by the Prosecutor in the *Musema* case. The Trial Chamber of the Yugoslavia Tribunal in the *Blaski* case also is reported to have set time limits for the presentation of evidence by both parties.



procedure where counsel examine and cross-examine witnesses, but the judge may direct counsel to pursue particular lines of questioning, call for additional evidence, summon expert witnesses and ask questions, with counsel asking the final questions.<sup>19</sup> The draft rule draws from the best in each of these approaches. It permits examination, cross-examination and re-examination by counsel, thus ensuring this effective method for determining truth is available at trial.<sup>20</sup> It also expressly provides a role for the judge in the examination of witnesses in case counsel for the parties fail to conduct effective questioning by stating that the judge may put a question to the witness at any stage.

Australian draft Rule 90 (c), which is identical to Yugoslavia Rule 90 (H), provides that “[c]ross-examination shall be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters as if on direct examination.” This draft rule will help to ensure that the cross-examination of witnesses will be focused and help speed up proceedings. It has the necessary flexibility to permit broader questioning in the interests of justice, and counsel are always free to call the witness on their own behalf, if necessary. Australian draft Rule 94, based upon Yugoslavia Rule 90 (D), requires the exclusion of witnesses who have not yet testified, unless otherwise ordered. This draft rule would help to ensure the truthfulness and accuracy of the testimony of witnesses by preventing previous testimony from influencing them. It retains the necessary flexibility by providing that “a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying”.

Yugoslavia Rule 94<sup>ter</sup>, as adopted on 10 December 1998, permits one party to corroborate the testimony of one of its witnesses by the introduction of affidavits by other persons if the other party does not object within five days of the testimony of the witness. If that party objects, the Trial Chamber may call the other persons who made the affidavits for cross-examination. Although such a rule could help accelerate proceedings, particularly with regard to matters which are not really in dispute, the right of the Prosecution and the accused to cross-examine the persons who have made such affidavits must be preserved. Given the length and complexity of some of the trials, it will often be difficult for counsel to determine in only five days whether it would be necessary to cross-examine the persons who made the affidavits. For example, the transcripts of testimony in the Yugoslavia and Rwanda Tribunals have in the past sometimes taken up to a month to be provided to counsel in all language versions. It would be essential to provide more time to demand cross-examination and allow the Trial Chamber to permit more time in the interests of justice. In any event, the use of such affidavits should be limited to avoid a trial like the trial before the Nuremberg Tribunal which was largely based on affidavits, even when the witnesses were readily available.

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<sup>19</sup> Lawrence J. Fassler, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 Colum. J. Transnat'l L. (1991) 245, 269.

<sup>20</sup> The leading expert on cross-examination cited this statement by Cox in his classic book on the subject: “Cross-examination - the rarest, the most useful, and the most difficult to be acquired of all the accomplishments of the advocate . . . It has always been deemed the surest test of truth and a better security than the oath.” Francis L. Wellman, *The Art of Cross-Examination* (4<sup>th</sup> ed. 1936), 8.

**Prohibition of self-incrimination by witnesses.** Article 67 (1) (g) of the Statute provides that the accused has the right “[n]ot to be compelled to testify or to confess guilt” and Article 14 (3) (g) of the ICCPR has an identical guarantee. There is no text for Australian draft Rule 91 on the prohibition of self-incrimination by witnesses, but the comment mentions Rule 90 (F) of the Yugoslavia Rules.<sup>21</sup> That rule could be included in the ICC Rules. However, the Court can only grant use immunity with respect to a prosecution by the Court, it cannot do so with respect to national prosecutions. Nothing in Yugoslavia Rule would prevent the Prosecutor using the compelled testimony as the basis for an investigation to locate other evidence.

**Agreements as to evidence.** One of the major problems in the case management by the Yugoslavia and Rwanda Tribunals has been the extensive time taken by the parties to prove matters of fact in a particular case which should not really have been in dispute. To some extent, this problem will go away as legal precedents are established concerning such matters as the existence of an international armed conflict in a particular region and as the Tribunals begin to use judicial notice more often. However, this problem could also be addressed in part by encouraging the parties to reach agreements as to evidence. This practice reportedly was used effectively in the recent trial of Anthony Sawoniuk in the United Kingdom. Australian draft Rule 97, which the comment states “seeks to expedite the conduct of proceedings by facilitating the acceptance of material or information into evidence”, provides in paragraph (a) that the parties “may agree that a fact, the contents of a document or the expected testimony of a witness is not to be contested and, accordingly, should be considered as evidence by a Chamber”. Paragraph (b) provides that, “in the interests of justice, the Chamber may decline to accept an agreement under sub-rule (a)”, thus, in the words of the comment, maintaining “control of the process”. Australian draft Rule 97 would serve a useful purpose and strikes an appropriate balance between the requirements of due process and judicial reasoning. The footnote to French draft Rule 37.1 indicates that the principle of freedom of evidence would lead to a similar result to that in Australian draft Rule 97 (b).

## **H. Offences against the administration of justice (Article 70)**

Article 70 provides the Court with jurisdiction over offences against its administration of justice, including false testimony; false or forged evidence; corruption or intimidation of witnesses; impeding, threatening, corrupting or retaliating against Court officials; and bribery of Court officials. Paragraph 2 states that “[t]he principles and procedures governing the Court’s exercise of jurisdiction over offences under this article shall be those provided in the Rules of Procedure and Evidence.” It also provides that state cooperation with the Court with respect to proceedings concerning such offences are to be governed by the domestic law of the requested state. Paragraph

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<sup>21</sup> Yugoslavia Rule 90 (F) reads:

“A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.”

3 states that the imposition of imprisonment or fines must be in accordance with the ICC Rules. Paragraph 4 governs the role of states in prosecuting such offences.

There is no Australian draft Rule concerning offences against the administration of justice, although the comment to Part 10 of the Australian draft Rules states that Article 70 “will need to be elaborated upon in the Rules”. There is no text for the five French draft Rules concerning offences against the administration of justice.<sup>22</sup> It will be essential for the ICC Rules to ensure that the proceedings in the Court concerning such offences are fully consistent with international law and standards concerning the right to fair trial. In addition, although state cooperation with such proceedings is to be governed by domestic law, such domestic law must be consistent with the requirements of the Statute and other international law and standards. In preparing draft rules to implement Article 70, the Preparatory Commission will need to take into account Yugoslavia Rule 77, as amended 10 December 1998, concerning contempt of the Yugoslavia Tribunal, and Yugoslavia Rule 91, as amended on the same date, concerning false testimony under a solemn declaration.

#### **I. Sanctions for misconduct (Article 71)**

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<sup>22</sup> The five French draft Rules to be elaborated are: 102. Definition of offences; 103. Sanctions incurred; 104. Determination of competent Court organ; 105. Applicable proceedings; and 106. International cooperation.

Article 71 provides that the Court may impose sanctions other than imprisonment on persons who commit misconduct before it, including such administrative measures as removal from the courtroom, a fine or similar measures provided for in the ICC Rules. It also requires that the procedures for imposing them be provided for in the ICC Rules. There is no Australian draft Rule concerning offences against the administration of justice, although the comment to Part 10 of the Australian draft Rules states that Article 70 “will need to be elaborated upon in the Rules”. France has proposed three rules, but has not yet provided the text.<sup>23</sup> Particular care will have to be taken in drafting such rules to ensure that the rights of the accused and counsel are fully respected. Although the Court has the inherent right, independent of Article 71, to take certain measures to control order in the court to ensure a fair and effective trial, it will have to be careful not to misinterpret vigorous advocacy and objections to rulings as misconduct.

#### **J. National security information (Article 72)**

The lengthy and complex procedures in Article 72 concerning the protection of national security information may be sufficiently detailed to require few ICC Rules. Much of the Article concerns state cooperation and the Preparatory Commission may decide to postpone discussion of this article until the third session in November and December 1999. Article 72 must be interpreted in the light of the fundamental obligations of states to cooperate in bringing to justice those responsible for “the most serious crimes of concern to the international community as a whole” (Preamble, paragraph 4) and to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court” (Article 86). Any ICC Rules implementing Article 72 must, therefore, ensure that states parties fulfil their solemn obligations under international law to bring those responsible for violations of prohibitions - many of which have achieved the status of *jus cogens* - to justice. Article 72 (5) (d) states that the ICC Rules should provide alternative protective measures for the submission of national security information. There is no Australian draft Rule expressly implementing Article 72. French draft Rule 40 on the protection of national security information has not yet been written. French draft Rule 40 on protection of national security information has not yet been written.

#### **K. Third party information or documents (Article 73)**

Article 73, which has some similarities to Yugoslavia Rule 70, provides that “[i]f a State Party is requested to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information.”

If the state party originated the document or information, it must consent to disclosure or undertake to resolve the issue, subject to Article 72 concerning national security information. If the originator is not a state party and refuses to consent to disclosure, then the state party may inform the Court that it is unable to disclose the document or information. There are no Australian or French draft Rules expressly implementing this article. Article 73, like Article 72, deals with issues of state cooperation and could better be discussed in that context at the third

<sup>23</sup> The three French draft Rules are: 107. Definition of misconduct before the Court; 108. Sanctions incurred; and 109. Applicable proceedings.

session of the Preparatory Commission in November and December 1999. Like Article 72, Article 73 is subject to the overriding obligations of states to cooperate in bringing to justice those responsible for genocide, crimes against humanity and war crimes. Once the Statute enters into force, it would be inconsistent with these obligations for states to accept documents or information from a third party pursuant to an agreement which would conceal them from the Court. Such information could be crucial to a prosecution or be exculpatory information which could exonerate an accused or be relevant to the question of mitigation of the penalty. Apart from the specific question of privileges, to the extent that the duty of third parties to disclose information to the Court is not addressed in the ICC Rules, it will have to be addressed in implementing legislation.

#### **L. Requirements for the decision (Article 74)**

Article 74 (1) to (4) is sufficiently detailed so that few if any ICC Rules should be necessary, and any further elaboration of the procedure to implement these paragraphs which is needed probably could be addressed in the Regulations as part of the routine functioning of the Court. Article 74 (5) requires that “[t]he decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.” There is no Australian draft Rule concerning this requirement, but it would be helpful to require that the statement make clear the weight accorded to each item of evidence which the Trial Chamber considered relevant to its decision in order to assist the Appeals Chamber on appeal. Such a requirement would be essential if the Trial Chamber were to consider hearsay, double hearsay or even triple hearsay testimony, as the Yugoslavia and Rwanda Tribunals are reported to have done.

Article 74 (5) requires that “[t]he decision or a summary thereof shall be delivered in open Court”, and Articles 63 and 67 (1) (d) require that the trial be held in the presence of the accused. Australian draft Rule 94 (a) provides that “[t]he decision of the Trial Chamber shall be pronounced, whenever possible, in the presence of the accused.” Australian draft Rule 94 (b), which is modelled on Yugoslavia Rule 98<sup>ter</sup> (D), provides that a copy of the decision should be provided “as soon as possible to the person who has been convicted or acquitted in a language or languages he or she fully understands and speaks” and to that person’s counsel.

#### **M. Reparations to victims (Article 75)**

Article 75 establishes in general terms the procedure for the Court to follow in awarding reparations to victims. The ICC Rules will have to establish more detailed procedures for determining reparations. Amnesty International has indicated the principles which should guide the Court in making awards of reparations in its paper, *The International Criminal Court: Ensuring an effective role for victims - Memorandum for the Paris seminar, April 1999*, April 1999 (AI Index: IOR 40/06/99). There is no text for Australian draft Rule 95, and the comment simply states that the ICC Rules “will need to elaborate procedures to underpin the operation of article 75”. There is no text for French draft Rule 45 concerning reparations for victims, but France plans to submit the recommendations on this subject of the Paris seminar to the Preparatory Commission in July 1999.

## N. Sentencing (Article 76)

Article 76 provides the Trial Chamber with two possible approaches for determining a sentence. One possibility, set forth in Article 76 (1), is for the Trial Chamber, in the event of a conviction, to “consider the appropriate sentence to be imposed” and to “take into account the evidence presented and submissions made during the trial that are relevant to the sentence”. Although this method has the advantage of judicial economy in avoiding a further hearing on matters relevant to an appropriate sentence, it puts a burden on the accused, who is entitled under Article 66 to the presumption of innocence, during the trial in which the accused is asserting his or her innocence to introduce evidence which is relevant only if he or she is found guilty. The ICC Rules should make clear that the accused has the opportunity at the outset of the trial to challenge the use of this first option where it would prejudice his or her case.

Article 76 (2) has a second, more preferable option, which is consistent with the presumption of innocence. It provides that,

“[e]xcept where article 65 [concerning proceedings on an admission of guilt] applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence”.<sup>24</sup>

The ICC Rules should make this second option the preferred one.

Article 76 (5), which provides that “[t]he sentence shall be pronounced in public and, wherever possible, in the presence of the accused”, is designed to be consistent with Article 14 (1) of the ICCPR, which recognizes the duty of courts to make public a judgment rendered in a criminal case and Articles 63 and 67 (1) (d), which guarantees the right of the accused to be tried in his or her presence. There is no text for French draft Rules 74 and 77 on sentencing in an ordinary proceeding.

There is no text for Australian draft Rule 93 on the sentencing hearing, although the comment states that the ICC Rules “need to elaborate upon Article 76, paragraph 2”, or concerning the pronouncement of the sentence.

## II. THE NEED FOR THE RULES CONCERNING APPEAL TO BE CONSISTENT WITH INTERNATIONAL LAW AND STANDARDS

The right to fair trial applies to appeals as well as to earlier stages of proceedings. Although Article 67 (1) guaranteeing the right of an accused to a fair hearing conducted impartially applies to the determination of a charge, the internationally recognized right to a fair trial applies to

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<sup>24</sup> Article 76 (3) provides that when paragraph 2 applies any representations concerning reparations under Article 75 should be heard during the hearing under Article 76 (2) or subsequent hearing under that provision. See discussion above concerning the reparations procedure under Article 75.

appeals as well as to other stages of the proceedings. Indeed, the right of “[e]veryone convicted of a crime [t]o have his conviction and sentence being reviewed by a higher tribunal according to law”, is recognized in Article 14 (5) of the ICCPR as part of the right to a fair trial. Moreover, Article 83, which governs proceedings on appeal, states in paragraph (2) that one of the standards which the Appeals Chamber should apply is whether “the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence”, and it would be illogical if the same principles did not apply to the Appeals Chamber. Therefore, the ICC Rules concerning appeals should fully respect the right to a fair trial.

The right to appeal is governed by three articles in the Statute: Articles 81, 82 and 83; the Australian draft Rules contain 18 draft rules. This approach has the virtue of making it easier for delegates to understand the structure of the proceedings which could or should be elaborated in the ICC Rules, even though Australia was not intending that all provisions should appear in the ICC Rules when they are adopted instead of in the Regulations and it envisaged that many of the draft rules could be combined. Many of these rules are repetitive of provisions concerning other stages of the proceedings which could all be put in one place and made applicable to all stages of the proceedings, such as Australian draft Rule 109 concerning submissions by *amici curiae*, which is virtually the same as Australian draft Rule 85. Others deal entirely with the routine functioning of the Court, such as Australian draft Rules 113 (Record on appeal); 114 (Appellant’s brief); 115 (Respondent’s brief); and 116 (Date of hearing), contain large parts which deal with the routine functioning of the Court, such as Rule 117 (a) concerning service of motions applying to submit additional evidence on appeal. Such provisions should be placed in the Regulations. Many Australian draft Rules simply repeat exactly the same or virtually the same procedures for one type of appeal for as other types. For example, Australian draft Rule 118, concerning notices of appeal against decisions under Article 81 (3) (ii) and Article 82 (1) and (2) is virtually identical with Australian draft Rule 119 concerning notices of appeal under Article 82 (1) (a) to (c) and the first part of Australian draft Rule 124 concerning notices of appeal under Article 82 (4). The French proposal contains seven draft rules, but the text has not yet been written.<sup>25</sup>

Article 81 (1) (a) provides that the Prosecutor may make an appeal “in accordance with the Rules of Procedure and Evidence” of a decision under Article 74 acquitting or convicting a person on grounds of procedural error, error of fact or error of law. As Amnesty International stated in its paper, *The international criminal court: Making the right choices - Part II: Organizing the court and guaranteeing a fair trial*, July 1997 (AI Index: IOR 40/11/97), Section IV.E, “the possibility of an appeal by the prosecutor of an acquittal seems to be inconsistent with the principle of *non bis in idem*”. It would, therefore, be appropriate under Article 81 (1) (a) for the ICC Rules to provide for such appeals from acquittals, but on the basis suggested by Amnesty International as “more consistent with this principle” by limiting the Prosecutor “to an appeal on points of law only, with the remedy of the appeals chamber limited to issuing an opinion correcting the legal error for future cases, but having no effect on the acquittal”. Amnesty

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<sup>25</sup> French draft Rules 84. Time for appeal, 85. Forms of appeal, 86. Notification of the appeal to all parties concerned (including victims), 87. Withdrawal of the appeal, 88. Suspensive effect of the appeal, 89. Ordinary proceedings and 90. Accelerated proceedings.

International noted that a similar procedure exists in one jurisdiction in the United Kingdom, England and Wales.<sup>26</sup>

### **III. THE NEED FOR THE RULES CONCERNING REVISION AND COMPENSATION TO BE EFFECTIVE IN REMEDYING INJUSTICES**

#### **A. REVISION**

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<sup>26</sup> Section 36 of the Criminal Justice Act 1972 permits the Attorney-General to refer a point of law to the Court of Appeal when a person tried on an indictment has been acquitted. The reference has no effect on the trial or the acquittal and the identity of the acquitted person is not disclosed. The decisions on reference have “strong persuasive force” and provide authoritative guidance in a number of areas of criminal law”. S.H. Bailey & M.J. Cunn, *Smith & Bailey on the Modern English Legal System* (London: Sweet & Maxwell 2d ed. 1991), p. 844.



Article 84 (1) provides that “[t]he convicted person or, after death, spouses, children, parents or one person alive at the time of the accused’s death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person’s behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence . . .” Three grounds are available, including certain newly discovered evidence which would have been likely to result in a different verdict; newly discovered evidence showing that the decisive evidence was false, forged or falsified; or that one of the judges committed a serious breach of duty. If the application for revision is meritorious, the Appeals Chamber may reconvene the original Trial Chamber, constitute a new Trial Chamber or retain jurisdiction, with a view to determining whether the application should be granted. Australian draft Rules 144 and 145 concerning the application for revision and the final determination of the application are largely satisfactory. They could be improved in at least one respect, however, by providing that “express written instructions from the accused to bring such a claim” means express written instructions to bring any legal claim in the event of the accused’s death, rather than express written instructions to bring a claim for revision in the Court pursuant to Article 84 (1). Few, if any, people would have issued express instructions before their death - even to their lawyer - authorizing another to pursue a claim for revision in the Court on their behalf. In some cases the newly discovered facts might not have been discovered until after the accused’s death. France has proposed seven rules concerning revision, but has not yet provided a text.<sup>27</sup>

## **B. COMPENSATION TO AN ARRESTED OR CONVICTED PERSON**

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<sup>27</sup> French draft Rules 91. Form of the application for judicial review of the facts and notification thereof to all parties to the initial proceedings; 92. Arguments of the applicant and of the other parties (all who have received notification of the application for judicial review); 93. Presentation of additional evidence; 94. Pre-trial judge designated by the Appeals Chamber; responsible for ensuring that the arguments and other documents relating to the proceedings are disclosed and for setting time limits for presentation of arguments by the parties; 95. Hearing on the relevance of the revision; 96. Decision on the relevance of the revision; 97. Procedure following authorization of the revision.

Article 85 provides for compensation to an arrested or a convicted person in three circumstances: (1) unlawful arrest or detention; (2) reversal of a conviction based on a newly discovered fact showing that there has been a miscarriage of justice; and (3) “[i]n exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice”. In the third situation, the Court “may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of proceedings for that reason”. There is no text for Australian draft Rules 146 to 149 on compensation. France has proposed four rules concerning compensation, but has not yet provided their text.<sup>28</sup> In drafting ICC Rules on compensation to the accused for miscarriages of justice, the Preparatory Commission should draw upon the criteria and procedure used to provide compensation as one form of reparations to victims.

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<sup>28</sup> French draft Rules 98. Competent organ; 99. Form of and time for application; 100. Grounds for compensation; and 101. Amount of compensation.