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RULES OF PROCEDURE

Working paper submitted by Argentina

Note: This paper contains some preliminary comments and alternative proposals on the paper submitted by the delegations of Australia and the Netherlands (A/AC.249/L.2).

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Rule 9

(A) No member of the Presidency who has participated in a decision by the Presidency under articles X (A 26(3), 27(5), 28, 29, 30(3) ILC) of the Statute concerning the case being tried or under appeal may sit as a member of the Trial or Appeals Chamber in that case. No Judge who has made a decision under articles X (A 26(3), 27(5), 28, 29, 30(3) ILC) of the Statute concerning the case being tried or under appeal pursuant to a delegation from the Presidency under article X (A 8(5) ILC) of the Statute may sit as a member of the Trial or Appeals Chamber in that case.

(B) A member of the Presidency who participated in the confirmation of the indictment against a suspect under article X (A 27(2) ILC) of the Statute may not subsequently sit as a member of the Trial Chamber for the trial of that accused or as a member of the Appeals Chamber hearing an appeal in relation to that trial.

(E) If a Judge is disqualified from continuing to sit in a part-heard trial and thereby deprives the Trial Chamber of its required quorum under article X (A 45(1) ILC) of the Statute, he or she shall be replaced immediately by an alternate Judge if the Trial Chamber has from the start of the trial comprised more than the required number of Judges. Otherwise, the Presidency shall order a retrial.

[Note: The proposed reforms are based on a strict interpretation of the principle of impartiality; it is felt that a judge who has sat previously in the same case, even if he or she has not played a decisive role, runs the risk of being subjected to influences which may prevent him or her from making an impartial decision. Therefore, it is preferable to establish an explicit rule - in line with part of the jurisprudence of the European Court of Human Rights, in the cases of "Piersack v. Belgium" (1982) and "De Cubber v. Belgium" (1984) - prohibiting the subsequent participation of the judge in the decision on the case, thereby avoiding an interminable discussion of the potential effects of the specific action taken by the judge for the principle in question. A similar general rule should be added to article 8(5) of the draft Statute prepared by ILC. The amendment of subrule (E) is based on the so-called "principle of immediacy", according to which only those who have witnessed the trial proceedings in their entirety are in a position to pass judgement.]

Rules 10 to 13

For the cases of illness or other incapacity (Rule 10 (A)), death (Rule 11 (A)), loss of office (Rule 12 (A)) or resignation (Rule 13 (A)) of a member of the Trial Chamber, the following formula is proposed:

If a Judge sitting as a member of the Trial Chamber is unable to continue sitting in a part-heard trial owing to illness or other incapacity, the Presiding Judge may adjourn the proceedings, if the cause of that inability seems likely to be of short duration. Otherwise, or if the cause of the

inability is still present 10 days after the adjournment, the Presiding Judge shall report to the Presidency, which shall order a retrial. If the Trial Chamber has comprised more than the required number of Judges from the start of the trial, the Judge in question shall be replaced immediately by an alternate Judge. This rule shall also apply to cases of death, loss of office or resignation of a Judge from the Trial Chamber.

[Note: The basis for this amendment is the same as that for Rule 9 (E). Only a Judge who has been present without interruption throughout the trial is in a position to pass judgement in a case. Alternative measures, such as audio and video recordings, cannot substitute for the judge's direct sensory perception of what takes place in the courtroom, and therefore do not constitute justifiable exceptions to the principle in question. In appellate proceedings, on the other hand, the principle of immediacy is much more limited in scope, since, as a rule, the Appeals Chamber bases its decision on the trial record. Therefore, the rules applicable in case of the death, incapacity or other impediment of a member of the Appeals Chamber have not been amended.]

Rule 51

(C) No person who has witnessed the act with which the accused is charged shall be admitted as defence counsel, nor shall a defence counsel be allowed to participate or continue to participate in the proceedings if there is a strong likelihood, according to objective information, that:

1. He or she participated or is participating in any of the offences under examination in the proceedings;

2. He or she has committed the crime of abetting or concealing the commission of these offences;

3. He or she participates with the accused in an illicit association or other type of unlawful organization that has a connection with the offence under examination in the proceedings;

4. He or she participated or is participating in an escape attempt on the part of the accused.

[Note: Subrule (C) is intended to prevent situations where the criminal investigation is thwarted by connivance between the suspect and a counsel who is involved in the offence under examination in the proceedings; for example, through an agreement to destroy or hide evidence or to intimidate witnesses.]

Rule 52

(G) If a suspect or an accused is not indigent but does not wish to retain defence counsel, the Court shall none the less assign defence counsel from the list kept by the Registrar, and shall then seek to recover the cost of providing defence counsel according to the procedure laid down in subrule (H). If a suspect or an accused person elects to conduct his or her own defence, he or she

shall so notify the Registrar in writing at the first opportunity. However, if the Trial or Appeals Chamber considers that the technical defence is thereby impaired, it shall automatically order the assignment of defence counsel from the list kept by the Registrar, and may subsequently recover the cost of providing defence counsel if the suspect or the accused is not indigent.

(I) No defence counsel may represent more than one indicted person or accused in the same trial.

(J) If the defence counsel of a suspect or an accused resigns the defence or abandons it during the proceedings, the Trial or Appeals Chamber shall give the suspect or the accused a specific time period in which to retain other defence counsel. If, at the end of that time, the suspect or the accused has not retained counsel or stated his or her intention to defend himself or herself in person, defence counsel shall be assigned automatically from the list kept by the Registrar. Subrules (G) and (H) shall also apply in this case.

[Note: The amendments to subrule (G) and new subrules (I) and (J) are designed to ensure that the suspect or the accused has effective technical assistance. The general principle is that, in all cases, the suspect or the accused must have the support of expert defence counsel. The possibility of defence in person is limited to those cases where the suspect or the accused demonstrates that he or she is capable of defending himself or herself against the prosecution. This seems nearly indispensable in proceedings which, broadly speaking, are based on the general principles of the adversary system: a suspect or an accused without any kind of technical knowledge is unlikely to be evenly matched against a professional prosecutor.]

Rule 57 bis

Conduct of the questioning

Before commencement of the questioning, the suspect shall be informed in detail of the acts of which he is accused, along with all available background information relating to them, a summary of the content of the existing pieces of evidence and the applicable criminal laws. He or she shall also be informed of his or her right to remain silent without it being used against him or her.

Before questions are posed, the suspect shall be invited to make such statement as he or she deems appropriate on the matter under investigation, and to indicate any pieces of evidence that it would be advisable to obtain. In no case shall the suspect be required to undertake to tell the truth, or subjected to any type of coercion, threat or promise, except as expressly authorized under criminal or procedural law, nor shall he or she be obliged or induced by any means to speak against his will.

No method that compromises the freedom of decision of the suspect shall be employed during the questioning. The questions posed shall be clear and precise. If, in the course of the questioning, the suspect shows signs of fatigue or loss of composure, the questioning shall be adjourned until those indications are no longer present.

Breach of or failure to observe this rule shall render inadmissible the information and evidence obtained through the questioning, unless favourable to the suspect.

[Note: The proposed rule establishes a series of minimum principles to guarantee the rights of the suspect during questioning. Basically, it aims at ensuring that the statements by the suspect constitute, first and foremost, a means of defence, as stipulated in the majority of legal systems based on the European-Continental model. Accordingly, it regulates the prohibited methods of questioning and clearly establishes the suspect's ability to intervene and the duty to inform him or her, before beginning the questioning, of the acts of which he or she is accused and his right to remain silent.]

Rule 60

(A) If in the course of an investigation the Prosecutor is satisfied that there is a prima facie case that a suspect has committed a crime within the jurisdiction of the Court, he or she shall prepare in writing and forward to the Registrar under article X (A 27(1) ILC) an indictment for confirmation by the Indictment Chamber, together with supporting material.

(E) The Registrar shall forward the indictment and supporting material to the Indictment Chamber, which will inform the Prosecutor of the date fixed for review of the indictment.

[Note: Both the ILC draft Statute and the draft rules of procedure provide for the Presidency of the Court to be responsible for confirmation of indictments. Traditionally, in legislation based on the European-Continental model, this task belongs to a specific jurisdictional organ, which in the proposed rule is called the "Indictment Chamber", following the French term. It seems preferable that an organ separate from the Presidency, which has had no prior involvement in the case, should be responsible for determining the factual reliability and legal correctness of the indictment.]

Rule 61

(A) On reviewing the indictment, the Indictment Chamber shall hear the Prosecutor, who may present additional material in support of any count. The Indictment Chamber may also require the Prosecutor to present additional material in support of any count. The proceedings may be adjourned to allow additional material to be produced.

(B) Whether the accused was held by order of the Court, or, being at liberty, voluntarily submitted himself or herself to its jurisdiction, the Indictment Chamber shall notify the suspect of the date fixed for the examination of the indictment, and shall transmit to him or her a copy of the document submitted by the Prosecutor. On the day of the hearing, the Indictment Chamber shall hear the accused, who may raise objections against the indictment,

point out any defects it may contain, criticize the evidence supporting it and draw attention to any evidence relevant to a decision on the existence of a prima facie criminal case that was omitted by the Prosecutor. If this is the first submission by the accused, he or she may at the same time raise the other objections referred to in Rule 79 (A), or wait for the sixty-day period provided under paragraph (B) of that rule.

(C) The Indictment Chamber shall determine in relation to each count whether a prima facie case exists with respect to a crime within the Court's jurisdiction and dismiss those counts where such a case does not exist.

(D) [Paragraph (C) of the original retained without change]

(E) If a prima facie case is found to exist in relation to one or more counts in the indictment, the Indictment Chamber shall determine whether, having regard, inter alia, to the matters referred to in article X (A 35 ILC) of the Statute, the case should on the information available be heard by the Court.

(F) If the Indictment Chamber determines that the case should be heard by the Court, it shall confirm the indictment and request the Presidency to establish a Trial Chamber.

[Note: The proposed changes in rule 61 govern the general outline of the procedure for review of an indictment by the Indictment Chamber. The major innovation lies in granting the ability to intervene at this stage to an accused who has been detained or who has submitted himself or herself to the jurisdiction of the Court, giving him or her a preliminary opportunity to criticize and object to the Prosecutor's indictment. At the same time, the submission of those objections granted under Rule 79 is permitted, in accordance with article 34 of the draft statute.]

Rule 65

The Prosecutor may amend an indictment, without leave, at any time before it is confirmed in the review proceedings under article X (A 27 ILC) of the Statute, but thereafter only with leave of the Indictment Chamber, or, if at trial, with leave of the Trial Chamber. If leave to amend is granted, the amended indictment shall be transmitted to the accused and to his or her counsel, and where necessary the date for trial shall be postponed to ensure adequate time for the preparation of the defence.

The indictment may be amended when the Prosecutor wishes to introduce a new fact or circumstance that changes the legal category or the penalty for the act or acts in the indictment, or because of the disclosure of a new crime related to the act or acts contained in the indictment.

[Note: There are two changes to the original text. First, naturally, the organ responsible for giving leave to amend the indictment prior to confirmation: this duty is reserved for the Indictment Chamber. Next, minimum standards are established for amending an indictment, following the traditional pattern of European-Continental legal systems.]

Rule 74

(iii) [The Trial Chamber shall] call upon the accused, once all the counts have been read, to make any statement deemed appropriate concerning the indictment and the counts contained therein;

(iv) If the accused admits any or all of the acts contained in the indictment, order the judge to follow the summary procedure provided under Rule 145 and instruct the Registrar to set a date for a hearing;

(v) In other cases, after the suspect has been heard, instruct the Registrar to set a date for trial;

(vi) Instruct the Registrar to set other dates as appropriate.

[Note: The original version of this rule established the possibility that the accused could plead guilty to the facts in the indictment, which would have the effect of sending the proceedings directly to the sentencing phase under Rule 118. Thus, the Trial Chamber would have asked the accused, after the reading of each count, if he pleaded guilty or not guilty to the count. The "guilty plea", however, is not an institution that is accepted by legal systems based on the European-Continental model; for some countries, such a regulation could, in addition, be unacceptable by reason of limitations in their domestic law. An intermediate solution was sought through the "summary procedure" described in Rule 145, which is a well-known institution in the European-Continental sphere and which partially fulfils a function similar to the "guilty plea", basically by the savings in time and effort it represents. One important difference, at any rate, is that the accused is not ordered to plead guilty or not guilty to the counts in the indictment, but is called on to make any statement he or she considers appropriate after the indictment is read; only if, on this occasion, the accused admits that the facts described in the indictment are true can there be recourse to the summary procedure.]

Rule 75

[A second paragraph is added.] The questioning shall be governed by the provisions laid down in Rule 57 bis.

[Note: The guarantees and restrictions established in the new Rule 57 bis in favour of a suspect obviously apply also for the questioning of an accused.]

Rule 77

(A) Once detained, an accused may not be released except upon an order of the Trial Chamber.

(B) Release may be ordered by the Trial Chamber after hearing the host country and only if it is satisfied that the accused will appear for trial and,

if released, will not pose a danger to any victim, witness or other person, nor obstruct the investigation and trial by means of the destruction or concealment of evidence or by intimidation or threats against witnesses.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond or surety and the observance of such conditions as are necessary to ensure his or her presence for trial and the protection of others.

(D) When the Trial Chamber considers that the danger of escape or obstruction of the proceedings can reasonably be avoided by means other than imprisonment, it may impose one of the following measures:

(i) House arrest, in the home of the accused or in the custody of another person, under such surveillance as the Trial Chamber may provide;

(ii) The obligation to submit to the care or surveillance of a certain person or organization which will report periodically to the Court;

(iii) Forbidding the accused to leave the territory of the State in which he or she is located, or a geographical area determined by the Trial Chamber, without authorization.

The Trial Chamber may impose one or more of these measures as appropriate in the case, and may order such measures and communications as are required to ensure their fulfilment.

(E) Every three months, the Trial Chamber shall re-examine the reasons for which it ordered the detention of the accused and, as appropriate, order its continuation, its replacement by a different measure, or the unconditional release of the accused. Provisional detention of the accused before committal shall not extend beyond one year from the time at which it was pronounced. At the well-founded request of the Prosecutor, the Presidency may order its extension for an additional year, provided that the Prosecutor gives sufficient explanation of the necessity of the extension and can reasonably estimate the time required to bring the accused to trial.

(F) In no case shall the accused be kept in a place of imprisonment intended for the detention of convicted prisoners. He or she shall always be treated as innocent, and his or her conditions of detention shall respect his or her dignity and privacy. The provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners shall be observed.

(G) [The original paragraph (D) is retained unmodified.]

(H) An accused who is deprived of his or her liberty may request of the Trial Chamber his or her unconditional release or the replacement of detention by one of the measures listed in (D). He or she may also appeal a ruling against that request before the Appeals Chamber, in accordance with Rule 128.

[Note: The proposed modifications are based upon the need to add flexibility to an excessively strict regime of provisional detention, both in the draft Statute

(A 28 ILC) and in the original version of the Rules of Procedure, which appears to conflict with the principle of the exceptional nature of deprivation of liberty during the proceedings (article 9 (3) of the International Covenant of Civil and Political Rights). This is why we have essentially moved towards the adoption of alternatives to preventive detention, and the language of the original version of the rules has been somewhat toned down. In the same way, we have added a rule obliging the court which ordered the detention to periodically reconsider the reasons for it, as well as a time-limit rule. It has been considered appropriate to give the Trial Chamber the power to order detention while the accused is on trial, basically owing to the belief that the accused should be able to have recourse to another court (the Appeals Chamber) for an examination of the legitimacy of the measure. It would seem inconsistent with the draft Statute system if a decision of the Presidency could be reviewed by another organ of the Court.]

Rule 89 bis

(A) When an inspection, re-enactment or expert opinion is needed, the nature and characteristics of which are such that it cannot later be fully reproduced during the trial, or when testimony is to be given by a witness who, owing to some hindrance which cannot easily be overcome, is expected to be unable to testify during the trial, the Prosecutor shall ask the Presidency to appoint a judge to carry out or supervise that act.

(B) The judge shall carry out or supervise the act after summoning the Prosecutor, the accused, and his or her counsel, who shall be entitled to be present and shall have the same rights of intervention as during the trial. An accused who is in detention shall be represented by his or her counsel unless he or she expressly asks to intervene personally and provided that he or she is detained in the same place where the act is carried out.

(C) When the identity of the accused is not known or when one of the acts listed in (A) is of extreme urgency, the Prosecutor may make a verbal request to the Presidency to appoint the judge, who shall carry out or supervise the act without being required to summon the persons listed in (B), designating a defence counsel to observe the act or to take part in it.

[Note: The new rule refers to what in the systems of the continental European tradition are termed "definitive and unrepeatable acts". They are acts which, by their nature, cannot be fully reproduced during the trial, but are normally incorporated by the reading of a document which records the way in which they were carried out. The role of the juge d'instruction is partially introduced, restricted to the carrying out or supervision of the act in question, and the prosecution and the accused and his or her counsel are given rights of intervention and supervision identical to those which they have during the trial.]

Rule 91

(C) The trial shall continue to take place in public in so far as the reasons for which proceedings were held in closed session cease to exist.

[Note: The addition is intended to ensure the principle of public trial. When the exceptional situation which justified the closure of the proceedings to the public no longer exists, the trial must resume in the normal way, with the public being allowed access to the courtroom.]

Rule 95

[It is proposed that sections (a) and (b) of paragraph (B) (i) should be deleted, because of the danger that they may lead to an unacceptable restriction of the right of the accused to cross-examine and contradict witnesses.]

Rule 100

(C) The accused may give evidence in his or her own defence, if he or she so desires. If he or she does so, his or her testimony shall be governed by the provisions of Rules 57 bis and 75.

[Note: While in common law systems the rule is that the accused is not at any time invited to give evidence during the trial, and that if he decides to do so of his own free will he is treated like any other witness, in continental European systems the reverse applies: the accused is invited to give evidence, he may refrain from doing so and, should he wish to give evidence, he does so under the rules which govern his questioning during the pre-trial phase - that is, unlike witnesses, he is not required to promise to tell the truth. We have struck a balance between the two: the accused gives evidence only if he decides to do so spontaneously and voluntarily; if he does, all the restrictions and principles set out in Rules 57 bis and 75 apply.]

Rule 104

(B) The judgement shall include:

(i) Details of the court in which it was pronounced and the date; the first and last names of the accused and such other information as may serve to determine his personal identity;

(ii) An account of the events and circumstances which were the object of the initial accusation or its modification;

(iii) The votes cast by the judges, with a concise description of their basis in fact and in law;

(iv) The precise determination of the offence which the Appeals Chamber considers to have been proved;

(v) The substantive part, with an indication of the legal provisions applied;

(vi) The signature of the judges; however, if one of the members of the Trial Chamber has been prevented from signing the judgement subsequent to the deliberation and vote, that shall be indicated and the judgement shall be valid without the signature.

(C) The judgement may not go beyond the act and circumstances described in the indictment, or amended indictment, if any.

[Note: Both the draft Statute and the draft Rules of Procedure are premised on a system of professional judges and not jurors. Professional judges are generally required to state the de facto and de jure grounds on which their decisions are based (acquittal or conviction). The proposed new paragraph (B) establishes, precisely, the obligation of the members of the Trial Chamber to state the grounds for the judgement and, at the same time, it regulates the other requirements which the judgement should fulfil. Lastly, the principle of consistency between indictment and judgement is established: the court may not hand down a judgement on acts which have not been included in the indictment or an amendment thereto.]

Rule 106

(F) The spouse of a suspect, his or her ancestors or descendants, his or her close relatives - either blood relatives or relatives by adoption - or a person who lives with the accused and is bound to him or her by ties of affection may refuse to testify. Such persons shall be informed of their right to refuse to testify before each testimony begins. They may exercise that right even while they are testifying, including in response to specific questions.

(G) Persons who have a duty to keep an official or personal secret in connection with the subject of their testimony shall not be admitted as witnesses. If called upon to testify, they shall appear, explain the reason why they are required to keep the secret and refuse to testify.

(H) If the Trial Chamber finds that the witness has no grounds for invoking the right to refuse to testify or the need to keep a secret, it shall order him or her to testify.

[Note: Paragraphs (F), (G) and (H) combined establish limits on summoning witnesses. First, the spouse and close relatives of the accused are entitled to refuse to testify; the idea is to avoid placing those witnesses in the difficult position of having to decide between testifying against someone to whom they

have an emotional tie and committing the crime of giving false testimony. In turn, those paragraphs establish the obligation of the Trial Chamber not to admit testimony of persons required to keep a professional or personal secret.]

Rule 112

Evidence that has been obtained by methods which cast serious doubt on its reliability shall not be admitted. Evidence obtained in violation of the rules established in the Statute or any rules which the Court shall subsequently decide, or by methods that violate internationally protected human rights, shall also not be admitted.

[Note: The Rule seeks to establish in greater detail the scope of the rule of exclusion of illegally obtained evidence. If the procedure established in the Statute and in the Supplementary Rules decided by the Court is not respected, evidence obtained through irregular acts or in violation of internationally recognized human rights shall be inadmissible.]

Rule 113

[It is proposed that paragraph (b) (iv) should be deleted.]

[Note: From the perspective of the accused's right to a defence, it does not seem possible, as provided in the draft, to bar all information on the victim's previous sex life. It is not difficult to imagine the existence of cases in which the victim's previous sexual conduct is a relevant piece of information in the determination of the accused person's criminal liability, and it is therefore not clear how the accused can be denied the right to prove his innocence of the charges brought against him on the basis of that same information. If it is feared that this right will be used abusively or in a manner that is humiliating to the victim, this may be resolved by the Trial Chamber's power to exercise controls.]

Rule 142

(D) The Appeals Chamber may rule only on objections formulated by the parties in their appeals. When the decision has been appealed only by the accused, it cannot be amended to his or her detriment.

[Note: This addition is aimed at setting the limits within which the Appeals Chamber may decide on the case. First, the Chamber may not go into aspects of the appealed decision which have not been submitted for its consideration by the parties. The second limitation is self-evident: an appeal brought solely by the accused, in accordance with his or her right to obtain a revision of the judgement, may not expose him or her to more harmful consequences. The solution would be even clearer if the Prosecutor was denied the possibility of appealing an acquittal.]

Rule 144

[A second paragraph is added.] The conviction shall be reviewed when:

(i) Additional evidence has been discovered which was not available at the time the conviction was handed down or confirmed and which could have had a decisive influence on the judgement;

(ii) It is proved that conclusive evidence, considered in the judgement, has no probative value because it was false, invalid, tampered with or forged;

(iii) It is proved that one of the judges who participated in the judgement or in its confirmation committed, in the case in question, a serious breach of his duties;

(iv) A previous judgement in favour of conviction was annulled;

(v) A more lenient criminal law than that applied in the conviction should be applied retroactively.

[Note: The reasons for revision of the conviction are not developed in the draft Statute. The rules proposed herein reflect the classic cases which lead to a revision of judgement.]

PART XIII

SUMMARY PROCEDURE

Rule 145

In the case set forth in paragraph (iv) of Rule 74, the Trial Chamber shall adopt the following procedure:

(A) The Trial Chamber shall hear the indictment by the Prosecutor and the penalty he seeks. Immediately thereafter, it shall hear the accused. If the accused does not reaffirm his admission of the facts, or does not agree to the application of the summary procedure, the trial shall continue in accordance with the normal procedure and the admission by the accused shall be considered as not having been made. After it has heard the Prosecutor and the accused, the Trial Chamber shall hand down its decision unless it believes that evidence needs to be produced.

(B) The Trial Chamber may acquit or convict the accused, basing its judgement on the description of the act described in the indictment and admitted by the accused. In the case of a conviction, the penalty may not exceed that requested by the Prosecutor.

(C) If the Trial Chamber deems it appropriate to follow the normal procedure in order to obtain a better understanding of the facts or because a penalty more severe than that requested might be necessary, it shall order that the trial continue in accordance with that procedure.

(D) The accused may appeal the conviction.

[Note: This Rule establishes a summary procedure for cases where the accused admits to the acts described in the Prosecutor's indictment. The procedure provides for the possibility that the accused may retract his initial admission or, even if he does not, may not accept the summary procedure for his case. In turn, it gives the Trial Chamber the right to refuse to hold summary proceedings and to opt for the normal procedure for the case in question.]
