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THE INTERNATIONAL CRIMINAL COURT:
Drafting effective Rules of Procedure and Evidence concerning the trial, appeal and review

INTRODUCTION

This paper is an updated version of the memorandum, *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*, June 1999 (AI Index: IOR 40/09/99). The draft rules (Siracusa draft Rules) prepared by participants have been incorporated into a discussion paper proposed by the Coordinator, which 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 Rules of Procedure and Evidence (ICC Rules) for adoption by the Assembly of States Parties after the Statute enters into force.

The Siracusa meeting is the third 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 draft ICC Rules concerning victims (Paris draft Rules) prepared by participants to the Preparatory Commission at its second session as a working document. Amnesty International is submitting a detailed paper to the Preparatory Commission which discusses the Paris draft Rules, *The International Criminal Court: Ensuring an effective role for victims*, July 1999 (AI Index: IOR 40/10/99). 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 schedule for the second session of the Preparatory Committee.* 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

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1 That memorandum was 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.
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, which with only a few exceptions, do not directly address the role of victims. Amnesty International has 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).

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.²

The two different approaches to the structure of the ICC Rules. 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. 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 were scheduled to be addressed at the Siracusa meeting, but only the draft dealing.

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. 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”. 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. This paper 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 Rules.

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4 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).


6 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.

7 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 were scheduled to be revised again in June 1999.
**The Siracusa draft Rules.** The Siracusa draft Rules include many of the ICC Rules needed concerning Part 6 (The trial). They replace Australian draft Rules 76 to 87, 90, 91, 93 to 100, 101 (i, ii and iii) and 102, as well as the French draft Rules [U.N.Doc.PCNICC/1999/DP.10]. However, the intersessional meeting did not discuss Australian draft Rules 74, 75, 88, 89 and 101 (iv) and they remain to be discussed. To assist the reader, the source of each of the Siracusa draft Rules discussed is identified in footnotes, so that it is easy to understand which approaches were followed or rejected.

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, guaranteeing the presumption of innocence, 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. 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

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8 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.
with the rights of the accused and a fair and 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 Siracusa draft Rule on this subject.9

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

There is no need for a specific 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 Siracusa draft Rule specifically on the subject of disruption by the accused.10 For principles concerning the treatment of the accused generally, see the discussion below under Article 64, and for misconduct by any person, see the discussion below of Article 71 and Siracusa draft Rules 6.37 to 6.40.

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 Rules 74 and 75; French draft Rule 60 (b))

The Rules should specify that the Trial Chamber has oversight authority over decisions of the Pre-Trial Chamber regarding release or detention of the accused. In particular, the Rules should require that the Trial Chamber conduct a review of a pre-trial detention or release order as soon as possible after being constituted and in no case later than 48 hours after being constituted.

9 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.

10 There are also no Australian or French draft Rules on the subject.
There is no Siracusa draft Rule specifically concerning orders relating to release or detention of the accused. Australian draft Rule 74, which implements Article 64 (6) (a), remains to be discussed by the Preparatory Commission. It 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 suggestion 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 the Blaski case and the subsequent decision to detain the accused during the trial that case. If French draft Rule 60 (b) were to be adopted, it should be amended to provide for a speedy referral process.

Australian draft Rule 75 (a), which also remains to be discussed, 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, as mentioned above, 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), which remains to be discussed, 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), which remains to be discussed, 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.11

2. Control of preparations for trial (Siracusa draft Rule 6.10)

Siracusa draft Rule 6.10 requires the Trial Chamber to hold a status conference as soon as possible after it is constituted to set a date for the trial and authorizes it to hold such conferences as necessary.12 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, this rule 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.

3. Motions before, during and after trial (Siracusa draft Rules 6.11 and 6.12)

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. The Siracusa draft Rules did not follow this approach and have failed to provide for any motions during trial (such as for the exclusion of evidence which only becomes available after the commencement of the trial or where the grounds for such exclusion only become known after the trial has started) or for post-trial motions.

Siracusa draft Rule 6.11 provides for motions challenging admissibility or jurisdiction of the case pursuant to Article 19 (2) and any motion on admissibility or jurisdiction at the commencement of the trial. It does not address motions concerning admissibility before trial pursuant to Article 18 or 19 (1), (3) or (4) or motions concerning admissibility after the commencement of the trial.

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12 This draft rule is based upon Australian draft Rule 76. That draft rule in turn is based on Yugoslavia Rule 65bis, which 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”. 

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pursuant to Article 19 (4). Siracusa draft Rule 6.12 governs other motions “on any issue concerning the conduct of the proceedings, prior to the commencement of the trial”. These draft rules replace Australian draft Rule 77, governing pre-trial motions, and Australian draft Rule 78, governing motions during the trial.

13 Australian draft Rule 77, which was based in part on Yugoslavia Rule 72, provided 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.

14 Australian draft Rule 78 was almost identical to Australian draft Rule 78, except that it permitted oral motions during the trial.
There is no Siracusa draft Rule providing for post-trial motions. 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).

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

**Medical examinations of the accused (Siracusa draft Rule 6.13).** 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. Examinations will also be needed to determine whether the accused understands the nature of the charges against him or her, whether the accused is capable of effectively assisting his or her legal representative in mounting a defence, 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 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.

Siracusa draft Rule 6.13 provides that the Trial Chamber may, for the purposes of discharging its obligations under Article 64 (8) (a) to satisfy itself that the accused understands the charges or “for any other reasons” may order an medical, psychiatric or psychological examination of the accused on its own motion or at the request of a party. This draft rule is an improvement over Australian draft Rule 79 (a), on which it was based since the Trial Chamber is not limited to the approved list of experts provided by the Registrar.

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15 There is no Australian draft Rule or French draft Rule governing such motions.

16 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.

17 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.

18 Australian draft Rule 79 (a), which was based upon Yugoslavia Rule 74 bis, provided 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 amendment is important as it would be too restrictive to require the expert in all cases to have been on a list drawn up beforehand by the Registrar. The Registrar cannot be expected to know in advance all the different types of medical conditions requiring differing areas of expertise that might arise in the cases before the Court. 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. It is also an improvement over French draft Rule 57.3, which was limited to examinations by the Pre-Trial Chamber and made no provision for examinations after the case was transmitted to the Trial Chamber.

In order to reach a decision on whether the accused understands the charges and is fit to stand trial, the Trial Chamber should conduct a full hearing that provides both the prosecution and defence an opportunity to present expert testimony for the court’s consideration.

**Instruments of restraint (Siracusa draft Rule 6.14).** 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. Siracusa draft Rule 6.14 provides that “[i]nstruments of restraint shall not be used except as a precaution against escape, for the protection of the accused and others, or for other security reasons, and shall be removed when the accused appears before a Chamber.” It would be better to amend this draft rule to delete the vague grounds of “other security reasons” to reflect the more precise formulation, based on nearly six years of practical experience, in Yugoslavia Rule 83 adopted on 10 December 1998 to require that instruments of restraint only be used on an order by the Registrar and on grounds of protecting the accused from self-injury or injury to others or to prevent serious damage to property. Moreover, the rule should provide that instruments of restraint may 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.

5. Joint and separate trials (Siracusa draft Rule 6.15)

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19 Siracusa draft Rule 6.14 is based upon Australian draft Rule 80, which in turn was based on Yugoslavia Rule 83 as in effect until 10 December 1998. The Yugoslavia Rule provided 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.”

20 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.”

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 has 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”.

Siracusa draft Rule 6.15 respects these principles but with insufficient vigour. Paragraph (a) provides that the Trial Chamber “may order that persons accused jointly be tried separately, if it deems necessary, in order to avoid serious prejudice to the accused, or to protect the interests of justice.” Siracusa draft Rule 6.15 (b) provides that “[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.”

It should also include the specific protection in Australian draft Rule 82 (b) that “[i]n joint trials, evidence which is admissible against only some of the joint accused may be considered only against the accused concerned.”

6. Maintaining records and evidence (Siracusa draft Rules 6.16, 6.17 and 6.19)

For any trial to have the confidence of the public, court records must be open to the public, including transcripts and records of the proceedings. The Rules should reflect a presumption that all records are open to the public, unless the Court has ordered a specific portion of a record to be sealed or otherwise withheld.

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22 Siracusa draft Rule 6.15 (a) is based upon Australian draft Rule 81, which in turn was based upon Yugoslavia Rule 82 (B). There was no French draft Rule expressly dealing with joinder.

23 Siracusa draft Rule 6.15 (b) is based upon Australian draft Rule 82 (a), which in turn is based on Yugoslavia Rule 82 (A). The Yugoslavia Rule states that “[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately”.

24 As, for example, where the Court has ordered the name of a victim of sexual violation to be withheld.
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. The Siracusa draft Rules did not adopt this approach, but instead envisaged separate rules concerning records and custody of evidence at each stage of the proceedings. Apart from this somewhat cumbersome approach, Siracusa draft Rules 6.16 (Transcripts), 6.17 (Custody of Evidence) and 6.19 (Record of the Proceedings) pose only a few problems. Siracusa draft Rule 6.19 fails to implement Article 67 (1) of the Statute, which guarantees the right to a public trial, since it expressly guarantees only the Prosecutor, the Defence, representatives of states participating in the proceedings and victims or their legal representatives access to the record of the proceedings.

In contrast, Australian draft Rule 83, should be supported and strengthened. Modelled on Yugoslavia Rule 81 (A), (B) and (D), it 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 Rule should also authorize the Trial Chamber to order the disclosure of all or part of the records when the Chamber has not issued a confidentiality order at all, in addition to situations when it determines that confidentiality is no longer required.

7. Amicus curiae submissions (Siracusa draft Rule 6.6)

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. Siracusa draft Rule 6.6 (a) provides that any 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, in writing or orally, any observation on any issue that the Chamber deems appropriate”. This draft rule is satisfactory and an improvement...

25 Siracusa draft Rule 6.16 largely reproduces Australian draft Rule 83. Paragraph (a) of this draft rule was based upon Yugoslavia Rule 81 (A); paragraph (b) reproduced Yugoslavia Rule 81 (B) and paragraph (c) reproduced Yugoslavia Rule 81 (D).

26 Siracusa draft Rule 6.17 is based upon Australian draft Rule 84, which in turn is based upon Yugoslavia Rule 81 (C).

27 Siracusa draft Rule 6.19 is based upon a proposal by France.

28 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.

29 Siracusa draft Rule 6.6 is based upon Australian draft Rule 85, which was based on Yugoslavia Rule 74, provided 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”
on Australian draft Rule 85 and Yugoslavia Rule 74 since it permits any Chamber to invite or grant leave for submissions by *amici curiae* on any issue which it deems appropriate, rather than simply an issue in a particular case. This would permit any Chamber to draw upon the experience of a wide range of authorities on a variety of issues of general concern, such as possible amendments of the Regulations or suggestions to the Court concerning recommendations it might make to the Assembly of States Parties pursuant to Article 51 (2) for amendment of the ICC Rules.

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”. To this clause should be added: “at all times respecting the due process rights of the accused”. There is no Siracusa draft Rule expressly dealing with this subject.  

**E. Proceedings on an admission of guilt (Article 65; Siracusa draft Rule 6.25)**

The procedures for consideration of admissions of guilt in Article 65 are so detailed that it is doubtful whether many or any ICC Rules will be necessary. There is only one Siracusa draft Rule on the subject. Siracusa draft Rule 6.25 provides that the Trial Chamber may invite the views of legal representatives of victims, in accordance with ICC Rules to be drafted, to assist it in fulfilling its functions, and that the Trial Chamber shall give reasons for its decision on the admission of  

If any further rules are drafted they should take into account Yugoslavia Rule 62bis, 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; Paris draft Rules)**

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*, July 1999 (AI Index: IOR 40/10/99). 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 and the French draft Rules were silent on the question of how victims may participate in the trial, but these issues are now addressed in the Paris draft Rules, which are to be submitted by France to the Preparatory Commission at its second session. 

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30 Australian draft Rule 86, which was based upon Yugoslavia draft Rule 80, provided 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”. There was no French draft Rule expressly dealing with this question.

31 There was no Australian draft Rule specifically on the subject. However, France had proposed that there be seven ICC Rules for such proceedings, but it did not propose a text for these rules. It had 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.

32 Australian draft Rule 87 concerning the solemn undertaking which all adult witnesses should take before giving testimony has been replaced by Siracusa draft Rule 6.7 (see discussion below of evidence). There was 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 stated that the ICC Rules need to elaborate upon Article 68 (3), “particularly in relation to the involvement of the legal representatives of victims”. There also was no text for French draft Rule 42 on participation of victims.
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, and the related issue of probative value or reliability of the evidence; the other is required to govern the manner in which relevant or admissible evidence is considered.

1. Determining relevance, admissibility and probative value

**General principles (Rule 6.1).** Article 69 (4) sets forth one of the basic principles concerning the determination of relevance, admissibility and probative value of the evidence:

“The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, 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.”

Article 69 (3) permits the Court “to request the submission of all evidence that it considers necessary for the determination of the truth.” Article 74 (2) states that

“[t]he Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.”

Thus, the approach taken by the Statute is somewhat similar to the principles of free evaluation of the evidence or *intime conviction* found in some civil law systems. Those principles give the court a largely unfettered discretion to consider almost any evidence it considers relevant, with few rules limiting admissibility or clear criteria for assessing the probative value or reliability of the evidence.

Nevertheless, the Statute does not incorporate this doctrine completely and provides some safeguards restricting the discretion of the court to admit evidence and some limited guidance in assessing its probative value or reliability. For example, as noted below, Article 69 (7) provides that evidence obtained in violation of the Statute or internationally recognized rights in certain circumstances should be excluded. It will be necessary for the ICC Rules to supplement these guarantees or for the Court to develop its own criteria in its jurisprudence to ensure that its decisions are made on the basis of generally agreed standards of relevance and reliability. Unfortunately, the Siracusa draft Rules do not provide sufficient safeguards.

Siracusa draft Rule 6.1, which is modelled on Article 69 (4) (a), provides that “[a]ll evidence submitted by the parties shall, in accordance with the discretion described in article 64, paragraph 9, be assessed freely by a Chamber of the Court to determine its relevance and admissibility in accordance with article 69.”

A footnote states that “[c]onsideration needs to be

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Siracusa draft Rule 6.1 is also based in part on French draft Rule 37.1, which provided that “[a]ll
given that in assessing relevance the Court shall consider reliability”, but it does not provide further guidance on how the Court should make such assessments. The implications of this proposed rule in the context of cases involving sexual violence are discussed below. If the approach in this draft rule is adopted, there would be few criteria for assessing the admissibility, relevance or reliability 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.

There are a number of rules of evidence developed in various delegations which could be used in developing criteria for determining relevance, admissibility and reliability. 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 (see discussion below of decisions).

Siracusa draft Rule 6.1 (b), which implements Article 69 (7), requiring the Court to determine that evidence obtained in violation of the Statute or internationally recognized human rights, is a useful rule, but it does not provide further explanation of the Statute, which will need to be addressed in the Court’s jurisprudence. 34

34 Siracusa draft Rule 6.1 (b) is based upon French draft Rule 37.3.
Siracusa draft Rule 6.1 (c), which provides that “[c]orroboration is not required for proof of any crime within the jurisdiction of the Court, including crimes of sexual violence”, must be read together with Article 66 on the presumption of innocence. This provision is positive step to state expressly that crimes of sexual violence are subject to the same rules concerning corroboration as other crimes. This rule will avoid the unfortunate decisions in the past where national courts have required corroboration of the testimony by victims of sexual violence when they would not have required such corroboration of the testimony by victims of other crimes. 35 Of course, the evidence in all cases before the Court must overcome the presumption of innocence by proof beyond a reasonable doubt.

Siracusa draft Rule 6.1 (d) provides that “[t]he Chambers shall not be bound by national law governing evidence.” 36 This draft rule must, however, be read together with Article 21 (1) (c), which provides that as a residual category of applicable law, the Court may apply general principles derived from national law. 37

Finally, Siracusa draft Rule 6.2 (b) requires the relevant Chamber to “give reasons, which shall be placed on the record, for any rulings it makes on evidentiary matters”. 38 This draft rule would 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.

35 France had proposed a different approach to corroboration which would not have addressed this problem. It explained how the adoption of the principle of freedom of evidence in French draft Rule 37.1 (now partly incorporated in Siracusa draft Rule 6.1), 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.”

36 Siracusa draft Rule 6.1 (d) is based in part on Australian draft Rule 96 (a), which was based on Yugoslavia Rule 89 (A). The Australian draft Rule provided 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 provided that “[t]he chambers of the Court shall not be bound by national legislation governing evidence.”

37 Article 21 (1) (c) provides: “The Court shall apply: ... (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world, including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”

38 Siracusa draft Rule 6.1 (b) replaces two proposals. French draft Rule 37.4 provided 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 stated was “intended to facilitate the consideration of evidentiary points on appeal”, required the Chamber concerned to “place on the record the reasons for any rulings it makes on evidentiary matters”.

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Evidence of a consistent pattern of conduct. There is no Siracusa draft Rule on evidence of a consistent pattern of conduct. Nevertheless, if it is decided to introduce such a rule, Amnesty International believes that it should be drafted to take into account certain principles. Although as a general rule, evidence of a consistent pattern of conduct should not be admissible to prove guilt, 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.

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.

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 “[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.

39 Australian draft Rule 99, which was deleted in Siracusa, reproduced the text of Yugoslavia Rule 99. Australian draft Rule 99 (a) provided 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.” Of course, the Court’s jurisdiction 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).
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.

Unfortunately, there is no Siracusa draft Rule expressly dealing with the relevance, admissibility or probative value of confessions and it was decided not to include or amend an Australian draft Rule on the subject. This means that the relevant Chamber is left to the limited guidance of Article 69 and Siracusa draft Rule 6.1 on the free assessment of the evidence. The starting point for drafting a rule on confessions would be Yugoslavia Rule 92, which provides:“A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.”. 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.

However, Yugoslavia Rule 92 has problems, since it shifts the onus of proof to the accused, contrary to the requirements of Articles 66 and 67 (1) (i). The ICC Rule on confessions should 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.

**Privileges (Rule 6.4).** 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

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40 The comment to Australian draft Rule 100, which reproduced Yugoslavia Rule 92, indicated that the draft rule was simply “to provide a starting point for discussions”. The comment to the draft rule stated that there might be a conflict with Article 67 (1) (i).
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. Article 69 (5) provides that in situations provided for in the ICC Rules, the Court shall respect privileges on confidentiality, but carefully does not prevent the Court from exercising discretion to recognize others in the course of time: “The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.” 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. For example, the Court should take into account the special role of the International Committee of the Red Cross as the guardian of international humanitarian law, a role which is expressly recognized in many international humanitarian law treaties. 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.

Siracusa draft Rule 6.4 largely satisfies these requirements. Paragraph (a) provides that communications between a person and his or her legal counsel shall be regarded as privileged, subject to three exceptions: the person consented to disclosure, the person voluntarily disclosed the content of the communication to a third party who then discloses it or the Chamber determines that the communication was not for the purpose of giving or receiving legal advice. Provided that paragraph (a) is interpreted to include such communications as confidential communications between an accused and defence investigators and communications and documents concerning defence strategy, it would be acceptable, but these matters should be clarified.

There was general support in the Preparatory Committee and at the Diplomatic Conference for the Court to recognize other privileges. Reflecting this support, paragraph (b) requires the Court to treat other communications as privileged when three criteria are met:

“(b) Having regard to Rule 6.1 (d), the Court shall treat other communications as privileged under the same terms as subparagraphs (i) and (ii) of paragraph (a), if a Chamber of the Court decides that:

(i) such communications were made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;

41 Siracusa draft Rule 6.4 (a) is based upon Australian draft Rule 102, which in turn was identical to Yugoslavia Rule 97.

42 The comment to Australian draft Rule 102 noted: “[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.”
(ii) confidentiality is essential to the nature and type of relationship between the person and the confidant; and
(iii) recognition of the privilege would further the objectives of the Statute and the Rules of Procedure and Evidence.”

As worded, the draft rule appears to be generally acceptable as far as it goes. It requires the Court to recognize the existence of the privilege when these three criteria are met, but does not prevent the Court from exercising its discretion to recognize other privileges when this would be consistent with the interests of justice and the object and purpose of the Statute. Any limits on the scope of privileges must be carefully drawn to ensure that the right to a fair trial is not compromised.

2. The manner of presenting evidence

Means of giving evidence (Australian draft Rule 88). 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 or discussed, 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 used 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

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43 Australian draft Rule 102 did not address other privileges and there was no specific French draft Rule on privileges.
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.

It should be noted that face-to-face questioning of a witness testifying via video-link can and should be done. 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 eliciting 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 (Australian draft Rule 89).** 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, which has not yet been discussed, 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.

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.\(^{44}\) A trial in which many or all - as in the current trial in the Musema case, which just concluded 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.”\(^{45}\)

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\(^{44}\) See footnote 28.

\(^{45}\) *Rex v. Sussex, Justices, Ex parte McCarthy* [1924] K.B. 256, 259 (Howard, J.).
Solemn undertaking by witnesses (Siracusa draft Rule 6.7). 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. Siracusa draft Rule 6.7 provides for a solemn undertaking by all witnesses in paragraph (a). Paragraph (b) provides for witnesses under 18 and persons whose judgement is impaired:

“A person under the age of 18 or a person whose judgement has been impaired and who, in the opinion of the Chamber of the Court, does not understand the nature of a solemn undertaking, may be allowed to testify without this solemn undertaking if the Chamber considers that the person is able to describe matters of which he or she has knowledge and that person understands the meaning of the duty to speak the truth.”

As a result of the decision in Siracusa draft Rule 6.1 (a) to adopt the standard of free evaluation of the evidence and in Siracusa draft Rule 6.1 (c) not to require corroboration of witness testimony, paragraph (b) would permit an accused to be convicted and sentenced to life imprisonment solely on the basis of the testimony of a child or a person whose judgement had been impaired. In contrast, Yugoslavia Rule 90 (C) contains the added safeguard of requiring that a judgment cannot be based upon the testimony of a child alone. The testimony of a child 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 Rule concerning testimony of children and persons whose judgement has been impaired.

Direct and cross-examination of witnesses (Siracusa draft Rule 6.18). 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[.]”

Siracusa draft Rule 6.18 provides for the Presiding Judge of the Trial Chamber to give directions for the conduct of proceedings, but if no directions are given, the Prosecutor and the accused are to agree on the order and manner for submission of evidence; if no agreement can be reached, the Presiding Judge shall issue directions for the presentation of evidence. This is not an entirely satisfactory provision as it could lead to inconsistent methods of presenting evidence in each case, depending upon the Presiding Judge of the Trial Chamber.

Prohibition of self-incrimination by witnesses (Siracusa draft Rule 6.9). Article 64 (6) (b) provides that the Trial Chamber “may, as necessary: . . . (b) Require the attendance and

46 Siracusa draft Rule 6.7 (a) is identical to Australian draft Rule 87, which was based on Yugoslavia Rule 90 (B). The Yugoslavia Rule 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.’”

47 Australian draft Rule 87, which was based on Yugoslavia Rule 90 (B), provided 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.’”
testimony of witnesses . . .” However, 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. Siracusa draft Rule 6.9 is consistent with these provisions. It permits the relevant Chamber to continue questioning a witness who has objected to making a statement on the ground that it would incriminate him or her, provided that the Chamber guarantees the witness that it will not be disclosed or used by the Court against the witness with respect to the conduct:

“A witness may object to making any statement that might tend to incriminate him or her. The Chamber may, however, continue the questioning after assuring the witness that the statement will not be disclosed to the public or any State or used as evidence in any subsequent prosecution by the Court against the witness for any conduct other than that defined in Articles 70 and 71.”

This draft rule is an acceptable balance between the Chamber’s power to compel the attendance and testimony of witnesses and the rights of an accused or other person not to testify against oneself or to be compelled to confess guilt.

**Agreements as to evidence (Siracusa draft Rule 6.9).** 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. Siracusa draft Rule 6.9, which provides that “[t]he Prosecutor and the Defence may agree that a fact, the contents of a document or the expected testimony of a witness is not contested and, accordingly, may be considered as evidence by a Chamber, unless it decides otherwise,” would serve a useful purpose and strikes an appropriate balance between the requirements of due process and judicial reasoning.

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48 There was no text for Australian draft Rule 91 on the prohibition of self-incrimination by witnesses, but the comment mentioned Rule 90 (F) of the Yugoslavia Rules. 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.”

49 Siracusa draft Rule 6.9 is modelled on Australian draft Rule 97, which the comment stated “seeks to expedite the conduct of proceedings by facilitating the acceptance of material or information into evidence”, provided 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) of Australian draft Rule 97 provided 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”. The footnote to French draft Rule 37.1 indicated that the principle of freedom of evidence (which is now found in Siracusa draft Rule 6.1 (a)) would lead to a similar result to that in Australian draft Rule 97 (b).
H. Offences against the administration of justice (Article 70; Siracusa draft Rules 6.26 to 6.36)

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.

However, Article 70 must be interpreted in the light of the read together with other provisions of the Statute and general principles of treaty interpretation. These provisions and principles make clear that a state party may not impose conditions in its domestic law which would prevent cooperation with the Court with respect to its proceedings under Article 70. For example, the Preamble affirms that the effective prosecution of crimes within the Court’s jurisdiction “must be ensured by taking measures at the national level and by enhancing international cooperation”. These national measures and this international cooperation necessarily extends to offences against the administration of justice which impede or prevent effective prosecution of crimes within the Court’s jurisdiction. Similarly, the fundamental obligation of states parties, as expressed in Article 86, to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court” must also extend to cooperation with respect to the prosecution of offences which undermine the effective investigation and prosecution of crimes. In addition, the obligation of states parties to implement treaties in good faith and the basic rule that states may not plead domestic legal requirements as a ground for refusing to implement treaty obligations reinforce the duty of states parties to cooperate fully with the Court with respect to offences against the administration of justice. Therefore, 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.

Paragraph 3 of Article 70 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 was no Australian draft Rule concerning offences against the administration of justice, and there was no text for the five French draft Rules on the subject. Therefore, it was a significant achievement of the Siracusa meeting that it was able to adopt a complete set of draft rules (Siracusa draft Rules 6.26 to 6.36) concerning such offences. Most of them appear to be fully consistent with international law and standards concerning the right to fair trial. Nevertheless, a few observations may be made.

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50 The comment to Part 10 of the Australian draft Rules, however, stated that Article 70 “will need to be elaborated upon in the Rules”. The five French draft Rules which were to be elaborated were: 102. Definition of offences; 103. Sanctions incurred; 104. Determination of competent Court organ; 105. Applicable proceedings; and 106. International cooperation.
For example, although Siracusa draft Rule 6.31, authorizing the Prosecutor to initiate and conduct investigations of offences against the administration of justice, a footnote refers to a question raised by one state at the Siracusa meeting about whether Article 54 (2) (b), which permits the Pre-Trial Chamber to authorize an on-site investigation when it “has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.” This situation is exactly the time when such authority is needed to investigate offences against the administration of justice - offences which could include the intimidation or murder of victims or witnesses.

Given the fundamental obligation of states parties to cooperate with the Court, as discussed above, Siracusa draft Rule 6.33 (a), providing that, with respect to offences against the administration of justice, “the Court may request a State to provide any form of cooperation or judicial assistance corresponding to those forms set forth in Part 9”, and Siracusa draft Rule 6.33 (b) concerning conditions for providing cooperation or judicial assistance, are fully acceptable.

Siracusa draft Rule 6.35, providing that “[n]o person who has been tried by the Court, or another court, for conduct proscribed by Article 70 shall be tried by the Court with respect to the same conduct”, is a generally acceptable reflection of the principle of *ne bis in idem*, but it should be amended to make clear that trial by another court must be pursuant to Article 70 (b). The Court must be able to decide when it, rather than a state, should try someone for an offence against the administration of justice.

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; Siracusa draft Rules 6.37 to 6.49)**

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. Siracusa draft Rules 6.37 to 6.40 appear to be consistent with the rights of the accused and counsel. 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)**

51 There was no Australian draft Rule concerning offences against the administration of justice, although the comment to Part 10 of the Australian draft Rules stated that Article 70 “will need to be elaborated upon in the Rules”. France had proposed three rules, but did not provide any text. The three French draft Rules were: 107. Definition of misconduct before the Court; 108. Sanctions incurred; and 109. Applicable proceedings.
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.

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 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; Siracusa draft Rule 6.24)

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 n shall be in writing and shall contain a full and reasoned
statement of the Trial Chamber’s findings on the evidence and conclusions.” In a positive step, Siracusa draft Rule 6.24 extends the principles in Article 74 (5), which appears to apply only to the decision at the end of the trial concerning guilt or innocence, to decisions concerning the admissibility of a case, the jurisdiction of the Court and sentence.52

However, it would have been better to require that the full and reasoned 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 is essential if the Trial Chamber, under the principle of the free evaluation of the evidence referred to in Siracusa draft Rule 6.1, considers hearsay, double hearsay or even triple hearsay testimony, as the Yugoslavia and Rwanda Tribunals are reported to have done. Moreover, by requiring such precision in the reasoning, the rule would tend to limit the use of such unreliable evidence.

52 There was no Australian draft Rule concerning this requirement.


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. Siracusa draft Rule 6.24 (a) provides that decisions “shall be pronounced in public and, whenever possible, in the presence of the accused, the Prosecutor and, if applicable, in the presence of the legal representatives of the victims and the representatives of the States which have participated in the proceedings.” Siracusa draft Rule 6.24 (b) provides that copies of the decision shall be provided as soon as possible to the convicted or acquitted person “in a language he or she understands and speaks fully” and to the person’s counsel, the Prosecutor and representatives of states and of victims who have participated in the proceedings.

M. Reparations to victims (Article 75; Paris draft Rules)

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. Workshop 4 of the Paris seminar prepared draft rules governing these procedures, which France plans to submit to the Preparatory Commission in July 1999. Amnesty International has commented in detail on these proposed rules in its paper, The International Criminal Court: Ensuring an effective role for victims, July 1999 (AI Index: IOR 40/10/99).

N. Sentencing (Article 76)

The Rules should explicitly provide that the accused may move at the earliest possible opportunity to have any sentencing hearing take place only after a decision on guilt. Such a provision would leave the defence the freedom to defend the case without having to argue mitigation before a decision on guilt or innocence is reached.

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.

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53 Siracusa draft Rule 6.24 (a) is an expanded version of Australian draft Rule 94 (a), which provided that “[t]he decision of the Trial Chamber shall be pronounced, whenever possible, in the presence of the accused.”

54 Siracusa draft Rule 6.24 is a somewhat broader version of Australian draft Rule 94 (b), which was modelled on Yugoslavia Rule 98ter (D). The Yugoslavia Rule 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.

55 There was no text for Australian draft Rule 95, and the comment simply stated that the ICC Rules “will need to elaborate procedures to underpin the operation of article 75”. There was also no text for French draft Rule 45 concerning reparations for victims.
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”.  

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

Article 76 (4), 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.

Siracusa draft Rule 6.21 implements Article 74 (2) and (3) by providing that the Presiding Judge of the Trial Chamber shall set the date for a further hearing on matters related to the sentence or reparations. However, the provision stating that “[t]his hearing can be postponed, in exceptional circumstances by the Trial Chamber”, seems to suggest that only in exceptional circumstances could a sentencing hearing be postponed. This provision should be modified to reflect Article 76 (2), which has no requirement of exceptional circumstances. Indeed, it should contain an additional provision making clear that the accused may move at the earliest possible opportunity to have any sentencing hearing take place only after a decision on guilt. Such a provision would leave the defence the freedom to defend the case without having to argue mitigation before a decision.

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

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56 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.

57 There was no text for Australian draft Rule 93 on the sentencing hearing, although the comment stated that the ICC Rules “need to elaborate upon Article 76, paragraph 2”, or concerning the pronouncement of the sentence.
to the determination of a charge, the internationally recognized right to a fair trial applies to 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.58

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 International noted that a similar procedure exists in one jurisdiction in the United Kingdom, England and Wales. Indeed, although Judge Nieto-Navia did not refer to this procedure in his declaration appended to the judgment by the Appeals Chamber on the merits in the Tadi case and concluded that there was no general principle of law that would prohibit appeals by a prosecutor of an acquittal, he expressed his strong doubts about such appeals which would leave the acquitted person in a worse position. The Appeals Chamber deferred sentencing and Judge Nieto-Navia urged that “the Appeals Chamber should analyse, at the sentencing stage, whether a successful Prosecution appeal should put the person in a worse position than at the end of the trial (‘reformatio in pejus’).”

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

A. Revision (Australian draft Rules 144 to 145; French draft Rules 91 to 97)

59 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.

60 Prosecutor v. Tadi, Judgment, 15 July 1999 (Appeals Chamber) (Declaration by Judge Nieto-Navia), para. 11.
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. The 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.61

B. Compensation to an arrested or convicted person (Australian draft Rules 146 to 149; French draft Rules 98 to 101)

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.62 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.

61 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.
